STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML AO - 3102

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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

January 5, 2000

Mr. Donald G. Symer
[redacted]

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. Symer:

I have received your letter of November 17 in which you questioned the propriety of an executive session held by the Lancaster Central School District Board of Education to discuss "pending litigation."

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

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

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

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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January 6, 2000

Mr. James R. Koury
City Clerk
City of Oneonta
City Hall, 258 Main Street
Oneonta, NY 12820-2589

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. Koury:

I have received your letter of November 24 in which you requested an opinion concerning "quorum parameters and voting procedures for a municipal legislative body."

According to your letter, the Common Council of the City of Oneonta consists of eight voting members, and the Mayor, who is a member of the Council, but who may vote only in the event of a tie. Following a motion made at a recent meeting, the vote was "4 ayes, 3 absents and 1 abstention." The City Attorney indicated that because the Council adopted Roberts Rules, passage of motions, in your words, "simply requires a majority of those present at the meeting and not a majority of the full membership of the legislative body." Roberts Rules refers to the ability to carry a motion by means of a majority, "that is, more than half the votes cast..."

I respectfully disagree with the view of the City Attorney, for Roberts Rules is not law, and in my opinion, insofar as it (or a local enactment) may be inconsistent with an applicable statute, an act of the State Legislature, it is of no effect. In this circumstance, I believe that Roberts Rules is inconsistent with statutes and their judicial interpretation.

As you are aware, first, the Open Meetings Law applies to meeting of public bodies, and §102(2) of the Law defines the phrase "public body" to mean:

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

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

Based on the foregoing, the Common Council is clearly a public body, and a quorum must convene for a public body to conduct public business.

Second, 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 language quoted above, a quorum is a majority of the total membership of a public body, notwithstanding absences or vacancies, for example; the number of the total membership determines what a quorum is, and absences or vacancies do not alter quorum requirements. Further, in order to carry a motion or take action, there must be an affirmative vote of a majority of the total membership. Therefore, if a public body consists of either eight or nine members, five affirmative votes would be needed to approve a motion, even if as few as five members are present.

With respect to the effects of abstentions, §41 of the General Construction Law has been interpreted by the courts on various occasions regarding abstentions. In short, it has consistently been found that an abstention has the effect of a negative vote and that action may be taken only by means of an affirmative vote of the majority of the total membership of a public body [see e.g., Rockland Woods, Inc. v. Suffern, 40 AD 2d 385 (1973); Walt Whitman Game Room, Inc. v. Zoning Board of Appeals, 54 AD 2d 764 (1975); Guiliano v. Entress, 4 Misc. 2d 546 (1957); and Downing v. Gaynor, 47 Misc. 2d 535 (1965); also Ops Atty Gen 88-87 (informal)]. In the opinion of the Attorney General cited above, it was advised that on a seven member board where two members are absent and two others abstain, no action can be taken.

In sum, I believe that the Council may carry motions and take action only by means of an affirmative vote of a majority of its total membership, not, as suggested in Roberts Rules, by means of a majority of votes cast.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Common Council
City Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3104

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January 10, 2000

Mr. Richard Crist
Director of Communications
Rensselaer County Legislature
Pattison Government Center
Troy, NY 12180

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

Dear Mr. Crist:

I have received your letter of December 7 in which you sought guidance concerning the Open Meetings Law.

You wrote that the majority caucus of the Rensselaer County Legislature consists of thirteen members, and that another legislator, "a person registered to another political party, has expressed an interest in joining [your] caucus." You added that the majority caucus meets monthly "to discuss proposed resolutions and local laws that will be considered at [y]our monthly meeting", and that it is your belief that those gatherings may be closed. If the fourteenth member joins the caucus, you asked whether the gatherings of the majority caucus will be required to be open.

I agree that a gathering of the thirteen members of the majority caucus may be held in private. However, if the fourteenth or any other member attends, and if the discussion involves matters of public business, the gathering would, in my opinion, constitute a "meeting" that must be conducted in public in accordance with the provisions of the Open Meetings Law. In this regard, I offer the following comments.

First, as you are likely aware, the Open Meetings Law is applicable to meetings of public bodies, such as the County Legislature. By way of historical 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 a public body gathers to discuss public 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.

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.

I note that 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 pertinent 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 view of the overall importance of Article 7, any exemption must be narrowly construed so that it will not render Section 100 meaningless" (id., 278).

Although the County Legislature in the instant situation does not consist wholly of members of a single political party, I believe that the thrust of the decision indicates that, in view of the intent of the Open Meetings Law, exceptions to the right to attend meetings should be construed narrowly. Based on its intent, if a member registered to a political party different from that of the majority joins the majority to discuss public business, I believe that the gathering is no longer a political caucus, but rather a "meeting" that falls within the coverage of the Open Meetings Law.

I note that the decision in Buffalo News 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).

Based on the foregoing, I believe that consideration of the matter must focus on the overall thrust of the decision, coupled with the expressed legislative intent of the Open Meetings Law. 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).

It is possible that the fourteenth member may have a philosophy or inclination similar to that of the majority. Nevertheless, by virtue of that person's political party registration, it appears that he has affirmatively chosen to distinguish himself from the majority party. Similarly, there may be upstate democrats in the State Senate who are more conservative than their downstate counterparts and whose positions may in many instances be more closely aligned with the republican majority. In my view, despite what may be a similarity in their stances, if those democrats joined the republican majority during its caucus, I do not believe that the exemption regarding political caucuses would apply; on the contrary, I believe that the gathering would constitute a meeting subject to the Open Meetings Law.

In my view, the same conclusion should be reached in the situation that you presented.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
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January 10, 2000

Ms. Maureen Powell
[redacted]

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

Dear Ms. Powell:

I have received your letter of November 12, as well as a variety of related materials. You have raised a series of questions concerning meetings held on school property in the Roosevelt Union Free School District.

In this regard, it is emphasized at the outset that the jurisdiction of the Committee on Open Government is limited to advising with respect to the Open Meetings Law, and my comments will focus on that statute.

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

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

Based on the foregoing, the Open Meetings Law pertains to entities consisting of two or more members that are elected or designated, often by law, to carry out a governmental function collectively, as a body. Typical public bodies include boards of education, town boards, city councils and the like. Executive heads of agencies and their staffs do not constitute public bodies.

Second, the Open Meetings Law pertains to meetings of public bodies, and §102(1) 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 a speaker as part of an audience or group, I do not believe that the Open Meetings Law would be applicable.

Third, when the Open Meetings Law applies, notice must be given prior to every meeting pursuant to §104 of the Open Meetings law. That provision requires that:

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

There is no provision concerning a waiver of notice in relation to any meeting subject to the Open Meetings Law. However, there may be no obligation to provide notice of other gatherings, even though the public officials may be involved.

When a meeting falls within coverage of the Open Meetings Law, it is open to the general public (see §103). The status, interest or residence of an individual is irrelevant; any person has the right to attend a meeting falling within the scope of that statute.

Meetings subject to the Open Meetings law must be conducted open to the public, except to the extent that an executive session may properly be held. Section 102(3) of the Law defines the phrase "executive session" to mean an open meeting during which the public may be excluded. Paragraphs (a) through (h) of §105 (1) specify and limit the subjects that may validly be considered during an executive session.

The Open Meetings law does not deal with the use of school property or gatherings other than meetings held pursuant to that statute that may be held on school property. However, in an effort to offer guidance, enclosed is a copy of §414 of the Education Law, which deals with the use of school property.

Also enclosed is a copy of the Open Meetings law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Education

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3106

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January 10, 2000

TO: Richard Stine [redacted]

FROM: Robert J. Freeman, Executive Director

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

Dear Mr. Stine:

I have received your letter of December 6 in which you asked whether minutes of an executive session should be "in the same log as the minutes of open sessions."

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

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

Based on the foregoing, as a general rule, a public body may take action during a properly convened executive session [see Open Meetings Law, §105(1)]. If action is taken during an

Based on the foregoing, as a general rule, a public body may take action during a properly convened executive session [see Open Meetings Law, §105(1)]. 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 emphasized that minutes of executive sessions need not include information that may be withheld under the Freedom of Information Law. From my perspective, 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. However, there are situations in which the action may be preliminary and may be withheld under the Freedom of Information Law. For instance, 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 charges would not yet have been proven, and 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)].

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

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January 20, 2000

E-MAIL

TO: "Michael Clark" [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. Clark:

I have received your letter of December 15 in which you asked whether you "have a right to obtain a report of the discussions of [y]our school board at a recent meeting." As I understand the situation, a coach was approved for hiring by the athletic director of the Hilton Central School District, but the Superintendent "denied hire." Since you want to know a reason for the failure to hire that person, you questioned whether you may "obtain documentation (manuscripts) of the board meetings where this issue has been addressed."

In this regard, I offer the following comments.

First, it is emphasized that the Freedom of Information Law pertains to existing records, and that §89(3) of that statute states in relevant part that an agency, such as a school district, is not required to create a record in response to a request. Therefore, if there is no "manuscript" or "documentation" reflective of discussions at Board meetings, or if there are no records indicating the reason for not hiring the coach, the District would not be required to prepare records containing the information sought on your behalf.

Second, if the matter was discussed during one or more open meetings, minutes of those meetings would be available. I note, however, that minutes need not consist of a verbatim account of a discussion. Section 106 of the Open Meetings Law provides minimum requirement concerning the contents of minutes, and subdivision (1) pertaining to minutes of open meetings 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."

I note that if the District maintains a tape recording of a meeting open to the public, any person would have the right to listen to the tape or obtain a copy [see Zaleski v. Hicksville Union Free School District, Supreme Court, Nassau County, NYLJ, December 27, 1978).

Third, I would conjecture that the matter would not have been discussed in public, but rather during one or more executive sessions. An "executive session", according to §102(3) of the Open Meetings Law, is a portion of an open meeting during which the public may be excluded. Section 105 specifies the subjects that may be discussed during an executive session. Pertinent to your inquiry is paragraph (f) of subdivision (1) of that provision, for it permits a public body, such as a board of education, 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;"

When an issue is discussed in executive session, there is no requirement that a detailed record of that closed session be prepared.

Fourth, pertinent to the matter may be §87(2)(g) of the Freedom of Information Law, which deals with written communications between or among officers or employees of government agencies and 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 the context of your inquiry, to the extent that internal memoranda or letters consist of recommendations, opinions or

advice, for example, regarding whether to hire the individual in question, those kinds of records may be withheld.

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

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

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

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

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

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

RJF:tt

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 3108

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

February 7, 2000

E-Mail

TO: Robert Remler [redacted]>

FROM: Robert J. Freeman, Executive Director

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

Dear Mr. Remler:

As you know, I have received your letter in which you sought an opinion regarding the propriety of the policy of the Valley Stream School District Board of Education concerning the use of recording devices by the news media at its meetings. The policy states that:

> "Representatives from the news media are welcome at official meetings of the Board of Education as long as their activities do not interfere with the work of the Board. The use of cameras, recorders, microphones or other items of special equipment shall be permitted only if such use is unobtrusive and does not interfere with the conduct of the meeting. Recognizing that news coverage is related to 'timely issues', it is requested that the Board be notified in advance of the meeting date of the anticipated use of equipment. Such advance notice shall be made to one of the following persons:
>
> 1. President of the Board of Education.
> 2. District Clerk of the Board of Education.
> 3. Superintendent of Schools; or
> 4. Assistant Superintendent for Finance and Operations.
>
> "The advance notice shall include a written description, specifying precisely what equipment shall be used and how. An insurance certificate shall be filed protecting the Board and its employees against loss, injury, or liability; such certificate being equal in amount to that covered by the Board for similar purposes."

In this regard, I offer the following comments.

First, I point out that members of the news media are members of the public and that neither the Open Meetings Law nor any judicial decision relating to the issue raised has distinguished members of the news media from others. In short, I believe that members of the news media have the same rights, privileges and responsibilities as any member of the public. Further, it is my view that a policy involving the use of recording devices cannot validly distinguish the privileges accorded to the news media as opposed to others.

Second, 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 notice be given 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 any person would have the right to record open meetings of the Board, without advance notice or permission to do so, 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 and the Superintendent.

I hope that I have been of assistance.

RJF:jm

cc: Board of Education
Martin G. Brooks

OML-AO-3109

From: Robert Freeman
To: [redacted]
Date: Wed, Feb 9, 2000 10:24 AM
Subject: Re: Open Meetings Law

Good morning - - I hope that all is well for you and your family.

With respect to the situation that you described, I believe that there are likely two grounds for entry into executive session that would be pertinent.

As you suggested, §105(1)(d) authorizes a public body to enter into executive session to discuss "proposed, pending or current litigation." While I believe that the Board could discuss the litigation in private, if it meets with the adversary in litigation or that person's representative, it would lose its ability to conduct an executive session. The courts have held that the purpose of the litigation exception is to enable a public body to discuss its litigation strategy in private, so as not to divulge its strategy to its adversary. One of the cases specifically indicates that settlement negotiations with an adversary at a meeting with a public body cannot be conducted in executive session [see *Concerned Citizens v. Town of Yorktown*, 84 AD2d 612; also *Weatherwax v. Town of Stony Point*, 97 AD2d 840].

The other provision, which in my view clearly would be applicable is §105(1)(f), which authorizes a public body to enter into executive session to discuss: "the medicall, financial credit or employment history of a particular person or corporation or matters leading to the appointment, employment, promotion, discipline, suspension, dismissal or removal of a particular person or corporation."

Unlike the litigation exception, there would be no preclusion from holding an executive session under §105(1)(f) with the presence of the employee or his or her representative.

With respect to voting on a settlement, if indeed the municipality will be agreeing to spend money that has not been budgeted, I believe that its action would involve an appropriation and would have to be accomplished in public. If, on the other hand, monies have previously been budgeted in anticipation of this kind of situation, the action would involve a decision to spend money that has already been appropriated and, therefore, could be taken in private.

If you have any questions or would like to discuss the matter, please feel free to contact me.

I hope that I have been of assistance.

[redacted]

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3110

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February 9, 2000

Ms. Sally Sonne
[redacted]

The staff of the Committee on 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. Sonne:

I have received your letter of December 27 in which you sought an advisory opinion concerning the status of social gatherings in relation to the Open Meetings Law.

In this regard, it is noted at the outset that the Open Meetings Law pertains to meetings of public bodies, and that the courts have construed the term "meeting" [§102(1)] expansively. In a landmark decision rendered in 1978, the state's highest court, the Court of Appeals, held that any gathering of a quorum of a public body for the purpose of conducting public business constitutes a "meeting" subject to the Open Meetings Law, whether or not there is an intent to take action, and regardless of the manner in which a gathering may be characterized [see Orange County Publications, Division of Ottoway Newspapers, Inc. v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. In my opinion, inherent in the definition of "meeting" is the notion of intent. If a majority of a public body gathers in order to conduct public business collectively, as a body, I believe that such a gathering would constitute a "meeting" subject to the Open Meetings Law. In the decision cited earlier, the Court affirmed a decision rendered by the Appellate Division that dealt specifically with so-called "work sessions" and similar gatherings during which there was merely an intent to discuss, but no intent to take formal action. In so holding, the court stated:

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

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

With respect to social gatherings or chance meetings, it was found that:

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

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

If indeed the sole purpose of a gathering is social in nature, the Open Meetings Law, in my view, would not apply. However, if during the social gathering, a majority of the members of a public body begin to discuss the business of that body, collectively as a group, I believe that they should recognize that they are conducting public business without notice to the public and immediately cease their discussion of public business. Moreover, in that situation, I would conjecture that a court would determine that the public body would have acted in a manner inconsistent with law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11948
OML-AO-3111

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February 9, 2000

Mr. Michael J. Patane
Director
Great Swamp Conservancy, Inc.
8375 North Main Street
Canastota, NY 13032

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

Dear Mr. Patane:

As you are aware, I have received your letter of December 29. In your capacity as a director of the Great Swamp Conservancy, Inc., you indicated that you have encountered difficulty since 1997 in obtaining information relating to the Cowaselon Creek Watershed District (CCWD) Board. Your initial request directed to the Board appears to have been ignored, and you wrote that the Madison County Treasurer responded to your request for bills associated with the District by stating that: "We will supply them to you when we can." You added that the CCWD Board "does not advertise its meetings nor do they hold them in a public place."

In this regard, I offer the following comments.

First, when I raised questions concerning the means by which the Board was created, you referred to Article 5-D of the County Law. Within Article 5-D are §§299-o and 299-p. The former pertains to the establishment of a county watershed protection district and states in part that:

> "After a watershed district has been created and a project has been approved for construction it shall be the responsibility of the county to require the watershed district to construct, operate, repair and maintain the project works and facilities in accordance with the plans and specifications and to accomplish and maintain the project and purpose for which the watershed district was created."

The latter states that the County Board of Supervisors is required to appoint or designate an administrative head or body to enable the district to carry out its powers and duties, which are equivalent to those of other districts created by a county in accordance with §§261 to 264 of the County Law.

In this instance, a board was established, and assuming that the CCWD Board consists of two or more members, I believe that it would 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 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."

Because the CCWD Board was created by the County and, pursuant to Article 5-d, carries out certain powers and duties, I believe that it conducts public business and performs a governmental function for a public corporation, in this instance, Madison County. If that is so, the Board constitutes a "public body" required to comply with the Open Meetings Law.

Rights of access to meetings conferred by that statute have been construed expansively, and 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.).

Further, the Open Meetings Law requires that notice be posted and given to the news media prior to every meeting of a public body, such as a board of education. Specifically, §104 of that statute provides that:

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

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

There is nothing in the Open Meetings Law that specifies where meetings may be held. The only provision that deals somewhat directly with the issue is §103(b), which states that public bodies must make or cause to made reasonable efforts to hold meetings in locations that offer barrier-free access to physically handicapped persons. Perhaps equally pertinent is §100 of the Open Meetings Law, the Legislative Declaration, which states that:

> "It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of an able to observe the

> performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy. The people must be able to remain informed if they are to retain control over those who are their public servants. It is the only climate under which the commonweal will prosper and enable the governmental process to operate for the benefit of those who created it."

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

From my perspective, every provision of law, including the Open Meetings Law, should be implemented in a manner that gives reasonable effect to its intent. Whether a meeting is held on public or private property, to give reasonable effect to the law, I believe that meetings should be held in locations in which those likely interested in attending have a reasonable opportunity to do so.

Second, with respect to access to records, the Freedom of Information Law is applicable to agency records, and §86(3) defines the term "agency" to mean:

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

Based on the language quoted above, the County, as well as any municipal board, would constitute an agency falling within the coverage of the Freedom of Information Law.

As a general matter, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my view, bills and similar records involving the receipt or expenditure of public monies would be available, for none of the grounds for denial would apply.

Lastly, 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)].

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, a suggested earlier, 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. 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

As you requested, copies of this opinion will be forwarded to the officials that you designated.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Rocco DiVeronica
John Gladney
Dave Taber
Chairman, Madison County Board of Supervisors

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO - 3112

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February 14, 2000

E-Mail

TO: Susan Edelman [redacted]

FROM: Robert J. Freeman, Executive Director

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

Dear Ms. Edelman:

I have received your letter of January 7 in which you referred to a meeting of the New York City Board of Education held on that day "to interview candidates for interim chancellor." You indicated that "[n]o special meeting was called or notified", and that Board representatives said that the meeting was "not official" and that, therefore, no notice was required.

In this regard, I offer the following comments.

First, by way of background, rights of access to meetings conferred by that statute have been construed expansively, and 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.).

In short, if a majority of the Board convened for the purpose of conducting public business, collectively, as a body, I believe that the gathering would have constituted a "meeting" subject to the Open Meetings Law, irrespective of as characterization as "not official."

Second, although the Open Meetings Law makes no direct reference to "special" or "emergency" meetings, that statute nonetheless 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.

I hope that I have been of assistance.

RJF:jm

cc: David Bloomfield
Ron LeDonni

OML-AO- 3113

From: Robert Freeman
To: "VMULLEN@oswego.org".GWIA.DOS1
Date: 2/15/00 9:22AM
Subject: Re:

Good morning - -

The question is whether a quorum of any of the boards to which you referred will be participating.

As a general matter, any gathering of a quorum of a public body (a majority of its total membership) for the purpose of conducting public business would constitute a "meeting" subject to the Open Meetings Law, even if there is no intent to take action. Further, every meeting must be preceded by notice given to the news media and to the public by means of posting. It is also noted that case law indicates that a joint meeting, a meeting during which there is majority of two or more boards, is subject to the Open Meetings Law.

If there are merely representatives of the boards, but no majority of any of them, the Open Meetings Law would not apply.

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3114

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

February 22, 2000

Hon Carol-Jean Mackin
Town Clerk
Town of Clinton
P.O. Box 208
Clinton Corners, NY 12514

The staff of the Committee 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. Mackin:

As you are aware, I have received your letter of January 13, as well as a variety of related materials.

By way of background, you wrote that a member of the Town Board, Mr. Bill Keefe, delivered to you a hand-written letter on January 3 containing his resignation from the Board. He was later reinstated on January 11 via a "straw poll of the Town Board on the advice of the Town Attorney that the resignation was invalid due to the fact that it is not properly 'addressed' to the Town Clerk." Before the reinstatement, the Board held what was characterized as "an emergency executive session"prior to its scheduled meeting to consider, according to the supervisor, "possible litigation" and a "personnel matter" due to a threat by Mr. Keefe that he would initiate litigation if he was not reinstated. You were informed in advance that the executive session would be held, but that you would not be permitted to attend. You indicated that Mr. Keefe never asked you, the Town Clerk, to withdraw his resignation and that there were no minutes of the emergency executive session.

In conjunction with the foregoing, you have raised the following questions:

"1. When a meeting can be closed to the public and your opinion if the 'executive session' described above qualifies.

2. After meeting minutes, including the requirements of minutes of executive sessions.

> 3. Your opinion that approval of the minutes by the Town Board is a courtesy, not a matter of law.
>
> 4. Must a board member be addressed as 'Councilman...Councilwoman?'
>
> 5. Also, if you have any case law that you are familiar with concerning the concept of 'addressing' one's resignation."

In this regard, I offer the following comments.

First, there is no reference in the Open Meetings Law to "emergency" meetings or "emergency" executive sessions. 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 hold an executive session in advance of a meeting. In short, 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.

As indicated above, 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 Clinton."

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.

From my perspective, it does not appear that the reinstatement of an individual to the Town Board would fall within the language of §105(1)(f).

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. Nevertheless, by means of the kind of motion suggested above, members of a public body and others in attendance would have the ability to know that there is a proper basis for entry into an executive session. Absent such detail, neither the members nor others may be able to determine whether the subject may properly be considered behind closed doors.

Second, with 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."

Based on the foregoing, minutes of open meetings must be prepared and made available within two weeks; if action is taken in executive session, minutes must be prepared and disclosed to the required by the Freedom of Information Law within one week. If no action is taken during an executive session, there is no requirement that minutes of the executive session be prepared. As noted earlier, however, a motion to enter into an executive session must be made in public, during an open meeting. Further, §106(1) requires that minutes include reference to any such motion and the vote of the member on the motion.

Since the correspondence refers to action taken by the Town Board by means of a "straw poll", if a public body reaches a consensus upon which it relies, I believe that minutes reflective of decisions reached must be prepared and made available.. In Previdi v. Hirsch [524 NYS 2d 643 (1988)], the issue involved access to records, i.e., minutes of executive sessions held under the Open Meetings Law. Although it was assumed by the court that the executive sessions were properly held, it was found that "this was no basis for respondents to avoid publication of minutes pertaining to the 'final determination' of any action, and 'the date and vote thereon'" (id., 646). The court stated that:

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

Therefore, if the Board reached a "consensus" through a straw poll 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."

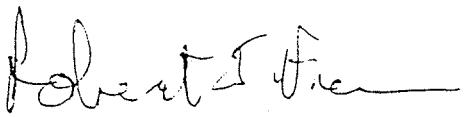
Third, although as a matter of practice, policy or tradition, many public bodies approve minutes of their meetings, there is nothing in the Open Meetings Law or any other statute of which I am aware that requires that minutes be approved. In another opinion of the State Comptroller, it was found that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

Fourth, and in a related vein, I know of no law or decision that deals with the manner in which members of a Town Board must be addressed or characterized in written materials.

Lastly, with respect to the concept of "addressing" a resignation, the issue is unrelated to the statutes within the advisory jurisdiction of this office. As such, I regret that I cannot offer guidance on the matter.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Anne Marie Mueser

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3115

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February 24, 2000

Mr. Elmer F. Bertsch
[redacted]

Thomas B. Hayner
County Attorney
County of Schenectady
620 State Street
Schenectady, NY

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

Dear Mr. Bertsch and Mr. Hayner or successor in office:

I have received your letters, which are respectively dated January and January 18. Both deal with essentially the same issue.

In brief, the Schenectady County Legislature consists of thirteen members. Among the thirteen are five Republicans and two Conservatives, and the two were cross-endorsed by the Republican party. Those seven members, a majority of the County Legislature, together conduct closed caucuses, and your question involves the ability to do so in consideration of the Open Meetings Law. Mr. Bertsch wrote that the new Chair of the County Legislature indicated that, in Mr. Bertsch's words, "there are at least thirty cases that uphold the current practice of having Republican/Conservative Caucuses."

I know of no such cases in New York that involve members of public bodies. Further, under the circumstances that you described, if a caucus involves matters of public business, the gathering would, in my opinion, constitute a "meeting" that must be conducted in public in accordance with the provisions of the Open Meetings Law. In this regard, I offer the following comments.

First, as you are likely aware, the Open Meetings Law is applicable to meetings of public bodies, such as the County Legislature. By way of historical 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 a public body gathers to discuss public 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.

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.

I note that 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.

In Buffalo News v. Buffalo Common Council [585 NYS 2d 275 (1992)], the matter 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 view of the overall importance of Article 7, any exemption must be narrowly construed so that it will not render Section 100 meaningless" (id., 278).

Although the County Legislature in the instant situation does not consist wholly of members of a single political party, I believe that the thrust of the decision indicates that, in view of the intent of the Open Meetings Law, exceptions to the right to attend meetings should be construed narrowly. Based on its intent, if members registered to different political parties comprising of a majority of the County Legislature convene to discuss public business, I believe that the gathering is no longer a political caucus, but rather a "meeting" that falls within the coverage of the Open Meetings Law.

I note that the decision in Buffalo News continually referred to the term "meeting" and the deliberative process, and that 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, coupled with the expressed legislative intent of the Open Meetings Law. 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).

It is possible that two Conservative members may have a philosophy or inclination similar to that of the Republicans. Nevertheless, by virtue of their political party registration, it appears that they have affirmatively chosen to distinguish himself from members of other parties. Similarly, there may be upstate Democrats in the State Senate who are more conservative than their downstate counterparts and whose positions may in many instances be more closely aligned with the Republican majority. In my view, despite what may be a similarity in their stances, if those Democrats joined the Republican majority during its caucus, the exemption regarding political caucuses would not apply; on the contrary, I believe that the gathering would constitute a meeting subject to the Open Meetings Law.

I believe that the same conclusion should be reached in the situation that you presented.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Matt Roy

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3116

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February 24, 2000

Mr. Tyler M. Schroeder
[redacted]

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

Dear Mr. Schroeder:

I have received your letter of January 16 in which you sought an advisory opinion concerning "recent actions" taken by the Rensselaer City School District Board of Education. You indicated that the Board approved a resolution to add two administrative positions at the middle school, but that there was no public discussion of the matter. You added that you are "sure this topic was discussed in executive session."

It is noted at the outset that the fact that there was little or no public discussion of the issue may but does not necessarily lead to the conclusion that the Board considered the matter in executive session. If, for example, memoranda or other written materials offering support for the proposed action were distributed to the Board prior to its adoption of the resolution, there may have been no need for a detailed discussion.

On the other hand, if indeed the Board discussed the creation of the two positions in executive session, I believe that it would have failed to have complied with the Open Meetings Law. In this regard, I offer the following comments.

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

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

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

Second, although it is used frequently, I point out that 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, as in this instance, the creation or elimination of positions, I do not believe that §105(1)(f) may be asserted, even though the discussion may relate to "personnel". In a decision that dealt directly with the ability to conduct an executive

session to discuss the creation of positions, i.e., whether they are needed, whether they should be full or part time, it was held that there was no basis for entry into executive session [see Gordon v. Village of Monticello, Supreme Court Ulster County, August 5, 1993; modified, 207 AD2d 55 (1994); reversed on other grounds, 87 NY2d 124 (1995)].

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).

As you requested, copies of this opinion will be sent to the persons identified in your letter.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Theodore Grocki
Anne Myers

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3117

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February 24, 2000

TO: Russ Johnson [redacted]

FROM: Robert J. Freeman, Executive Director

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

Dear Mr. Johnson:

I have received your letter of January 15 in which you asked whether "a vote [may] be taken on a particular issue during an executive session (county legislature or legislative committees)."

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

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

Based on the foregoing, as a general rule, a public body may take action during a properly convened executive session [see Open Meetings Law, §105(1)]. 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 emphasized that minutes of executive sessions need not include information that may be withheld under the Freedom of Information Law. From my perspective, 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. However, there are situations in which the action may be preliminary and may be withheld under the Freedom of Information Law. For instance, 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 charges would not yet have been proven, and 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)].

I hope that I have been of assistance.

RJF:jm

OML-AO-3118

From: Robert Freeman
To: [redacted]
Date: 3/1/00 8:14AM
Subject: Dear Mr./Ms. Zimkin:

Dear Mr./Ms. Zimkin:

You have asked whether a village zoning board of appeals is subject to the Open Meetings Law.

The short answer is that a zoning board of appeals is a "public body" required to comply with the Open Meetings Law. Any gathering of a majority of such a board for the purpose of conducting public business, even if there is no intent to take action, would constitute a "meeting" that falls within the coverage of that statute.

If you need a more detailed response, please so inform me.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
Albany, NY 12231
(518) 474-2518 - Phone
(518) 474-1927 - Fax
Website - www.dos.state.ny.us/coog/coogwww.html

CC: Ann-riberio-village-of-elmsford@worldnet.att.net

OML-AO-3119

From: Robert Freeman
To: [redacted]
Date: 3/6/00 7:57AM
Subject: Re: Fwd: (no subject)

The answer is that it depends on the actual nature of the discussion. As you are likely aware, the grounds for entry into executive session are limited to those appearing in paragraphs (a) through (h) of §105(1) of the Open Meetings Law. The only ground that would appear to be relevant is paragraph (f), which permits a public body to conduct an executive session to discuss: "the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, dismissal or removal of a particular person or corporation..."

The question is whether any of the language quoted above would be applicable to the discussion. For instance, to the extent that it involved the "financial history" of a particular corporation, there would have been a basis for holding an executive session. If none of the language of that provision would have applied, the discussion should have occurred in public.

I hope that I have been of assistance.

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[redacted]

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3120

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

March 8, 2000

E-Mail

TO: F. James Rohlf <rohlf@like.bio.sunysb.edu>

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. Rohlf:

I have received your recent letter in which you asked whether the Open Meetings Law applies to "non-profit home owners associations in New York." If it does not, you asked what other laws might regulate those kinds of entities.

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

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

Based on the foregoing, the Open Meetings Law generally applies to governmental entities, such as town boards, city councils, boards of education and the like. In my view, since a non-profit homeowners association is private and not a governmental entity, the Open Meetings Law would not be applicable to its meetings.

I am unaware of laws that might regulate homeowners associations, and I would conjecture that there are none. However, it is suggested that you raise the issue by contacting the Suffolk Regional Office of the Attorney General in Hauppauge at 231-2424.

I hope that I have been of assistance.

RJF:jm

OML-AO-3121

From: Robert Freeman
To: [redacted]
Date: Mon, Mar 13, 2000 10:53 AM
Subject: Dear Sir or Madam, or M.ou Mlle:

Dear Sir or Madam, or M.ou Mlle:

I have received your letter, and the brief answers are that you cannot be prohibited from taking notes at an open meeting of a public body, that any person, including "non-citizens" have the right to attend, and that any person may tape record a meeting, so long as the use of a recording device is not disruptive.

If you want a detailed written advisory opinion in response to your questions, I can prepare an opinion within approximately one month. If you would like to discuss the matters, you can call or provide your phone number so that I can call you.

If there is no need for a detailed opinion, please let me know.

I hope that I have been of assistance.**********

Robert J. Freeman
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3122

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

March 14, 2000

E-Mail

TO: [redacted]

FROM: Robert J. Freeman, Executive Director

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

Dear Mr./Ms. Brown:

I have received your letter of January 20. You wrote that a city council has televised its meetings on the public access channel but recently decided that it would no longer do so. You asked whether the council has the right to do so.

In this regard, there is no provision of law that requires that a public body, such as a city council, televise or broadcast its proceedings. Therefore, in my view, the council would have the right to suspend its arrangement to have meetings televised on the public access channel.

I note, however, that any person would have the right to audio tape record or video record open meetings of public bodies, so long as the use of the recording devices is not disruptive or obtrusive [see Mitchell v. Board of Education, 113 AD2d 924 (1985); Peloquin v. Arsenault, 616 NYS 716 (1994). As such, you could, for example, videotape a meeting of the city council with your camcorder and replay the tape as you see fit.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3123

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

March 14, 2000

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 undated letter, which reached this office on January 24. You have sought guidance concerning the "Open Meetings Law and the Deliberations of Political Caucuses."

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

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

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

> or minority status of such political committees, conferences and caucuses or (iii) whether such political committees, conferences and caucuses invite staff or guests to participate in their deliberations..."

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

Many local legislative bodies, recognizing the potential effects of the 1985 amendment, have taken action to reject their authority to hold closed caucuses and to continue to conduct their business open to the public as they had prior to the amendment. It is suggested that you attempt to ascertain whether the Town of Chili may have done so. If any such action was taken, it likely would have occurred late in 1985 or early in 1986.

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: Town Board

OML-AO-3124

From: Robert Freeman
To: [redacted]
Date: Tue, Mar 14, 2000 1:48 PM
Subject: Re: Notice of Village meetings

The short answer is that §104 of the Open Meetings Law requires that notice be given prior to every meeting to the news media and by means of posting. I note that many public bodies, usually at their organizational meetings, schedule meetings for the remainder of the year. If a regular schedule is established, sending notice of scheduled meetings once to the news media and posting notice continuously would satisfy the notice requirements for the period in which the schedule is in effect. In that circumstance, the only situations in which additional notice would be required would involve unscheduled meetings.

I hope that I have been of assistance.

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[redacted]

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3125

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

March 15, 2000

Mr. Peter Costa
[redacted]

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

Dear Mr. Costa:

I have received your letter of January 27. In short, you indicated that the president of your board of education approved payments and transfers of funds on December 22 without approval or action taken by the board. The board apparently ratified the president's actions more than a month later.

In this regard, I offer the following comments.

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

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

It is clear that a board of education constitutes a public body required to comply with the Open Meetings Law.

A key element in the implementation of that statute involves its relationship to §41 of the General Construction Law, which is entitled "Quorum and majority." That statute states that:

> "Whenever three of more public officers are given any power or authority, or three or more persons are charged with any public duty to

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

Based upon the foregoing, a quorum is a majority of the total membership of a public body, notwithstanding absences or vacancies. In construing §41 of the General Construction Law, it has consistently been found that action may be taken only by means of an affirmative vote of the majority of the total membership of a public body [see e.g., Rockland Woods, Inc. v. Suffern, 40 AD 2d 385 (1973); Walt Whitman Game Room, Inc. v. Zoning Board of Appeals, 54 AD 2d 764 (1975); Guiliano v. Entress, 4 Misc. 2d 546 (1957); and Downing v. Gaynor, 47 Misc. 2d 535 (1965); also Ops Atty Gen 88-87 (informal)].

In the context of the situation described, if the action could only have been taken by the board, the action purportedly taken by the president would, in my view, if challenged, be found to be a nullity and invalid.

Second, 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."

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3126

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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

March 17, 2000

Hon. Rose Mary Christian
Councilwoman
[redacted]

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

Dear Councilwoman Christian:

I have received your letter of January 30 in which you contend that the City Council of the City of Batavia engaged in "a violation of the State's Open Government Laws." In brief, you referred to a vote taken during an executive session on October 12 and that "City officials claimed that no legally binding vote but, only a straw poll was taken in the executive session and therefore it was not illegal." You contend that "[i]t was illegal because it never came back to the floor until January."

If my understanding of the matter is accurate, there is but one decision that deals with the "consensus" or "straw poll." In Previdi v. Hirsch [524 NYS 2d 643 (1988)], the issue pertained to access to records, i.e., minutes of executive sessions held under the Open Meetings Law. Although it was assumed by the court that the executive sessions were properly held, it was found that "this was no basis for respondents to avoid publication of minutes pertaining to the 'final determination' of any action, and 'the date and vote thereon'" (id., 646). The court stated that:

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

In the context of the situation to which you referred, when the Council reached a "consensus" reflective of its final determination of an issue, I believe that minutes should have been prepared indicating the nature of the action taken and the manner in which each member voted.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: City Council

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3127

41 State Street, Albany, New York 12231
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March 17, 2000

Mr. Jerry Brixner
[redacted]

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

Dear Mr. Brixner:

I have received your letter of February 1 in which you raised the following questions concerning the Open Meetings Law:

> "1. Is there any requirement for Town Government to have to provide an Agenda to the Public during the course of a Town Board Meeting?
>
> 2. Is there any provision in the Law that requires a Town Board to offer its Town's Residents an opportunity to talk at a Town Board Meeting?"

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

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.

A public body's rules pertaining to public participation typically indicate when, during a meeting, the pubic may speak (i.e., at the beginning or end of a meeting, for a limited period of time before or after an agenda item or other matter is discussed by a public body, etc.). Most rules also limit the amount of time during which a member of the body may speak (i.e., no more than three minutes).

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-3128

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March 24, 2000

E-Mail

TO: Steven Kurlander <skurlander@ftr.com>

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. Kurlander:

I have received your letter of February 11. In your capacity as a member of the Sullivan County Legislature, you raised questions concerning the Open Meetings Law.

The first involves an "'unofficial' Steering Committee" consisting of the leaders of the County Legislature, who meet with the County Manager, the County Attorney and other "high ranking bureaucrats" on a weekly basis. With respect to the second, you indicated that you serve as Chair of the Real Property Committee and as a member of the Real Property Advisory Board, which meets monthly in private and consists of yourself, the County Attorney, the Fiscal Manager, the County Treasurer and the managers of the Real Property Department and the Real Property Assessment Office. Recently, among the nine members of the County Legislature, five "appeared and sat through the proceedings" of the Advisory Board. You have asked whether the presence of five of nine members would trigger the application of the Open Meetings Law and whether the Advisory Board is subject to that statute.

In this regard, the Open Meetings Law pertains to public bodies, and §102(2) defines the phrase "public body" to mean:

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

The last clause of the definition refers to any "committee or subcommittee or similar body of [a] public body." Based on that language and judicial decisions, when a public body, such as a county legislature, creates or designates its own members to serve as a committee or subcommittee, the committee or subcommittee would constitute a public body subject to the requirements of the Open Meetings Law. Therefore, committees of the County Legislature consisting solely of its own members would have the same obligations regarding notice and openness, for example, as well as the same authority to conduct executive sessions as the governing body [see Glens Falls Newspapers, Inc. v. Solid Waste and Recycling Committee of the Warren County Board of Supervisors, 195 AD2d 898 (1993)].

However, if an entity is advisory in nature and does not consist wholly of members of a public body, it has been held it would not constitute a public body. Judicial decisions indicate generally that 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)].

Considering the foregoing in relation to the issues that you raised, it is unlikely in my opinion that the Steering Committee, as you described it, would constitute a "public body" subject to the Open Meetings Law. You characterized the group as "unofficial" and there is no indication that the Committee was created by any action taken by the Legislature. If that is so, I do not believe that it constitutes a "public body."

With respect to the Real Property Advisory Board, whether it falls within the coverage of the Open Meetings Law would in my view be dependent on the means by which it was created and its functions. In the decisions cited earlier, none of the entities was designated by law to carry out a particular duty and all had purely advisory functions. Pertinent, however, in my view is the decision rendered in MFY Legal Services v. Toia [402 NYS 2d 510 (1977)]. That case involved an advisory body created by statute to advise the Commissioner of the State Department of Social Services. In MFY, it was found that "[a]lthough the duty of the committee is only to give advice which may be disregarded by the Commissioner, the Commissioner may, in some instances, be prohibited from acting before he receives that advice" (id. 511) and that, "[t]herefore, the giving of advice by the Committee either on their own volition or at the request of the Commissioner is a necessary governmental function for the proper actions of the Social Services Department" (id. 511-512).

If the Advisory Board was created by law, or if it performs a required function in the process of decision making, I believe that its meetings would be subject to the Open Meetings Law. In that circumstance, even if its authority is advisory, if the decision maker or decision making body must, by law, consider the advice of the Advisory Board as a condition precedent to its ability to take action, I believe that the Board would be carrying out a governmental function and, therefore, would constitute a public body. On the other hand, if the Board is not a creation of law and it performs no

legally necessary function in the decision making process, it would not, based on judicial decisions, be required to comply with the Open Meetings Law.

Lastly, the question involving the attendance of five of the nine members is whether their presence results in a finding that the gathering is a "meeting" that falls within the scope of the Open Meetings Law. Section 102 of that statute defines the term "meeting" to mean "the official convening of a public body for the purpose of conducting public business". It is emphasized that the definition of "meeting" has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be convened open to the public, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

Inherent in the definition and its judicial interpretation is the notion of intent. If there is an intent that a majority of a public body 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 a speaker as part of an audience or group, for example, I do not believe that the Open Meetings Law would be applicable.

In the context of the situation that you described, if the members of the Legislature attend merely as observers, it does not appear that their presence would transform the gathering into a meeting of the County Legislature. Conversely, however, if a majority of membership of the Legislature attends, if the members have the ability to attend due to their status as legislators, and if they participate as members of the Legislature, I believe that the gathering would constitute a "meeting" that falls within the framework of the Open Meetings Law.

I hope that I have been of assistance.

RJF:jm

cc: Ira J. Cohen, County Attorney

FOML-AO-3129

From: Robert Freeman
To: [redacted]
Date: 3/24/00 8:02AM
Subject: Re:

Good morning - -

Under §105(2) of the Open Meetings Law, a public body may authorize a non-member to attend an executive session. If the presence of the employee is an issue, the Board would determine, by majority vote, whether to permit the employee to attend.

Have a great day.

Robert J. Freeman
Executive Director
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[redacted]

STATE OF NEW YORK
DEPARTMENT OF STATE
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FOIL-AO-3130

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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

March 28, 2000

Ms. Carol M. Lane
[redacted]

The staff of the Committee on 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. Lane:

I have received your letter of February 20 in which you asked whether "an incorporated Village's Harbor Commission is a 'public body' as defined by the Open Meetings Law."

By way of background, a three person commission was initially established by the mayor, but most recently, the board of trustees enacted a local law that makes reference to the "Harbor Commission." Further, the local law indicates that the Commission has various areas of authority, including the power to "approve or disapprove" mooring permits and establish anchoring areas.

In this regard, as you are likely aware, the Open Meetings Law is applicable to meetings of public bodies, and §102(2) of that statute defines the phrase "public body" to mean:

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

Judicial decisions indicate generally that advisory bodies having no power to take final action, other than committees consisting solely of members of public bodies, fall outside the scope of the Open Meetings Law. As stated in those decisions: "it has long been held that the mere giving of advice, even about governmental matters is not itself a governmental function" [Goodson-Todman Enterprises, Ltd. v. Town Board of Milan, 542 NYS 2d 373, 374, 151 AD 2d 642 (1989); Poughkeepsie Newspapers v. Mayor's Intergovernmental Task Force, 145 AD 2d 65, 67 (1989); see

also New York Public Interest Research Group v. Governor's Advisory Commission, 507 NYS 2d 798, aff'd with no opinion, 135 AD 2d 1149, motion for leave to appeal denied, 71 NY 2d 964 (1988)].

In this instance, however, the Harbor Commission, an entity created by law, has, according to your letter, been given specific powers and authority to act and make decisions. That being so, and assuming that it consists of three or more members, I believe that it constitutes a "public body" required to comply with the Open Meetings Law.

That conclusion may be reached by breaking down the definition by its components.

First, with respect to a quorum requirement, I direct your attention to §41 of the General Construction Law, which is entitled "Quorum and majority." That statute states that:

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

Based on the foregoing, if the Commission consists of three or more members, since they are charged with a public duty to be performed by them collectively, as a body, the Commission may conduct business only with the presence of a quorum.

Second, based on its authority, the Harbor Commission performs a governmental function and conducts public business for a public corporation, a village.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3131

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March 28, 2000

E-Mail

TO: Victoria Mullen <VMULLEN@oswego.org>

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. Mullen:

I have received your letter of February 9. In brief, you have sought guidance concerning commonly cited grounds for entry into executive session.

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

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

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

The provision that deals with litigation or, in some instances, "legal matters" 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."

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

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

> see, Matter of Orange County Publs., Div. of Ottaway Newspapers v County of Orange, 120 AD2d 596, lv dismissed 68 NY 2d 807).
>
> "Applying these principles to the matter before us, it is apparent that the Board's stated purpose for entering into executive session, to wit, the discussion of a 'personnel issue', does not satisfy the requirements of Public Officers Law § 105 (1) (f). The statute itself requires, with respect to personnel matters, that the discussion involve the 'employment history of a particular person" (id. [emphasis supplied]). Although this does not mandate that the individual in question be identified by name, it does require that any motion to enter into executive session describe with some detail the nature of the proposed discussion (see, State Comm on Open Govt Adv Opn dated Apr. 6, 1993), and we reject respondents' assertion that the Board's reference to a 'personnel issue' is the functional equivalent of identifying 'a particular person'" [Gordon v. Village of Monticello, 620 NY 2d 573, 575; 207 AD 2d 55 (1994)].

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

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

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

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

> discussed in executive session involve Article 14 of the Civil Service Law" [Doolittle, supra].

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

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

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3132

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March 28, 2000

Mr. John L. Cummings
[redacted]

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

Dear Mr. Cummings:

I have received your letter of February 15 in which you sought an advisory opinion under the Open Meetings Law relating to practices of the Town Board of the Town of Ballston.

You wrote that the Board schedules two meetings per month, which "are advertised and conducted according to schedule." However, prior to every scheduled meeting that you have attended, the Board, according to your letter, "meets in the Supervisor's Office," and the agenda for the scheduled meeting is discussed.

I this regard, the Open Meetings Law pertains to meetings of public bodies, such as town boards, and the definition of "meeting" [see Open Meetings Law, §102(1) has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be 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 Town business, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law.

Further, §104 of the Open Meetings Law requires that every meeting, including the kind of gathering to which you referred, be preceded by notice of the time and place given to the news media and by means of posting. Therefore, if the Board intends to convene to discuss the agenda or other matters of public business before its scheduled meeting, notice must be given indicating the time and place of that gathering.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board

OML-AO-3133

From: Robert Freeman
To: [redacted]
Date: 3/28/00 8:20AM
Subject: Re: (no subject)

Good morning - -

Sorry for the delay; I was out of town yesterday.

With respect to your question, there is nothing in the Open Meetings Law or any other law of which I am aware that deals with the preparation or treatment of an agenda. The key point, in my opinion, is that the Supervisor is one of five members of the Board and that §63 of the Town Law states in part that "The board may determine the rules of its procedure." Based on that grant of authority to the Board, it has the ability to establish or change a rule or procedure if you are dissatisfied with the current situation.

Hope that this helps.

[redacted]

Robert J. Freeman
Executive Director
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STATE OF NEW YORK
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March 31, 2000

Mr. James E. Coombs
Town Attorney
Town of Poughkeepsie
Department of Law
One Overocker Road
Poughkeepsie, NY 12603

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

Dear Mr. Coombs:

I have received your letter of February 18. You wrote that the Town of Poughkeepsie Town Board consists of seven members, five of whom are members of one political party, and two who are members of a different party. You wrote that:

> "An issue has been raised as to whether or not the five (5) majority members of the Board may hold caucuses or private meetings in their capacity as members of the Town Board of the Town of Poughkeepsie in order to discuss, *inter alia*, public business, either with or without the presence of staff or guests who might be invited to participate in their deliberations."

In this regard, by way of background, since 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, 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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

OML-AO-3135

From: Robert Freeman
To: "VMULLEN@oswego.org".GWIA.DOS1
Date: 3/31/00 10:21AM
Subject: Re:

Good Morning - -

Very simply, there is no law that deals with the function of an agenda or that even requires that there must be an agenda. How the agenda is used or followed, or whether matters can be added for consideration at a meeting that are not referenced on the agenda is up to the Town Board. In my view, if there is no rule or procedure that prohibits a member from introducing a resolution at a meeting that is not referenced on the agenda, he or she may do so. Again, §63 of the Town Law states that the Town Board has the authority to adopt its rules of procedure. Absent a rule on the subject, I know of no reason why a new resolution cannot be introduced.

I hope that I have been of assistance.

[redacted]

Robert J. Freeman
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OML-AO-3136

From: Robert Freeman
To: [redacted]
Date: 4/3/00 7:57AM
Subject: Re: HELPPPPPPPPPPPPPP

Good Morning - -

Although the Supervisor presides at the meeting, again, under §63 of the Town Law, the Town Board is authorized to determine its rules of procedure and has the capacity to act by means of a majority vote of its membership. Therefore, if a majority of the Board wants to discuss an issue, it may determine to do so by majority vote.

With respect to commentary by the public, the Open Meetings Law is silent with respect to public participation. Therefore, if the Board (not the Supervisor) does not want to allow the public to speak, the public would have no right to do so. However, most public bodies permit some sort of public participation. It has been suggested that if a public body chooses to authorize the public to speak, it should do so by means of reasonable rules (in this instance, adopted pursuant to §63) that treat members of the public equally. For instance, often a rule will enable members of the public to speak for up to a certain amount of time, i.e., 3 minutes on any topic, or on topics being considered by the board, etc.

If you have further questions, please feel free to contact me.

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[redacted]

STATE OF NEW YORK
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April 11, 2000

Ms. Pamela A. Brooks
President
Fort Edward Chamber of Commerce
P.O. Box 267
Fort Edward, NY 12828

The staff of the Committee on 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. Brooks:

I have received your letter of February 22, as well as a variety of materials relating to it. In your capacity as President of the Fort Edward Chamber of Commerce, you wrote that the Town of Fort Edward "depends on business from boaters traveling the Champlain Canal" and that your organization "came out strongly in favor of maintenance dredging."

One of the attachments to your letter is a letter from the Town Supervisor in which she wrote that "The Fort Edward Town Board has elected not to write a check to the Fort Edward Chamber of Commerce for $5000.00 at this time despite the fact that we budgeted that amount for fiscal 2000." She added that the decision not to provide funding related to the Chamber's "politically motivated activities." You requested minutes of the meeting during which that decision was made, and you were informed that no such minutes could be located. As such, you expressed concern with respect to compliance with the Open Meetings Law. In addition, you raised an issue pertaining to a request to be placed on an agenda to speak at a meeting that was rejected.

In this regard, I offer the following comments.

First, if indeed the Town Board took action, I believe that it could validly have done so only at a meeting held in accordance with the Open Meetings Law. Section 102(2) of that statute defines the phrase "public body" to mean:

> "...any entity for which a quorum is required in order to conduct public business and which consists of two or more members,

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

A town board is a "public body" for which a quorum is required. Especially relevant in my view is §41 of the General Construction Law which provides guidance concerning quorum and voting requirements. Specifically, the cited provision states that:

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

Based upon the language quoted above, a public body 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.

Second, and in a related vein, §102(1) of the Open Meetings Law defines the term "meeting" to mean "the official convening of a public body for the purpose of conducting public business". Based upon an ordinary dictionary definition of "convene", that term means:

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

In view of the ordinary definition of "convene", I believe that a "convening" of a quorum requires the physical coming together of at least a majority of the total membership of a public body, that a majority of a public body would constitute a quorum, and that an affirmative majority of votes would be needed for a public body to take action or to carry out its duties.

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

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

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

If action was taken by outside the context of a meeting held in accordance with the Open Meetings Law, that statute in my opinion would have been circumvented.

Third, if action was taken by the Town Board, I believe that it should have been memorialized in minutes prepared pursuant to §106 of the Open Meetings Law. That provision states that:

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

Based on the foregoing, whether action is taken during an open meeting or an executive session, which I do not believe could appropriately have been held, it must be recorded in minutes.

Lastly, with respect to "freedom of speech rights" and being placed on the agenda, I note that there is nothing in the Open Meetings Law or any other statute of which I am aware that deals with the function of an agenda or any requirement that an agenda be prepared. Further, while any person may write letters to the editors of newspapers, advertise or otherwise express their views, there is no right to do so in the context of meetings held under the Open Meetings Law. That statute 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, 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 reasonable rules that treat members of the public equally.

While public bodies have the right to adopt rules to govern their own proceedings, the courts have found in a variety of contexts that such rules must be reasonable. By means of example, in a decision rendered in 1963 concerning the use of tape recorders, it was found that the presence of a tape recorder, which then was a large and obtrusive device, would detract from the deliberative process and that, therefore, a policy prohibiting its use was reasonable [Davidson v. Common Council, 40 Misc.2d 1053]. However, when changes in technology enabled the public to use portable, hand-held tape recorders, it was found that their use would not detract from the deliberative process, because those devices were unobtrusive. Consequently, it was also determined that rules adopted by public bodies prohibiting their use were unreasonable [People v. Ystueta, 99 Misc.2d 1105 (1979); Mitchell v. Board of Education of the Garden City Union Free School District, 113 AD 2d 924 (1985). Specifically, in Mitchell, it was held that: "While Education Law §1709(1) authorizes a board of Education to adopt by laws and rules for its government and operations, this authority is not unbridled. Irrational and unreasonable rules will not be sanctioned."

In the context of the situation that you presented, unless the Board has established a rule or procedure that confers the privilege of being placed on an agenda for the purpose of speaking, I do not believe that you or the Chamber would have the right to insist that the Board grant your request to do.

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-3138

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April 14, 2000

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 information presented in your correspondence.

Dear Mr. Chipkin:

I have received your letters of March 13 and 14 concerning compliance with the Open Meetings Law by the Town Board of the Town of Mexico. In the following commentary, guidance will be offered regarding the most commonly cited grounds for conducting executive sessions and the specificity of motions for entry into executive session necessary to comply with law.

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

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

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

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

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

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

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

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

As such, a proper motion might be: "I move to enter into executive session to discuss our litigation strategy in the case of the XYZ Company v. the 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 recently confirmed the advice rendered by this office. In discussing §105(1)(f) in relation to a matter involving the establishment and functions of a position, the Court stated that:

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

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

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

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

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

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

discussed in executive session involve Article 14 of the Civil Service Law" [Doolittle, supra].

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

I hope that I have been of assistance.

RJF:jm

cc: Town Board, Town of Mexico

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3139

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April 14, 2000

Mr. Bernard Sohmer
Chair
City University of New York
University Faculty Senate
535 East 80th Street
New York, NY 10021

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

Dear Mr. Sohmer:

I have received your letter of March 8, as well as the materials attached to it. You have sought an advisory opinion relating to the Open Meetings Law.

You wrote that you serve as Chair of the University Faculty Senate of the City University of New York, and that in that role, you are an *ex officio* member of the Board of Trustees. Nevertheless, at a meeting of the Committee on Faculty and Staff Affairs, "a standing committee of the Board", the chair of that committee moved to enter into executive session to discuss collective bargaining negotiations and asked that you leave. It is your view that, as a Trustee, you had the right to be present.

In this regard, I offer the following comments.

First, attached to your letter is an excerpt from §6204 of the Education Law pertaining to the Board of Trustees of the City University. Subdivision (2) describes the membership of the Board and specifies that the "chairperson of the university faculty senate" is an "ex-officio" member, that the "ex-officio trustees shall be afforded the same parliamentary privileges as are conferred upon the appointed trustees" and that they are subject to the same laws as other members with respect to the discharge of their duties. In short, as an *ex officio* member of the Board, you have the same privileges and responsibilities as other members.

Second, §105(2) of the Open Meetings Law states that: "Attendance at an executive session shall be permitted any member of the public body and any other persons authorized by the public body." Based on the foregoing, I believe that you have the right to attend any executive session of any public body upon which you serve as a member. For instance, because you are a member of the Board of Trustees, the Board, in my view, could not preclude you from attending any executive session that it conducts.

Third, however, the question in my opinion is whether you are a member of the Committee on Faculty and Staff Affairs, or whether, as a member of the Board of Trustees, you had the "privilege" to attend. As you may be aware, the Open Meetings Law pertains to meetings of public governing bodies, such as the Board of Trustees, and committees and similar bodies consisting of members of governing bodies. Section 102(2) of that statute defines the phrase "public body" to include:

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

Although the original definition of "public body" enacted in 1976 made reference to entities that "transact" public business, the current definition as amended in 1979 makes reference to entities that "conduct" public business and added specific reference to "committees, subcommittees and similar bodies" of a public body.

In view of the definition of "public body", I believe that any entity consisting of two or more members of a public body would fall within the requirements of the Open Meetings Law [see Glens Falls Newspapers, Inc. v. Solid Waste and Recycling Committee of the Warren County Board of Supervisors, 195 AD2d 898 (1993); also Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984 (1981)]. Therefore, a standing committee of Board of Trustees members in my view constitutes a public body subject to the Open Meetings Law that is separate and distinct from the Board of itself. Further, as a general matter, I believe that a quorum consists of a majority of the total membership of a body (see General Construction Law, §41). As such, since the Board of Trustees, by statute, consists of seventeen members, its quorum is nine [see also, Education Law, §6204(3)(d)]. If a committee consisting of five Board members is designated, its quorum would be three.

Again, as a member of the Board of Trustees, I believe that you have the right to attend its executive sessions pursuant to §105(2) of the Open Meetings Law. If you are not a member of the Committee on Faculty and Staff Affairs, I do not believe that you would have the right to attend an executive session of that public body, unless there is some independent authority to do so based on a rule, policy or other privilege conferred by the Board of Trustees upon its members. It is suggested that you seek to ascertain whether the privilege of attending executive sessions of committees of the Board has been granted to members of the Board who are not members of committees.

hat I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Boarustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3140

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April 17, 2000

Mr. Carl L. Johantgen
[redacted]

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

Dear Mr. Johantgen:

I have received your letter of March 13. You complained that the Supervisor of the Town of Wayland "has meetings that do not include all four members of the Town Board", and that "[m]embers who are not in agreement with [him] are not informed of all meetings."

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

First, I point out that the Supervisor is a member, one of five, of the Town Board.

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

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

Based on the foregoing, a town board clearly constitutes a "public body."

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

> "Whenever three of more public officers are given any power or authority, or three or more persons are charged with any public duty

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

Based upon the language quoted above, a public body 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, even if a majority of the Town Board is present, i.e., the Supervisor and two other Board members, but they convene without informing the other two members, there would be no quorum, and the three would have no authority, in my view, to vote or otherwise take action.

Next, §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". Therefore, if a majority of the Board gathers for the purpose of discussing public business, I believe that the gathering would constitute a "meeting" that falls within the requirements of the Open Meetings Law.

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

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

Moreover, the Open Meetings Law has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals found that any gathering of a majority of a public body for the purpose of conducting public business is a "meeting" that must be convened open to the public, whether or not there is an intent to take action and regardless of the manner in which a

gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

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

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3141

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April 20, 2000

Mr. Charles J. Theophil
[redacted]

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

Dear Mr. Theophil:

I have received your letter of March 14. You referred to a meeting and a hearing held by the City Council of the City of Saratoga Springs and raised questions relating to the notice requirements applicable to those events.

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

Specifically, the provisions in the Open Meetings Law pertaining to notice appear in §104 and state 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."

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

Lastly, I believe the responsibility to comply with the notice requirements to which you referred is imposed upon a public body, which is the governing body of a city, town or village, for example.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Office of Corporation Counsel

OML-AO-3142

From: Robert Freeman
To: "VMULLEN@oswego.org".GWIA.DOS1
Date: 4/24/00 9:51AM
Subject: Re:

Good morning:

It sounds as though you are going through a series of trials by fire, but I'm sure that you will be stronger and a more effective member of the Town Board as a result.

With respect to the question regarding the Open Meetings Law, the exception dealing with discussions involving real property is limited in its scope. Section 105(1)(h) of that statute permits a public body, such as the Town Board, to enter into an executive session to discuss the "proposed acquisition, sale or lease of real property", but "only when publicity would substantially affect the value of the property."

If the matter involves applying for a grant, and if the focus is not on any particular parcel, a negotiation strategy or an indication of a price, it is doubtful in my view that it could properly be considered during an executive session.

If you need further assistance, please feel free to contact me.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
Albany, NY 12231
(518) 474-2518 - Phone
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STATE OF NEW YORK
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OML-AO-3143

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April 24, 2000

Hon. Robert F. Couse
Councilman
Town of Pine Plains
Box 320
Pine Plains, NY 12567

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

Dear Mr. Couse:

I have received your letter of March 20 in which you questioned whether you, as a member of the Pine Plains Town Board, have the right to attend meetings, "whether open or closed", of the Town's Police Advisory Council, which was created by enactment of a local law in 1997.

In this regard, I offer the following comments.

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

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

It is noted that several 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)]. In this instance, the entity in question is not ad hoc, for it has a continual existence and functions concerning the duty to advise Town officials. Moreover, it has been held that an advisory body created by law, which is so in the case of the Police Advisory Council, is a public body subject to the Open Meetings Law [see MFY Legal Services, Inc. v. Toia, 402 NYS 2d 510 (1977)].

While the Council's authority is clearly advisory in nature, Local Law #4 requires that it "shall" engage in a variety of duties, including the responsibility to "receive and hear suggestions, comments and complaints", "review the annual proposed budget for the Police Department" and its policies and procedures, "interview prospective appointments to the Police Department" and generally advise the Town Board and the Police Department. From my perspective, the ongoing responsibilities of the Council imposed by law reflect more than merely the ability to recommend or advise; they represent a recognition on the part of the Town Board that there is a continuing need for oversight that is sufficiently significant to warrant the enactment of a local law ensuring permanent oversight of the functions of the Police Department.

For the reasons expressed above, I believe that the Council is a "public body" required to comply with the Open Meetings Law. That being so, you or any member of the public may, in my opinion, attend its meetings.

If you are not a member of the Council, however, I do not believe that you would have the right to attend its executive sessions, even though you are a member of the Town Board. Section 105(2) of the Open Meetings Law states that: "Attendance at an executive session shall be permitted any member of the public body and any other persons authorized by the public body." Based on the foregoing, I believe that you have the right to attend any executive session of any public body upon which you serve as a member. For instance, because you are a member of the Town Board, the Board, in my view, could not preclude you from attending any executive session that it conducts. If you are not a member of the Council, I do not believe that you would have the right to attend an executive session of that public body, unless there is some independent authority to do so based on a rule, policy or other privilege conferred by the Town Board.

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 24, 2000

E-Mail

TO: Roy McDonald [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. McDonald:

I have received your letter of March 20 in which you described a gathering of four members of the Schroeppel Town Board at the home of a person whose property is the subject of a pending change in zoning. In separate correspondence, the Town Attorney indicated that the members met to view the site of the proposed zoning amendment, that the news media were invited to attend, and that no discussion of town business occurred.

Based on the information provided by the Town Attorney, it does not appear that the Open Meetings Law would have applied.

In this regard, although the term "meeting" [see Open Meetings Law, §102(1)] has been construed expansively by the courts to encompass any gathering of a majority of a public body for the purpose of conducting public business [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)], in the only decision of which I am aware dealing with a site visit, the members of a public body were in a van, and it was held that "the Open Meetings Law was not violated" [City of New Rochelle v. Public Service Commission, 450 AD 2d 441 (1989)]. In that case, members of the Public Service Commission toured the proposed route of a power line in order to acquire a greater understanding of evidence previously presented.

Based upon that decision, a site visit or tour by a public body, particularly on private property, would apparently not constitute a meeting. It has been advised, however, that site visits or tours by public bodies should be conducted solely for the purpose of observation and acquiring information, and that any discussions or deliberations regarding such observations should occur in public during meetings conducted in accordance with the Open Meetings Law.

I hope that I have been of assistance.

RJF:jm

cc: Town Board
Anthony Rivizzigno, Town Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-12069
OML-AO-3145

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April 26, 2000

Mr. Thomas H. Greenwood
Greenwood Commercial Investment
Realtors, Inc.
6780 Northern Boulevard - Suite 400
East Syracuse, NY 13057

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

Dear Mr. Greenwood:

I have received a copy of your letter of April 14 addressed to Assemblyman Harold C. Brown, Jr., as well as materials that you forwarded to the Committee. You have sought an opinion concerning your "right to attend and participate in the discussions with regard to the management of the "Special Assessment District" in the City of Syracuse and its financial operations.

By way of background, you wrote that you are "required to pay a Special Assessment District Tax to the Downtown Committee of Syracuse, Inc.", a "private, not for profit, professional downtown management organization, representing all property owners and tenants within the central business district." You questioned "how this committee can call itself private" and wrote that its meetings and records are closed.

From my perspective, the entity in question is required to conduct its meetings in accordance with the Open Meetings Law. Further, I believe that its records are subject to rights of access conferred by the Freedom of Information Law. In this regard, I offer the following comments.

Among the materials that you forwarded is Chapter 38 of the General Ordinances of the City of Syracuse entitled "Special Assessment District." Section 1 created the District, and Section 3 states that, unless otherwise provided, all property situated within the District "shall be subject to assessment..." Section 4 pertains to the establishment of a "special district operation and development committee...to consist of fifteen members (15) appointed by the mayor..." The remainder of section 4 describes the functions and duties of the Committee. Section 7 is entitled "Not-for-profit corporation" and subdivision (1) states in relevant part that:

> "The special district operations and development committee shall establish a not-for-profit corporation. The directors of such corporation shall be the members of the special district operations and development committee. All directors shall initially serve terms of from one to four (4) years as determined by the mayor...The mayor shall designate one of their number as chairman of the board of directors. Vacancies in the board of directors shall be filled by the mayor."

Subdivision (2) of Section 7 describes the powers of the Corporation, which include "Construction, operation and maintenance of authorized district improvements..."

In sum, the Special District Operations and Development Committee, whose members are designated solely by the Mayor pursuant to Section 5, is the *alter ego*, the same entity, as the not-for-profit corporation to which you referred, the Downtown Committee of Syracuse, Inc. Consequently, despite the corporate status of the Downtown Committee, it is clearly a creation of government and under the substantial control of the Mayor.

With respect to the ability to attend meetings of the Committee and/or the Board of Directors of the Corporation, I believe that the Open Meetings Law is applicable. For purposes of clarity, since the membership of the Committee and the Board are the same, the remainder of the commentary will refer to it as the "Committee/Board."

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

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

Several decisions indicate 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)].

In this instance, however, the entity in question is not *ad hoc*, for it has a continual existence and carries out a variety of functions pursuant to law. Moreover, it has been held that an advisory

body created by law is a public body subject to the Open Meetings Law [see MFY Legal Services, Inc. v. Toia, 402 NYS 2d 510 (1977)].

The Committee/Board, in consideration of the totality of its functions, is not advisory in nature. On the contrary, particularly in view of the authority conferred in Section 7(2), it is empowered to carry out a series of functions for the City of Syracuse.

Further, a review of the definition of "public body" indicates that the Committee/Board maintains each of the characteristics necessary to conclude that it is a public body. It is an entity consisting of fifteen members; it is required to conduct its business by means of a quorum pursuant to §41 of the General Construction Law or the Not-for-Profit Corporation Law; and finally, based on Chapter 38 fo the General Ordinances of the City of Syracuse, the Committee/Board conducts public business and performs a governmental function for a public corporation, the City of Syracuse.

As a general matter, the Open Meetings Law is based on a presumption of openness. Meetings of public bodies must be conducted open to the public, except to the extent that an executive session may be held. Section 102(3) defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded, and §105(1) specifies and limits the subjects that may properly be considered during an executive session.

Since you asked about your right join in the discussions of the Committee/Board, I emphasize that the Open Meetings Law provides the public with the right to attend, listen to and observe the proceedings of public bodies; it is silent with respect to public participation. Consequently, while I believe that you may attend meetings of the Committee/Board , I do not believe that you have the right to speak or otherwise participate at its meetings. This is not to suggest that there may be no opportunity to do so, for many public bodies authorize the public to speak at their meetings. When a public body chooses to do so, it has been suggested that it adopt reasonable rules that treat members of the public equally.

Lastly, another avenue of accountability involves the use of the Freedom of Information Law. That statute is applicable 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 upon the language quoted above, documents need not be in the physical possession of an agency to constitute agency records; so long as they are produced, kept or filed for an agency, the courts have held they constitute "agency records", even if they are maintained apart from an agency's premises..

For instance, it has been found that records maintained by an attorney retained by an industrial development agency were subject to the Freedom of Information Law, even though an agency did not possess the records and the attorney's fees were paid by applicants before the agency. The Court determined that the fees were generated in his capacity as counsel to the agency, that the agency was his client, that "he comes under the authority of the Industrial Development Agency" and that, therefore, records of payment in his possession were subject to rights of access conferred by the Freedom of Information Law (see C.B. Smith v. County of Rensselaer, Supreme Court, Rensselaer County, May 13, 1993).

Additionally, in a decision rendered by the Court of Appeals, the state's highest court, it was found that materials received by a corporation providing services for a branch of the State University that were kept on behalf of the University constituted "records" falling with the coverage of the Freedom of Information Law. I point out that the Court rejected "SUNY's contention that disclosure turns on whether the requested information is in the physical possession of the agency", for such a view "ignores the plain language of the FOIL definition of 'records' as information kept or held 'by, with or for an agency'" [see Encore College Bookstores, Inc. v. Auxiliary Services Corporation of the State University of New York at Farmingdale, 87 NY 2d 410. 417 (1995)].

In sum, because records produced or kept by the Committee/Board are maintained for the City of Syracuse, I believe that the City would be required to direct the custodian of the records to disclose them in accordance with the Freedom of Information Law, or obtain them in order to disclose them to the extent required by law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Harold. C. Brown, Jr.
Hon. Roy Bernardi

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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April 26, 2000

Mr. Herman S. Stuhl
New York State Institute of Legal Research
P.O. Box 398
Yorktown Heights, NY 10598-0398

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

Dear Mr. Stuhl:

I have received your letter of March 16. You have sought my opinion "concerning the availability of sitting in on the negotiations between Article X applicants and the New York State Department of Public Service." It is your view that those meetings "should be open to the public under a number of statutes."

In this regard, as you may be aware, the advisory authority of the Committee on Open Government in relation to meetings involves the Open Meetings Law. That statute is applicable to meetings of public bodies, and §102(2) defines the phrase "public body" to mean:

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

Based on the foregoing, a public body is an entity, such as a city council, a board of education or the Public Service Commission, that consists of two or more members and carries out a governmental function collectively, as a body.

As I understand the nature of the gatherings of your interest, there is no public body present. If that is so, the Open Meetings Law would not apply.

Whether any other statute would confer a right upon the public to be present is, in my view, conjectural and involves a matter beyond the jurisdiction of the Committee on Open Government.

I regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: William G. Little

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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April 26, 2000

Mr. Thomas Pawlaczyk
Mrs. Patricia Pawlaczyk
[redacted]

The staff of the Committee 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. and Mrs. Pawlaczyk:

I have received your letters of March 18 and March 23, as well as a variety of related correspondence concerning your ability to speak at meetings of the Board of Trustees of the Village of Bergen.

Among the materials that you sent are copies of advisory opinions prepared by this office. While there is little of substance that I can add to them, I offer the following comments.

First, since you questioned the Mayor's authority, I point out that §4-412(2) of the Village Law concerning the powers of a board of trustees states in part that "The board may determine the rules of its procedure..." Consequently, unless the Board of Trustees has authorized the Mayor to do so, I do not believe that he would have the authority to adopt policy or rules unilaterally. Pertinent to the matter are requirements involving a quorum and the ability to take action. Specifically, §41 of the General Construction Law states that:

> "Whenever three or more public officers are given any power or authority, or three or more persons are charged with any public duty to be performed on exercised by them jointly or as a board or similar body, a majority of the whole number of such persons or officers, at a meeting duly held at a time fixed by law, or by any by-law duly adopted by such board or body, or at any duly adjourned meeting of such meeting, or at a any meeting duly held upon reasonable notice to all of them, shall constitute a quorum and not less than a majority of the whole number may perform and exercise such power, authority or duty. For the purpose of this provision the words 'whole number'

> shall be construed to mean the total number which the board, commission, body or other group of persons or officers would have were there no vacancies and were one of the persons or officers disqualified from acting."

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

Second, 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. If a rule enables the Mayor to authorize some to speak while prohibiting others from doing so, or enables the Mayor to permit one to speak for ten minutes and another for two minutes or not at all, I believe that the rule would be unreasonable.

In sum, as you are aware based on your review of advisory opinions, there is no general statutory right to speak at meetings, nor is there an obligation that members of public bodies answer questions raised at meetings. However, if a public body chooses to permit public participation, I believe that it should do so on reasonable rules that treat members of the public equally.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. James R. MacConnell
Tracy P. Jong
Board of Trustees

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

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April 26, 2000

Mr. Lawrence Barrett, 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. Barrett:

I have received your letter of March 12 in which you expressed concerns relative to meetings and hearings conducted by governmental bodies in the Town of Rosendale.

In this regard, the Committee on Open Government is authorized to offer advice and opinions pertaining to the Open Meetings and Freedom of Information Laws. The Committee is not empowered to compel an entity to comply with those statutes or conduct audits. Nevertheless, in an effort to provide guidance, I offer the following comments.

First, you wrote that minutes of meetings of the Zoning Board of Appeals and the Planning Board are "missing...and incomplete." Section 106 of the Open Meetings Law provides direction concerning the contents of minutes and the time within which they must be prepared and disclosed. Specifically, that provision states that:

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

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

Based upon the foregoing, minutes must be prepared and made available within two weeks of meetings.

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

You also wrote that the minutes do not include reference to those who voted "and what individual voted for or against." Here I point out that since its enactment in 1974, the Freedom of Information Law has included an "open vote" requirement. Section 87(3)(a) states that "[e]ach agency shall maintain a record of the final vote of each member in every agency proceeding in which the member votes." Therefore, in each instance in which a public body, such as the Zoning Board of Appeals or Planning Board, takes action, a record must be prepared specifying the manner in which each member cast his or her vote. Typically, the record of votes appears in minutes of meetings.

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

Specifically, the provisions in the Open Meetings Law pertaining to notice appear in §104 and state 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."

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

In an effort to enhance compliance with and understanding of the law, copies of this opinion will be forwarded to the Zoning Board of Appeals and the Planning Board, as well as the Town Board.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Zoning Board of Appeals
Planning Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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May 4, 2000

Ms. Marie-Daniele Turcotte
[redacted]

The staff of the Committee on 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. Turcotte:

I have received your letters of March 27. In your capacity as a member of the Marcellus Central School District Board of Education, you raised a series of questions relating to the Freedom of Information and Open Meetings Laws.

The initial area of inquiry involves a request by a resident that you provide copies of "handwritten notes from open school board meetings", and you asked whether:

> "1) the district's attorney had the right to review the information prior to its release to the resident;
>
> 2) [You] can release the excluded pages to the resident;
>
> 3) the district's reason for denial of these pages was legal and appropriate; and
>
> 4) what is 'Part of Investigatory File', i.e. the reason for denial of the excluded pages."

In this regard, by way of background, I point out that the Freedom of Information Law pertains to agency records (i.e., those of a school district) 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).

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)].

Second, the Freedom of Information Law is permissive. In other words, while that statute authorizes 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 not mandatory, and that an agency may choose to disclose records even though the authority to withhold exists [Capital Newspapers v. Burns, 67 NY 2d 562, 567 (1986)].

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

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

Third, in terms of the District's attorney's "right to review" records prior to their release, for the purpose of offering perspective, §89(1) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural implementation of that statute (21 NYCRR Part 1401). In turn, §87 (1) requires the governing body of a public corporation, i.e., a board of education, to adopt rules and regulations consistent those promulgated by the Committee and with the Freedom of Information Law. Further, §1401.2 of the regulations provides in relevant part that:

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

> authorized to make records or information available to the public form continuing from doing so."

Section 1401.2 (b) of the regulations describes the duties of a records access officer and states in part that:

> "The records access officer is responsible for assuring that agency personnel...
>
> (3) upon locating the records, take one of the following actions:
> (i) make records promptly available for inspection; or
> (ii) deny access to the records in whole or in part and explain in writing the reasons therefor.
> (4) Upon request for copies of records:
> (i) make a copy available upon payment or offer to pay established fees, if any; or
> (ii) permit the requester to copy those records..."

Based on the foregoing, the records access officer must "coordinate" an agency's response to requests. As part of that coordination, the records access officer may in my opinion consult with staff or an attorney prior to disclosure. I know of no provision that specifies that an attorney must or enjoys a "right" to review records prior to disclosure. Certainly there are numerous disclosures by agencies that are made without the knowledge or consent of or prior review by an attorney.

Third, the phrase "part of investigatory files" appeared in the Freedom of Information Law as originally enacted in 1974; it has not been in that statute, however, since 1978. The provision most closely analogous to that language is §87(2)(e), which authorizes agencies to withhold records "compiled for law enforcement purposes" in certain circumstances. I do not believe that notes taken by a Board member during an open meeting could be characterized as having been "compiled for law enforcement purposes" or that the basis for denial offered by the District could validly have been asserted.

In my view, the provision most pertinent to access to notes and which was cited in Warder, supra, concerning notes taken during an open meeting, is §87(2)(g). That provision permits an agency to withhold records that:

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

iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

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

In Warder, the court found, in brief, that the notes consisted of a factual rendition of events that occurred at an open meeting and, therefore, that they were accessible under §87(2)(g)(i).

The second area of inquiry relates to the ability of the public to speak or participate during open meetings of a board of education, as well as the authority of a board or its president to restrict that kind of activity.

It is emphasized at the outset that 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.

In my opinion, any such rules could serve as a basis for preventing verbal interruptions, shouting or other outbursts, as well as slanderous or obscene language or signs; similarly, I believe that the Board could regulate movement on the part of those carrying signs or posters or using camera equipment so as not to interfere with meetings or prevent those in attendance from observing or hearing the deliberative process.

A public body's rules pertaining to public participation typically indicate when, during a meeting (i.e., at the beginning or end of a meeting, for a limited period of time before or after an

agenda item or other matter is discussed by a public body, etc.) members of the public may speak. Most rules also limit the amount of time during which a member of the body may speak (i.e., no more than three minutes). If the rules are not heeded, a public body may contact a local law enforcement agency. Often the presence or possibility of the presence of an officer will encourage decorum. If a person continues to interrupt, I believe that an officer could be asked to remove the person or persons from the meeting. If, however, a person is not being disruptive, pursuant to §103 of the Open Meetings Law, I believe that he or she clearly has the right to attend a meeting.

With regard to the nature of speech or commentary that is permissible, 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 one person defends or praises 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:jm

cc: Board of Education
Paul Bristol

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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May 4, 2000

Ms. Alice Knapik
[redacted]

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

Dear Ms. Knapik:

I have received your letter of March 25.

Your first area of inquiry involves the designation of a deputy town supervisor. In this regard, the advisory jurisdiction of the Committee on Open Government is limited to matters relating to the Freedom of Information and Open Meetings Laws. Since this issue is unrelated to those statutes, I regret that I cannot offer guidance.

The second question is whether a deputy supervisor can attend an executive session "when the supervisor is present." Relevant is §105(2), which provides that: "Attendance at an executive session shall be permitted to any member of the public body and any other persons authorized by the public body". Therefore, the only people who have the right to attend executive sessions are the members of the public body conducting the executive session. A public body may, however, authorize others to attend an executive session. While the Open Meetings Law does not describe the criteria that should be used to determine which persons other than members of a public body might properly attend an executive session, I believe that every law, including the Open Meetings Law, should be carried out in a manner that gives reasonable effect to its intent. Typically, those persons other than members of public bodies who are authorized to attend are the clerk, the public body's attorney, the superintendent in the case of a board of education, or a person who has some special knowledge, expertise or performs a function that relates to the subject of the executive session.

If there is a dispute concerning the attendance of a person other than a member of the town board at an executive session, I believe that the board could resolve the matter by adopting or rejecting a motion by a member to permit or reject the attendance by a non-member at an executive session.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board, Town of Amsterdam

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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OML-AO-3151

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May 4, 2000

Hon. Robert L. North
Town Clerk
Town of Richland
P.O. Box 29
Pulaski, NY 13142

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

Dear Mr. North:

I have received your letter of March 16, which reached this office on March 27. You have raised a series of issues relating to the custody of records in conjunction with your role as town clerk, records access officer and records management officer, as well as the nature and content of minutes of meetings.

In this regard, I offer the following comments.

First, §30(1) of the Town Law dealing with the powers and duties of a town clerk states in part that the clerk "Shall have the custody of all records, books and papers of the town." As such, even though you may not have physical custody or possession of all Town records, as Clerk, I believe that you have legal custody of the records.

In a related vein, §57.19 of the Arts and Cultural Affairs Law, entitled "Local government records management program", states in relevant part that:

> "The governing body, and the chief executive official where one exists, shall promote and support a program for the orderly and efficient management of records, including the identification and appropriate administration of records with enduring value for historical or other research. Each local government shall have one officer who is designated as records management officer. This officer shall coordinate the development of and oversee such program and shall coordinate legal disposition, including destruction of obsolete records. In towns, the town clerk shall be the records management officer."

As such, by statute, as Town Clerk, you have the duty of coordinating the Town's records management program.

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

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

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

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

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

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

> "The records access officer is responsible for assuring that agency personnel:
>
> (1) Maintain an up-to-date subject matter list.
> (2) Assist the requester in identifying requested records, if necessary.
> (3) Upon locating the records, take one of the following actions:

(i) make records promptly available for inspection; or
(ii) deny access to the records in whole or in part and explain in writing the reasons therefor.

(4) Upon request for copies of records:

(i) make a copy available upon payment or offer to pay established fees, if any; or
(ii) permit the requester to copy those records.

(5) Upon request, certify that a record is a true copy.
(6) Upon failure to locate the records, certify that:

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

Assuming that the Clerk is the Town's designated records access officer, that person has the duty of coordinating the Town's response to requests for records. Therefore, in the absence of the assessor, for example, I believe that, as records access officer, you would have the authority to determine to grant or deny access to assessor's records.

I note that your function as records access officer would not, in my view, preclude the Supervisor from disclosing or disseminating records to other members of the Town Board. In short, I know of no provision of law that would create such a prohibition.

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

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

The provision quoted above pertains to notice given to members of a town board, and the requirements imposed by §62 are separate from those contained in the Open Meetings Law.

Section 104 of the Open Meetings Law provides that:

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

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

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

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

> "Whether abbreviated notice is 'practicable' or 'reasonable' in a given case depends on the necessity for same. Here, respondents virtually concede a lack of urgency: They deny petitioner's characterization of the session as an 'emergency' and maintain nothing of substance was transacted at the meeting except to discuss the status of litigation and to authorize, pro forma, their insurance carrier's involvement in negotiations. It is manifest then that the executive session could easily have been scheduled for another date with only minimum delay. In that event respondents could even have provided the more extensive notice required by POL §104(1). Only respondent's choice in scheduling prevented this result.
>
> "Moreover, given the short notice provided by respondents, it should have been apparent that the posting of a single notice in the School District offices would hardly serve to apprise the public that an executive session was being called...
>
> "In White v. Battaglia, 79 A.D. 2d 880, 881, 434 N.Y.S.ed 637, lv. to app. den. 53 N.Y.2d 603, 439 N.Y.S.2d 1027, 421 N.E.2d 854, the Court condemned an almost identical method of notice as one at bar:
>
> "Fay Powell, then president of the board, began contacting board members at 4:00 p.m. on June 27 to ask them to attend a meeting at 7:30 that evening at the central office, which was not the usual

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

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

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

In my opinion, inherent in each of the provisions cited is an intent that they be carried out reasonably, fairly, with consistency, and that minutes be accurate.

More specifically, §106 of the Open Meetings Law provides that:

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

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

Based on the foregoing, minutes need not consist of a verbatim account of everything that was said; on the contrary, so long as the minutes include the kinds of information described in §106, I believe that they would be appropriate and meet legal requirements. Certainly if a clerk wants to include more information than is required by law, he or she may do so.

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

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

In short, it is my view that you, in your position as clerk, have the responsibility and the authority to prepare minutes and to ensure their accuracy. While the Board and/or the Supervisor may have other areas of authority, I do not believe that they could validly remove or insist upon the removal of information from minutes, so long as the information is accurate and, again, presented reasonably, fairly and in a manner consistent with the contents of minutes as they are generally prepared.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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May 5, 2000

Ms. Rose M. Floramo
[redacted]

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

Dear Ms. Floramo:

I have received your letter of April 5. You wrote that you serve as a member of a board of education, and that you are "being asked by the new Superintendent to attend a retreat so the board can set goals." It your view that the retreat is a "meeting" subject to the Open Meetings. I agree, and in this regard, I offer the following comments.

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

Inherent in the definition and its judicial interpretation is the notion of intent. If there is an intent that a majority of a public body will convene for the purpose of conducting public business, such a gathering would, in my opinion, constitute a meeting subject to the requirements of the Open Meetings Law.

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

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

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

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

Based upon the direction given by the courts, when a majority of a public body gathers to discuss public business, in their capacities as members of the body, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law. In my view, a "retreat" held to discuss or set goals clearly involves conducting public business and would constitute a "meeting" that should be held in accordance with the requirements of the Open Meetings Law.

On occasion, boards of education and other public bodies conduct what have been characterized as "self-assessment" sessions to discuss interpersonal relations and similar matters. If the business of a public body is not intended to arise and does not arise at those kinds of sessions, I do not believe that they would be subject to the Open Meetings Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Board of Education
Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12093
OML-AO-3153

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May 5, 2000

E-Mail

TO: Karen Vasile <karen_vasile@auburn.cnyric.org> RJF

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. Vasile:

I have received your letter of April 3 in which you sought clarification concerning minutes and notes taken during executive sessions.

In your first area of inquiry, you wrote that:

> "The Board of Education is required to approve minutes of a regular board meeting. If the Board of Education adjourns into executive session and minutes are taken in executive session, is the Board of Education required to approve the minutes of the executive session, as they are required to approve the minutes of the regular board meeting."

From my perspective, the question is based on the mistaken assumption that minutes of meetings must be approved.

By way of background, first, §106 of the Open Meetings Law pertains to minutes of meetings and states that:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.

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

In view of the foregoing, it is clear in my opinion that minutes of open meetings must be prepared and made available "within two weeks of the date of such meeting."

There is nothing in the Open Meetings Law or any other statute of which I am aware that requires that minutes be approved. Nevertheless, as a matter of practice or policy, many public bodies approve minutes of their meetings. In the event that minutes have 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 "preliminary", for example. By so doing within the requisite time limitations, the public can generally know what transpired at a meeting; concurrently, the public is effectively notified that the minutes are subject to change. If minutes have been prepared within less than two weeks, I believe that those unapproved minutes would be available as soon as they exist, and that they may be marked in the manner described above.

Second, only in rare instances may a board of education take action during an executive session. 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 those unusual circumstances in which a statute permits or requires such a vote.

Those circumstances would arise, for example, when a board initiates charges against a tenured person pursuant to §3020-a of the Education Law, which requires that a vote to do so be

taken during an executive session. The other instance would involve a situation in which action in public could identify a student. When information derived from a record that is personally identifiable to a student, the federal Family Educational Rights and Privacy Act (20 USC §1232g) would prohibit disclosure absent consent by a parent of the student. Since §102(2) of the Open Meetings Law states that minutes need not include information that may be withheld under the Freedom of Information Law, and since unproven charges and records identifiable to students may be withheld, minutes containing those kinds of information would not be accessible to the public.

Lastly, if no action was taken but the clerk took notes of an executive session, you asked whether the notes should be available "to the Board of Education or newspaper without a FOIL request." In this regard, the Freedom of Information Law pertains to agency records, and §86(4) of that statute defines the term "record" to mean:

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

Based on the foregoing, notes taken by the clerk constitute "records" that fall within the coverage of the Freedom of Information Law.

In brief, that 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 would conjecture that, due to the nature of the subject matter typically discussed in an executive session, the notes could likely be withheld in great measure, if not in their entirety. If the Board seeks the notes in the performance of its duties, as the governing body, I believe that it would have the authority to obtain them. However, it would be inappropriate in my view to make the notes available to the public or the news media without reviewing them in order to determine the extent, if any, to which they may be withheld.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3154

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May 8, 2000

Mr. Bill Gage
[redacted]

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

Dear Mr. Gage:

I have received your note of March 31 in which you asked whether there is a distinction between a meeting and a workshop. From my perspective, there is no legal distinction between the two. In this regard, I offer the following comments.

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. Since a workshop held by a majority of a public body is a "meeting", it would have the same responsibilities in relation to notice and the taking of minutes as in the case of a formal meeting, as well as the same ability to enter into executive sessions.

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

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

Based upon the foregoing, it is clear in my view that minutes need not consist of a verbatim account of what was said at a meeting; similarly, there is no requirement that minutes refer to every topic discussed or identify those who may have spoken. Although a public body may choose to prepare expansive minutes, at a minimum, minutes of open meetings must include reference to all motions, proposals, resolutions and any other matters upon which votes are taken. If those kinds of actions, such as motions or votes, do not occur during workshops, technically I do not believe that minutes must be prepared.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hampton Town Board
Hon. Rebecca S. Jones

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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May 8, 2000

Ms. Anita DiMiceli
Executive Director
Town of Oyster Bay Housing Authority
P.O. Box 351
Plainview, NY 11803

The staff of the Committee on 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. DiMiceli:

I have received your letter and the materials attached to it. In your capacity as Executive Director of the Town of Oyster Bay Housing Authority, you have questioned the advice rendered by the Authority's attorney concerning the use of a tape recorder at meetings of the Authority by an employee of the Authority such as yourself. In short, it was advised that neither members of the Board nor employees of the Authority may use a tape recorder at meetings of the Board "without the permission of the Chairman", and that "the person wishing to record the meeting shall inform the Chairman prior to its commencement so that the Chairman may inform those in attendance of the fact that the meeting is to be recorded."

From my perspective, the advice offered by the attorney 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 any person may tape record open meetings of public bodies, so long as tape recording is carried out unobtrusively and in a manner that does not detract from the deliberative process.

With respect to the requirement that the Chairman 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 an employee, 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, or any person, would have the right to record open meetings of the Board. Moreover, I do not believe that a person may be required to inform the Chairman or the Board of the intent to use a tape recorder at an open meeting, so long as the recording device is used in a manner that is not disruptive.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Jesse H. Harmon
Jack D. Tillem

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May 8, 2000

Neal Lewis, Esq.
Long Island Neighborhood Network
90 Pennsylvania Avenue
Massapequa, NY 11758

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

Dear Mr. Lewis:

I have received your letter of April 3. "On behalf of Connie Kepert and Christopher O'Connor as individuals and on behalf of the Affiliated Brookhaven Civic Association (ABCO) and the Long Island Neighborhood Network (LINN) as not-for-profit organizations", you have sought an advisory opinion "in relation to the New York State Open Meetings and the Freedom of Information Laws and the practices of the Town of Brookhaven.

You wrote that, for some time, "a rumor has circulated that the Town Board conducts most of its business behind closed doors before the actual public meeting takes place", and you have sought an opinion "as to the legality of the Town of Brookhaven's practice of conducting meetings of the entire Town Board – with such meetings being described as executive sessions, but without first following the procedural prerequisites required for executive sessions..." You also sought an opinion "as to the rights of the public to request copies of the agendas of the meetings conducted by the entire Town Board....under the Freedom of Information Law."

In this regard, I offer the following comments.

First, by way of background, 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.).

In view of the direction given by the courts, when a majority of the Board gathers to discuss Town business, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law.

Based on the foregoing, if indeed a majority of the Board gathers in advance of a scheduled meeting to discuss Town business, the gathering would constitute a "meeting" subject to the requirements of the Open Meetings Law, including a requirement that notice of the time and place be given in accordance with §104 of that statute.

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

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

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

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

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

For the reasons expressed in the preceding commentary, a public body cannot in my view schedule an executive session in advance of a meeting. In short, because a vote to enter into an executive session must be made and carried by a majority vote of the total membership during an open meeting, it cannot be known in advance of that vote that the motion will indeed be approved.

Lastly, with respect to the right to seek agendas prior to meetings, I direct your attention to the Freedom of Information Law. That statute pertains to agency records, and §86(4) defines the term "record" to mean:

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

forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based on the foregoing, as soon as an agenda is prepared, I believe that it would constitute a "record" that falls within the scope of the Freedom of Information Law.

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

If the agendas of your interest are typical of most agendas, they merely list, in general terms, the items to be considered. If that is so, I believe that they would be available, for none of the grounds for denial would be applicable. If, however, an agenda is more expansive, it is possible that portions might be deleted prior to disclosure of the remainder. For instance, if an agenda item involves filling a vacancy in a position and it identifies those who have applied, the names of those who have applied need not be disclosed [see Freedom of Information Law, §89(7)], and that portion of the record could be deleted.

In an effort to enhance compliance with and understanding of open government laws, 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

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May 11, 2000

Mr. Nelson A. Castillo
[redacted]

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

Dear Mr. Castillo:

As you are aware, I have received your letter of April 5, as well as the material relating to it. I hope that you will accept my apologies for leaving the event New York City last week so quickly. A quick departure was necessary to be able to catch a train.

In brief, you have asked whether "Precinct Community Councils of the New York City Police Department" (the Councils) are subject to the Open Meetings and Freedom of Information Laws.

According to regulations apparently promulgated by the New York City Police Department, a Council consists of "a group of concerned individuals who are dedicated to the improvement of relations between the police and the community." Any member of a community at least 18 years of age may join a Council. Councils also sponsor programs and activities for the purpose of maintaining public interest in quality police services. Council meetings are open to the public.

Based on the information that you provided, a Council, in my view, is not 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, a public body is, in my view, an entity required to conduct public business by means of a quorum that performs a governmental function and carries out its duties collectively, as a body.

Several judicial decisions indicate generally that advisory 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, 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.).

It is my understanding that a Council does not have the power or authority to take action on behalf of any government agency. If that is so, it does not perform a governmental function and would not constitute a "public body" subject to the Open Meetings Law. Most analogous to a Council, in my opinion, would be a PTA. PTA's exist to foster good relationships among parents, teachers and schools. Despite its relationship with government, a PTA is not part of the government, and the same would be so in the case of a Council.

For a similar reason, I do not believe that a Council would be subject to the Freedom of Information Law. That statute pertains to agencies, and §86(3) defines the term "agency" to mean:

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

Since a Council is not a governmental entity performing a governmental function, I believe that its records would fall beyond the coverage of the Freedom of Information Law.

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:jm

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May 18, 2000

Hon. Lauren Ayers
Guilderland Town Councilmember
[redacted]

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

Dear Councilmember Ayers:

As you are aware, I have received your letter of April 7 and the materials attached to it. You have raised a series of questions relating to an incident involving the death of a Town resident while in police custody.

You asked first whether, as a member of the Town Board, you "have a right to all information" concerning the incident. In this regard, in general, I believe that 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 Board rule or policy to the contrary, I believe that a member of the board 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 board member 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 right conferred upon a board member by means of law or rule. In such a case, a member seeking records could presumably be treated in the same manner as the public generally.

Your last question is related to the first, for you asked whether the public has "a right to know of people who die while in police custody, or can government withhold this information?" From my perspective, it is likely that some aspects of the records must be disclosed, while others may be withheld. As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. Further, the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the grounds for denial that follow. The phrase quoted in the preceding sentence indicates that a single record or report may contain both accessible and deniable information. Moreover, that phrase in my opinion imposes an obligation upon agencies to review requested records in their entirety to determine which portions, if any, may justifiably be withheld.

Of possible relevance is §87(2)(b) of the Freedom of Information Law, which states that an agency may withhold records or portions thereof that:

> "if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of this article...."

In addition, §89(2)(b) lists a series of examples of unwarranted invasions of personal privacy, the first two of which pertain to:

> "i. disclosure of employment, medical or credit histories or personal references or applicants for employment;
>
> ii. disclosure of items involving the medical or personal records of a client or patient in a medical facility..."

In y view, a record of a medical emergency or similar call consists in great measure of what might be characterized as a medical record or history relating to the person needing care or service (see Hanig v. NYS Department of Motor Vehicles, 79 NY 2d 106 (1992)].

I believe that an emergency call, particularly when sirens or flashing lights are used, is an event of a public nature. When a fire truck or ambulance travels to its destination, that destination is or can be known to those in the vicinity of the event. In essence, I believe that event is of a public nature and that disclosure of an address or a description of an event would not likely constitute an unwarranted invasion of personal privacy. Further, the fact of one's death in police custody would, in my opinion, be public.

On the other hand, medical records, and perhaps other aspects of the records relating to the deceased, family members, or witnesses, for example, might, depending on the content of the records, might be withheld on the ground that disclosure would constitute an unwarranted invasion of privacy.

Also pertinent may be §87(2)(g), which enables an agency to withhold records that:

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

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

The records in question may include autopsy and related records prepared by a coroner. If that is so, §87(2)(a) would be applicable. That provision pertains to records that "are specifically exempted from disclosure by state or federal statute, and one such statute, §677(3)(b) of the County Law, states that:

> "Such records shall be open to inspection by the district attorney of the county. Upon application of the personal representative, spouse or next of kin of the deceased to the coroner or the medical examiner, a copy of the autopsy report, as described in subdivision two of this section shall be furnished to such applicant. Upon proper application of any person who is or may be affected in a civil or criminal action by the contents of the record of any investigation, or upon application of any person having a substantial interest therein, an order may be made by a court of record, or by a justice of the supreme court, that the record of that investigation be made available for his inspection, or that a transcript thereof be furnished to him, or both."

Based upon the foregoing, the Freedom of Information Law in my opinion is inapplicable as a basis for seeking or obtaining an autopsy report or other records described in §677, for the right to obtain such records is based solely on §677(3)(b). In my view, only a district attorney and the next of kin of the deceased have a right of access to records subject to §677; any others would be required to obtain a court order based on demonstration of substantial interest in the records to gain a right of access.

Lastly, you asked whether a "violation of the open meetings law" would have occurred if the members of the Town Board met in private to discuss the incident. Without additional facts, I cannot offer unequivocal guidance. However, as a general matter, the Open Meetings Law applies to meetings of public bodies, and §102(1) of the Law defines the term "meeting" to mean "the official convening of a public body for the purpose of conducting public business". I note that the definition of "meeting" has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be convened open to the public, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

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

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

In short, based upon the direction given by the courts, if a majority of the public body, such as a town board, gathers to conduct the business of the body, in their capacities as board members, such a gathering, in my opinion, would ordinarily constitute a "meeting" subject to 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
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OML-AO-3159

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May 23, 2000

Mr. Anthony M. Tesorio
Mr. Joseph Calarco
Auburn Enlarged City School District
78 Thornton Avenue
Auburn, NY 13021

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

Dear Board President Tesorio and Vice-President Calarco:

I have received your letter of April 16 in which you sought an advisory opinion in relation to the Open Meetings Law, as well as access to certain records. Although the following comments will not describe in detail the events that you presented, they will focus on the provisions and principles of law that are pertinent.

First, following a decision by the Board of Education to negotiate new contracts with the District's Superintendent and Associate Superintendent, information relating to the matter was reported in a local newspaper, despite the fact that the issue was discussed in executive session. A board member thereafter called for a special meeting, indicating that its purpose was to discuss "the employment of person." The Superintendent, however, later informed you that he asked the member to call for the meeting and that its purpose was, in your words, "to discuss the leak to the paper..." The meeting was held and an executive session was conducted, despite your protest. You added that an additional topic was discussed during the executive session, a request by a newspaper for records of "expenses incurred by the board attorney and convention expenses incurred by the board and the administration."

From my perspective, as you described the topics considered, there would not have been any basis for entry into executive session.

By way of background, the Open Meetings Law is based on a presumption of openness. In short, meetings of public bodies must be conducted in public, except to the extent that an executive session may properly be held. Further, the Law requires that a procedure be accomplished in public 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, provided, however, that no action be formal vote shall be taken to appropriate public moneys..."

Paragraphs (a) through (h) of §105(1) specify and limit the topics that may properly be considered during an executive session.

Again, based on your description of the matter, consideration of a leak to the news media would not have fallen with any of the grounds for entry into executive session. Similarly, a discussion of a request for records under the Freedom of Information Law would not, in my view, have been a proper topic for discussion in executive session. Moreover, the motion made for entry into executive session did not accurately reflect the subjects that were discussed.

With respect to the subject of leaks to the news media, I note that there is nothing inherently confidential about information said or heard during an executive session.

In this regard, both the Open Meetings Law and the Freedom of Information Law are permissive. While the Open Meetings Law authorizes public bodies to conduct executive sessions in circumstances described in paragraphs (a) through (h) of §105(1), there is no requirement that an executive session be held even though a public body has right to do so. Further, the introductory language of §105(1), which prescribes a procedure that must be accomplished before an executive session may be held, clearly indicates that a public body "may" conduct an executive session only after having completed that procedure. If, for example, a motion is made to conduct an executive session for a valid reason, and the motion is not carried, the public body could either discuss the issue in public, or table the matter for discussion in the future. Similarly, although the Freedom of Information Law permits an agency to withhold records in accordance with the grounds for denial, it has been held by the Court of Appeals that the exceptions are permissive rather than mandatory, and that an agency may choose to disclose records even though the authority to withhold exists [Capital Newspapers v. Burns], 67 NY 2d 562, 567 (1986)].

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

For instance, if a discussion by a board of education concerns a record pertaining to a particular student (i.e., in the case of consideration of disciplinary action, an educational program, an award, etc.), the discussion would have to occur in private and the record would have to be withheld insofar as public discussion or disclosure would identify the student. As you may be aware,

the Family Educational Rights and Privacy Act (20 USC §1232g; "FERPA") 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).

Second, after the meeting, you requested minutes of the executive session. Section 106 of the Open Meetings Law pertains to minutes and states that:

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

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)]. In the case of most public bodies, if action is taken during an executive session, minutes reflective of the action, the date and the vote must be recorded in minutes pursuant to §106(2) of the Law. If no action is taken, there is no requirement

that minutes of the executive session be prepared. Various interpretations of the Education Law, §1708(3), however, indicate that, except in situations in which action during a closed session is permitted or required by statute, a school board cannot take action during an executive session [see United Teachers of Northport v. Northport Union Free School District, 50 AD 2d 897 (1975); Kursch et al. v. Board of Education, Union Free School District #1, Town of North Hempstead, Nassau County, 7 AD 2d 922 (1959); Sanna v. Lindenhurst, 107 Misc. 2d 267, modified 85 AD 2d 157, aff'd 58 NY 2d 626 (1982)]. Stated differently, based upon judicial interpretations of the Education Law, a school board generally cannot vote during an executive session, except in rare circumstances in which a statute permits or requires such a vote. In this instance, I believe that any action or final vote by Board should have occurred during an open meeting.

The remaining issues involve your requests for records, which include a contract with the teachers' union, records of expenses to which reference was made earlier, and "lost time" records relating to leave time used by the Superintendent. Based on the judicial interpretation of the Freedom of Information Law, those records would be available not only to you as Board members, but to any member of the public.

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

A contract, such as a collective bargaining agreement, would, in my opinion, clearly be available, for none of the grounds for denial would be applicable.

With respect to "lost time" records and records reflective of expenses incurred by public officers and employees, two of the grounds for denial are relevant. However, those records, based on judicial decisions, must be disclosed in great measure, if not in their entirety.

In addition to the provisions dealing with the protection of privacy, also significant to an analysis of rights of access is §87(2)(g), which permits an agency to withhold records that:

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

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

Attendance records could be characterized as "intra-agency materials." However, those portions reflective of dates or figures concerning "lost time" or the use of leave time or absences or the time that employees arrive at or leave work would constitute "statistical or factual" information accessible under §87(2)(g)(i).

Also relevant is §87(2)(b), which permits an agency to withhold record or portions of records when disclosure would result in "an unwarranted invasion of personal privacy." The Committee has advised and the courts have upheld the notion that records that are relevant to the performance of the official duties of public employees are generally available, for disclosure in such instances would result in a permissible as opposed to an unwarranted invasion of personal privacy [Gannett, supra; Capital Newspapers v. Burns, 109 AD 2d 292, aff'd 67 NY 2d 562 (1986) ; Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, October 30, 1980; Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975) ; and Montes v. State, 406 NYS 664 (Court of Claims 1978)].

In a decision affirmed by the State's highest court dealing with attendance records, specifically those indicating the days and dates of sick leave claimed by a particular employee, it was found, in essence, that disclosure would result in a permissible rather than an unwarranted invasion of personal privacy. In that case, the Appellate Division found that:

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

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

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

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

Based on the preceding analysis, it is clear in my view that attendance records, including those concerning the use or accrual of sick leave, for instance, must be disclosed under the Freedom of Information Law.

Lastly, with regard to records indicating charges by or payments to a school district attorney and others, I believe that bills, vouchers, contracts, receipts and similar records reflective of payments made or expenses incurred by an agency or payments made to an agency's staff or agents are generally available, for none of the grounds for denial would be applicable in most instances.

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

disclosure by state or federal statute" (see Civil Practice Law and Rules, section 4503). Therefore, while some identifying details or descriptions of services rendered found in the records sought might justifiably be withheld, numbers indicating the amounts expended and other details to be discussed further are in my view accessible under the Freedom of Information Law.

There may be other grounds for denial that would apply with regard to attorneys' bills or similar records pertaining to legal work performed for a school district. For instance, insofar as those kinds of records identify or could identify particular students, I believe that they must be withheld. As indicated earlier, FERPA exempts records from disclosure. In general, that statute provides 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.

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

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

> "The difficulty of defining the limits of the attorney client privilege has been recognized by the New York State Court of Appeals. (Matter of Priest v. Hennessy, 51 NY2d 62, 68.) Nevertheless, the Court has ruled that this privilege is not limitless and generally does not extend to the fee arrangements between an attorney and client. (Matter of Priest v. Hennessy, supra.) As a communication regarding a fee has no direct relevance to the legal advice actually given, the fee arrangement is not privileged. (Matter of Priest v. Hennessy, supra. at 69.)

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: William Miller

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3160

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May 23, 2000

Mr. Ronald W. Hayes
Village of Deposit
[redacted]

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

Dear Mr. Hayes:

I have received your letter of April 17 and the memorandum attached to it. The matter involves the application of the Open Meetings Law to a gathering in the Village of Deposit conducted "in a back room of a local business attended by the entire Board of Trustees, the Mayor and the village clerk." In the memorandum, it was suggested that there would be "no problem" in holding the gathering in private.

From my perspective, the event clearly fell within the coverage of the Open Meetings Law. In this regard, I offer the following comments.

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

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

> "We believe that the Legislature intended to include more than the mere formal act of voting or the formal execution of an official

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

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

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

I note that it has also been that "a planned informal conference" or a "briefing session" held by a quorum of a public body would constitute a "meeting" subject to the requirements of the Open Meetings Law [see Goodson-Todman v. Kingston, 153 Ad 2d 103, 105 (1990)].

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

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

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

In view of the foregoing, a motion to conduct an executive session must include reference to the subject or subjects to be discussed, and the motion must be carried by majority vote of a public body's total membership before such a session may validly be held. The ensuing provisions of

§105(1) specify and limit the subjects that may appropriately be considered during an executive session. Therefore, even if a public body has the authority to conduct an executive session (and that does not appear to have been so in the circumstance described in the materials), it may do so only after having convened an open meeting preceded by notice given to the news media and by means of posting.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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May 24, 2000

Mr. Peter Ward
Director
The Smithtown Library
1 North Country Road
Smithtown, NY 11787

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

Dear Mr. Ward:

I have received your letter of April 16 in which you raised a question relating to the Open Meetings Law.

According to your letter, the Board of Trustees of the Smithtown Library scheduled a meeting for April 11 at 7 p.m. to discuss the adoption of a resolution involving a capital proposition, and notice relating to that meeting was given as required by the Open Meetings Law. Briefings on the matter were scheduled for the morning and afternoon of that day to provide the news media with an opportunity to raise questions and acquire background information concerning the proposal. No public notice of the briefings was given. Two members of the Board participated in the morning session. Although only the Board chair, who did not attend the morning session, was to participate in the afternoon session, the two who attended the morning session decided to stay for the afternoon session as well. When a reporter saw that three trustees were present during the afternoon session, "he refused to participate unless one of them left, claiming that quorum of the board was present and therefore the briefing constituted a 'public meeting' and was in violation of the Open Meetings Law." One of the trustees left the room, and the issue was resolved. You asked, however, whether the gathering would have been subject to the Open Meetings Law had three trustees been present.

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, I do not believe that the Open Meetings Law would be applicable.

As I understand the situation, there was no intent that a majority of the Board should be present at either of the briefings. Further, it does not appear that the function of the briefings involved the Board engaging in conducting public business, collectively, as a body. If that is so, the gathering, in my view, would not have constituted a "meeting".

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 some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3162

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May 24, 2000

Hon. Richard D. Zarbo
Councilman
Town 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 Councilman Zarbo:

I have received your letter of April 25. You indicated that you received a call from a resident who indicated that "some big meeting" was being held that night. When you arrived at the site of the meeting, you were approached by another member of the Town Board, who told that you that you should not be there because your presence created a quorum of the Town Board. You indicated that you did not know the purpose of the gathering and asked why you could not be there as a citizen.

You have asked whether you are precluded from attending similar gatherings because you are an elected official and whether it is "true that just because three (majority) members of our Town Board happen to be in the same place unintentional[ly] that makes a quorum."

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)].

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, stated that:

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

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

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

Based upon the direction given by the courts, if a majority of the Board gathers to discuss Town business, in their capacities as Board members, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law.

With respect to chance meetings, it was found that:

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

In view of the foregoing, if members of a public body meet by chance or at a social gathering, for example, I do not believe that the Open Meetings Law would apply, for there would be no intent to conduct public business, collectively, as a body. Further, if less than a quorum is present, the Open Meetings Law would not, in my opinion, be applicable.

I point out that questions similar to yours 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.

In sum, I believe that, in your capacity as a citizen, you have the right to attend the kind of gathering to which you referred. Further, if a majority of the Board, by chance, happens to be at the same gathering, I do not believe that the Open Meetings Law would apply.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

OML-AO-3163

From: Robert Freeman
To: [redacted]
Date: 5/25/00 9:40AM
Subject: Dear Mr. Mintzes:

Dear Mr. Mintzes:

I have received your letter and agree with your analysis. In short, neither the Open Meetings Law nor any other statute of which I am aware specifies that there must be an agenda, or that if an agenda is prepared that it must be followed. The only situation in which a public body must prepare and/or abide by an agenda would involve the case in which it has adopted rules on the subject. Again, in the absence of any rule or policy, I believe that agenda may but need not be followed.

I hope that I have been of assistance.

Robert J. Freeman
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May 26, 2000

Mr. Jason D. McCord
The Leader-Herald
8 East Fulton Street
Gloversville, NY 12078

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

Dear Mr. McCord:

I have received your letter of April 24. You questioned the propriety of closed political caucuses routinely held by six of the seven members of the City of Gloversville Common Council.

In this regard, by way of background, since the Open Meetings Law became effective in 1977, it has contained an exemption concerning political committees, conferences and caucuses. When a matter is exempted from the Open Meetings Law, the provisions of that statute do not apply. 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 has since stated 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. In the context of your inquiry, I believe that the six majority party members of the Common Council may meet in private to discuss, in essence, the subjects of their choice.

Irrespective of the legality of holding closed political caucuses, many have suggested, editorially or otherwise, that doing so may not be in the public interest or reflect optimal public policy. Further, several municipal legislative bodies have, by resolution or local law, determined to reject the ability to discuss public business in closed political caucuses and have limited their right to hold closed caucuses to those matters involving purely political party business.

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 FOIL-AO-12124
OML-AO-3165

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May 31, 2000

Patricia and Thomas Pawlaczyk
[redacted]

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

Dear Mr. and Ms. Pawlaczyk:

I have received your letter of April 27, as well as the materials attached to it. You have raised issues relating to both the Open Meetings and Freedom of Information Laws.

You referred to a meeting characterized as an "emergency meeting" by the Village of Bergen Administrator and indicated that she (the Village Administrator) stated that the Village was not obligated by law to provide notice of the meeting to the official newspaper. She added that she did provide notice to the official newspaper, but that the newspaper did not print "any public notification of this meeting."

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 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.

The Open Meetings Law does not specify that notice of a meeting must be given to the official newspaper. In some instances, the official newspaper may be a weekly publication, and notice in some circumstances might be more appropriately given to a daily newspaper or radio station, for example. Further, to comply with the Open Meetings Law, a public body is not required to pay to place a legal notice in a newspaper or to "advertise" that a meeting will be held at a certain time and place; a public body must merely "give" notice to the news media and post the notice. In some circumstances, public bodies have given notice to the news media, and the newspapers or radio stations in receipt of the notices have chosen not to print or publicize the meetings to which the notices relate. In those cases, despite the failure of a notice to be publicized, a public body would have complied with law.

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

> "Whether abbreviated notice is 'practicable' or 'reasonable' in a given case depends on the necessity for same. Here, respondents virtually concede a lack of urgency: They deny petitioner's characterization of the session as an 'emergency' and maintain nothing of substance was transacted at the meeting except to discuss the status of litigation and to authorize, pro forma, their insurance carrier's involvement in negotiations. It is manifest then that the executive session could easily have been scheduled for another date with only minimum delay. In that event respondents could even have provided the more extensive notice required by POL §104(1). Only respondent's choice in scheduling prevented this result.
>
> "Moreover, given the short notice provided by respondents, it should have been apparent that the posting of a single notice in the School District offices would hardly serve to apprise the public that an executive session was being called...
>
> "In White v. Battaglia, 79 A.D. 2d 880, 881, 434 N.Y.S.ed 637, lv. to app. den. 53 N.Y.2d 603, 439 N.Y.S.2d 1027, 421 N.E.2d 854, the Court condemned an almost identical method of notice as one at bar:

> "Fay Powell, then president of the board, began contacting board members at 4:00 p.m. on June 27 to ask them to attend a meeting at 7:30 that evening at the central office, which was not the usual meeting date or place. The only notice given to the public was one typewritten announcement posted on the central office bulletin board...Special Term could find on this record that appellants violated the...Public Officers Law...in that notice was not given 'to the extent practicable, to the news media' nor was it 'conspicuously posted in one or more designated public locations' at a reasonable time 'prior thereto' (emphasis added)" [524 NYS 2d 643, 645 (1988)].

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

The second issue involves a resolution approved "to allow the Village attorneys to rehire [an] environmental consulting firm." Nevertheless, you wrote that the minutes of the meeting indicate that the matter was discussed during an executive session held "to discuss potential litigation." You asked whether "the attorneys hiring the consulting firm [will] restrict using FOIL to gain access to information about this public project."

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

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

Based upon the foregoing, I believe that the exception is intended to permit a public body to discuss its litigation strategy behind closed doors, rather than issues that might eventually result in litigation. Since potential litigation could be the subject or result of nearly any topic discussed by a public body, an executive session could not in my view be held to discuss an issue merely because there is a possibility of litigation; in my opinion, only to the extent that public body discusses its litigation strategy could an executive session be properly held under §105(1)(d).

With regard to access to records, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. It is emphasized that the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the exceptions that follow. In my view, the phrase quoted in the preceding sentence evidences a recognition on the part of the Legislature that a single record or report, for example, might include portions that are available under the statute, as well as portions that might justifiably be withheld. That being so, I believe that it also imposes an obligation on an agency to review records sought, in their entirety, to determine which portions, if any, might properly be withheld or deleted prior to disclosing the remainder.

The Court of Appeals expressed its general view of the intent of the Freedom of Information Law 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.).

As I understand the matter, that the attorneys for the Village were given the authority to hire a consulting firm would not remove the records prepared by the firm for the Village from the Freedom of Information Law. That statute pertains to agency records, and §86(4) defines the term "record" expansively to include:

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

Based on the foregoing records prepared by a consulting firm *for* the Village would constitute Village records that fall within the coverage of the Freedom of Information Law.

I note that under §3101(d) of the Civil Practice Law and Rules, material prepared for litigation is shielded from disclosure. However, it has been determined judicially that if records are prepared for multiple purposes, one of which includes eventual use in litigation, §3101(d) does not serve as a basis for withholding records; only when records are prepared *solely* for litigation can §3101(d) be properly asserted to deny access to records [see e.g., Westchester-Rockland Newspapers v. Mosczydlowski, 58 AD 2d 234 (1977)]. It is my understanding that the records prepared by the consulting firm would not be prepared solely for litigation.

It appears that the only pertinent ground for denial would be §87(2)(g), which permits an agency to withhold records that:

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

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

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

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.

The Court in the Gould decision cited earlier dealt with the issue of what constitutes "factual data" that must be disclosed under §87(2)(g)(i). In its consideration of the matter, the Court found that:

> "...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][i]. Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182)." (Gould, supra, 276-277).

In accordance with the direction offered by the Court of Appeals, insofar as records prepared by a consultant for the Village consist of statistical or factual information, it would appear that they must be disclosed.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees
Tracy Jong

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3166

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May 31, 2000

Hon. Al Cislo
Councilman
Town of Inlet
P.O. Bo x179
Inlet, NY 13360

The staff of the Committee on 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 Cislo:

I have received your letter of May 1. You complained that you, other members of the Inlet Town Board, and the public have not been informed of the items to be considered at monthly meetings. Although agendas are distributed "at the door prior to the night of the meeting", you have contended that agendas must be posted prior to meetings and asked whether the meetings are legal.

In this regard, I offer the following comments.

First, there is nothing in the Open Meetings Law or any other law of which I am aware that deals specifically with agendas. While many public bodies prepare agendas, the Open Meetings Law does not require that they do so. Similarly, the Open Meetings Law does not require that a prepared agenda be followed. Therefore, the absence of or a failure to post an agenda has no impact on the legality of a meeting. I note, however, that a public body on its own initiative may adopt rules or procedures concerning the preparation and use of agendas. For instance, under §63 of the Town Law, the Town Board has the authority to "determine the rules of its procedure." Therefore, you might consider proposing a rule or procedure imposing some sort of requirement that agendas be prepared and made available at a certain time prior to meetings.

Second, the Open Meetings Law requires that notice of the time and place of every meeting be given to the news media and to the public by means of posting. 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."

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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June 2, 2000

Marian Wise, Esq.
Research and Development Director
Healthy Schools Network, Inc.
96 South Swan Street
Albany, NY 12210

The staff of the Committee on 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. Wise:

I have received your letter of May 4 as well as the materials attached to it. Your primary question involves the status under the Open Meetings Law of health and safety committees created pursuant to regulations promulgated by the Commissioner of Education. You also raised questions concerning public participation at meetings and the application of the Open Meetings Law to "building level committees."

In this regard, by way of background, §409-d of the Education Law authorizes and directs the Commissioner of Education "to establish, develop and monitor a comprehensive public school safety program which shall include a uniform inspection, safety rating and monitoring system." That statute also provides direction concerning the implementation of the program, including the establishment of a "a process for monitoring all school buildings." To carry out that process, the Commissioner promulgated regulations that require boards of education and boards of cooperative educational services carry out certain functions, one of which involves the "[e]stablishment of a health and safety committee comprised of representation from district officials, staff, bargaining units and parents" [§155.4(d)(1)].

A health and safety committee, pursuant to regulation, performs a variety of functions. For instance, school districts are required to prepare safety ratings of all school buildings, and the regulations state that "The safety rating shall be established by each district or board of cooperative educational services after consultation with the health and safety committee...[§155.4(c)(1)]. Similarly, procedures "for investigation and disposition of complaints related to health and safety...shall involve the health and safety committee" [§155.4(d)(7)]. In addition, boards of education are required to "establish procedures for the involvement of the health and safety committee to monitor safety during school construction projects", and those committees are required to "meet periodically to review issues and address complaints related to health and safety resulting from the construction project" [§155.5(c)(2)].

In short, certain functions within a school district cannot be accomplished without consultation involving a health and safety committee. As such, a health and safety committee performs necessary functions, pursuant to law, in the process of decision making within a district. For that reason, I believe that such a committee would constitute a "public body" subject to the Open Meetings Law.

Section 102(2) of that statute defines the phrase "public body" to mean:

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

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

In this instance, however, a health and safety committee performs a necessary and integral function in the implementation of §409-d of the Education Law and the regulations promulgated by the Commissioner, which have the force and effect of law.

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

Again, according to the regulations, since a health and safety committee carries out necessary functions in the implementation of legislation and regulations, and since a board of education in certain contexts cannot act without first having consulted with such committee, I believe that it performs a governmental function and, therefore, is a public body subject to the Open Meetings Law.

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

In a related question, you asked whether "volunteer building level" committees formed within districts are subject to the Open Meetings Law. I am unaware of any provision that deals with the creation of the kinds of entities at issue. If that is so, and if there is no legal duty to carry out a function as part of the decision making process, it is unlikely, in my view, that a building level committee would constitute a public body falling within the coverage of the Open Meetings Law. This is not to suggest that such committees could not hold open meetings, but rather that they would not be obliged to do so to comply with the Open Meetings Law.

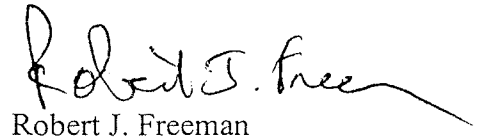
Next, while the Open Meetings Law clearly provides the public with the right "to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy" (see Open Meetings Law, §100), the Law is silent with respect to public participation. 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.

Lastly, as you suggested, members of the public may have the opportunity to raise questions either during meetings or in writing. Nevertheless, other than a general obligation to serve the public, I know of no law that would require a public official to answer questions.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

FOML-AO-3168

From: Robert Freeman
To: [redacted]
Date: 6/12/00 7:58AM
Subject: Re: (no subject)

Good Morning - -

Assuming that a majority of the Board was present, there would be no distinction between a "workshop" and a "meeting." Anyone can use a tape recorder at those gatherings, so long as the device is used in a manner that is not disruptive.

There are written opinions on the subject available on our website. In the Open Meetings Law index to opinions, several can be reviewed under "Tape Recorders, Use of".

Have a good day.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
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[redacted]

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June 13, 2000

Mr. James W. 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 May 5 in which you referred to a "pre-Board meeting" held by the Town Board of the Town of Saugerties during which the Board did not use its public address system. In addition, you indicated that the Supervisor did not answer the questions that you raised at the ensuing "general meeting."

In this regard, I offer the following comments.

First, there is no legal distinction in my view between the "pre-Board meeting" and a "general meeting." By way of background, 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 is present to discuss Town business, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law.

Further, because the "pre-Board meeting" is a "meeting", it must be preceded by notice of the time and place given to the news media and by means of posting pursuant to §104 of the Open Meetings Law. Therefore, if a pre-meeting is scheduled to begin at 6 p.m., notice must be given to that effect.

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

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

Based upon the foregoing, it is clear in my view that public bodies must conduct meetings in a manner that guarantees the public the ability to "be fully aware of" and "listen to" the deliberative

process. Further, I believe that every statute, including the Open Meetings Law, must be implemented in a manner that gives effect to its intent. In this instance, the Board must in my view 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.

Lastly, 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. It is reiterated, however, that the Supervisor and the Board members may choose to answer questions, but that they are not required to do so.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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June 16, 2000

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 May 11. You indicated that you sought to attend a meeting of the Town of Chili Planning Board after it had begun, and that the usual entrance was locked. Although a sign was posted indicating that the meeting was being held in a room not generally used for that purpose, the door to enter that room was also locked. Only after you exited the building and knocked on the window of the room in which the Board had convened could you enter.

In this regard, in my view, every law, including the Open Meetings Law, must be implemented in a manner that gives reasonable effect to its intent. Here I direct your attention to §100 of the Open Meetings Law, its legislative declaration. That provision states that:

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

Based upon the foregoing, it is clear in my view that public bodies must conduct meetings in a manner that guarantees the public the ability to attend in order to be fully aware of and listen to the deliberative process. From my perspective, the Board should have ensured that those interested in attending could enter the building and locate the meeting without impediment or difficulty.

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
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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June 16, 2000

Mr. Anthony Percoco
[redacted]

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

Dear Mr. Percoco:

As you are aware, I have received your letter of May 12 in which you asked that certain action taken by the Board of Education of the Ellenville Central School District "be annulled."

The issue involved the revision of a Board policy allowing persons present at Board meetings "one opportunity to address the Board for three minutes, only in regard to the resolutions to be discussed and voted upon that evening." For reasons that are not expressed, the Board considered revision of its policy to represent an "emergency" and waived its policy of waiting four weeks "between policy readings." Although the matter had apparently been scheduled to be discussed at a meeting on January 25, that meeting was cancelled due to weather conditions and held two days later in the Superintendent's office. You wrote that "[t]o the best of [your] knowledge, there wasn't enough time to publicize the special meeting." Further, it is your view that the Board "met in a location intended to avoid the public and the news media."

In this regard, it is noted at the outset that the Committee on Open Government is authorized to offer advisory opinions concerning the Open Meetings Law. The Committee is not empowered to compel a public body to comply with that statute or "annul" action taken by a public body. As such, the following remarks should be considered advisory in nature.

First, 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.

I note that 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, I do not believe that the Board is required to permit the public to speak at its meetings. However, if it chooses to do so, it must do so, in my opinion, in a manner that is reasonable and generally consistent with the preceding commentary.

Second, there is nothing in the Open Meetings Law pertaining to "special" or "emergency" meetings. Nevertheless, that statute requires that notice be given to the news media and posted prior to every meeting. Specifically, §104 of that statute provides that:

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

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

Third, I am unfamiliar with the location of the Superintendent's office. However, I believe that every law, including the Open Meetings Law, should be implemented in a manner that gives reasonable effect to its intent. If the Superintendent's office is accessible to the public and if, in terms of its size, it accommodated those interested in attending, it does not appear that holding a meeting at that site would have been unreasonable. On the other hand, if it could be anticipated that a greater number of persons would want to attend than the office could accommodate, and if an alternative location was available, the site of the meeting in my view would have been 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: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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OML-AO-3172

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June 16, 2000

Ms. Tamara O'Bradovich
[redacted]

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

Dear Ms. O'Bradovich:

As you are aware, I have received your letter of May 14 in which you raised questions relating to meetings and access to records.

Several aspects of your inquiry concern the procedure that must be followed in order to adopt a local law. In this regard, the Committee on Open Government is authorized to offer advice and opinions relating to the Open Meetings and Freedom of Information Laws. Issues involving the adoption of local laws fall beyond the scope of the jurisdiction or expertise of this office. Further, I do not believe that there is a procedure or series of requirements that would be universally applicable. Boards of education, for example, cannot adopt local laws, and the statutes pertinent to the matter may differ based upon the nature of a municipality, i.e., a town as opposed to a village or a city.

With respect to minutes of meetings, the Open Meetings Law contains 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 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 note, too, that there is no provision of law of which I am aware that requires that minutes be approved. While it is common practice to do so, the approval of minutes is accomplished *via* tradition, policy, or custom, for example, rather than pursuant to law.

Typically, minutes are approved or amended by motion or the adoption of a resolution. As indicated earlier, minutes must include reference to any motions or actions taken, including motions to approve or amend the minutes themselves. Further, it is implicit in my view that minutes must accurately reflect what transpired at a meeting.

With respect to requests for records, although an agency may accept an oral request, it may require that a request be made in writing [see Freedom of Information Law, §89(3)].

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

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

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

When records are accessible under the Freedom of Information Law, it has been held that they should be made equally available to any person, regardless of one's status, interest or the intended use of the records [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. Moreover, the Court of Appeals, the State's highest court, has held that:

> "FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose; while its purpose may be to shed light on government decision-making, its ambit is not confined to records actually used in the decision-making process. (Matter of Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581.) Full disclosure by public agencies is, under FOIL, a public right and in the public interest, irrespective of the status or need of the person making the request" [Farbman v. New York City Health and Hospitals Corporation, 62 NY 2d 75, 80 (1984)].

Farbman pertained to a situation in which a person involved in litigation against an agency requested records from that agency under the Freedom of Information Law. In brief, it was found that one's status as a litigant had no effect upon that person's right as a member of the public when using the Freedom of Information Law, irrespective of the intended use of the records. Similarly, unless there is a basis for withholding records in accordance with the grounds for denial appearing in §87(2), the use of the records, the purpose for which a request is made, and the status of the applicant, are in my opinion irrelevant. That being so, an agency cannot generally require that an applicant indicate the reason for his or her request.

Lastly, the Freedom of Information Law does not require that an applicant "give the exact description" of the records sought. When that statute was initially enacted in 1974, it required that an applicant request "identifiable" records. Therefore, if an applicant could not name the record sought or "identify" it with particularity, that person could not meet the standard of requesting identifiable records. In an effort to enhance its purposes, when the Freedom of Information Law was revised, the standard for requesting records was altered. Since 1978, §89(3) has stated that an applicant must merely "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.

When the records sought can be located with reasonable effort, I believe that a request would meet the requirement that a request "reasonably describe" the records. However, if the records of your interest are kept or filed, not by subject matter, for example, but rather intermingled with other kinds of records chronologically or by some other means, and if a search for them would involve a record by record review of hundred or perhaps thousands of records, the request, in my view, would not meet the standard of reasonably describing the records.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
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June 19, 2000

E-Mail

TO: Ernie Paskey <[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. Paskey:

I have received your letter of May 15 in which you wrote that "[y]our challenge is to get the planning board to discuss the application with the applicant present: two out of 5 board members are willing to state that they refuse to talk in front of the applicant." In addition, you suggested that the board makes its decisions "from 11:00 pm to 2:00 in the morning."

From my perspective, the refusal of board members to discuss an application in the presence of an applicant is clearly contrary to the Open Meetings Law. I direct your attention to §100 of the Open Meetings Law, its legislative declaration. That provision states that:

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

Based upon the foregoing, it is clear in my view that public bodies must conduct meetings in a manner that guarantees the public the ability to "be fully aware of", to "listen to" and to "observe" the deliberative process. If members of the Board refuse to deliberate in public or otherwise preclude

the public, including applicants, from observing their deliberations, again, I believe that such activity would fly in the face of the intent of the Open Meetings Law.

Similarly, in my view, every statute, including the Open Meetings Law must be implemented in a manner that gives effect to its intent. In this instance, the Board must in my view conduct its meetings at a time and in a manner in which those interested in attending have a reasonable opportunity to do so. If a public body purposely waits until past midnight to conduct its business or take action, case law indicates that doing so at a time at which most interested in attending cannot reasonably do so, it would be acting in a manner inconsistent with law (see Goetschius v. Board of Education of Greenburgh Eleven Union Free School District, 664 NYS2d 811, 244 AD2d 552 (1997)].

I hope that I have been of assistance.

RJF:jm

cc: Planning Board, Town of Canandaigua
Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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June 19, 2000

Mr. Daniel M. DiMatteo
Attorney at Law
39 Ellicott Street
Batavia, NY 14020

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

Dear Mr. DiMatteo:

I have received your letter of May 11, as well as the materials attached to it. You have sought an advisory opinion in your capacity as attorney for the City of Batavia.

By way of background, you indicated that the City Council, which consists of nine members, entered into a "water contract" with Genesee County in January, but "rescinded its consent to the contract on April 10, 2000." Based on the correspondence that you attached, you wrote that:

> "...it appears that five members of the city Council have circulated letters suggesting that the five are embarking on an alternative plan. The discussions of the proposed plan are not made in the regular Council meetings and appear to be to the exclusion of the remainder of the Board, the City Manager or the public. The letterhead used is not the authorized City letterhead. The correspondence was similarly, not discussed or authorized in the Council meetings. It may appear that the content of these letters may be confused as representing the acts or authorized correspondence of the City of Batavia."

You have asked whether "a majority of the City Council [may] meet to discuss issues of future policy and alternative water planning and not comply with the provisions of the Open Meetings Law." Additionally, you asked who may be "an aggrieved party who can seek remedy for a violation of the Open Meetings Law."

In this regard, I offer the following comments.

First, from my perspective, even though the items attached to your letter were signed by five Council members, that does not necessarily lead to a conclusion that the five, a majority of Council, convened for the purpose of discussing or conducting City business. In some instances, materials may be circulated without any convening of members of a public body. For instance, I believe that proposed legislation is frequently circulated among members of the State Senate or Assembly for the purpose of seeking sponsorship. That activity would not, in my view, constitute a meeting subject to the Open Meetings Law or a circumvention of that statute.

Second, however, and in response to your question, if a majority of a public body gathers to discuss public business, the gathering in my view would be a meeting that falls within the coverage of the Open Meetings Law.

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

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

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

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

> "The word 'formal' is defined merely as 'following or according with established form, custom, or rule' (Webster's Third New Int. Dictionary). We believe that it was inserted to safeguard the rights of members of a public body to engage in ordinary social transactions,

> but not to permit the use of this safeguard as a vehicle by which it precludes the application of the law to gatherings which have as their true purpose the discussion of the business of a public body" (id.).

Based upon the direction given by the courts, if a majority of a public body, such as the City Council, 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, five of nine members of a public body meet without informing the other four, even though the five represent a majority, I do not believe that they could vote or act as or on behalf of the body as a whole; unless all of the members of the body are given reasonable notice of a meeting, the body in my opinion is incapable of performing or exercising its power, authority or duty.

Lastly, since §103 of the Open Meetings Law gives any member of the public the right to attend a meeting of a public body, I believe that any person could be considered "aggrieved" for the purposes of §107 of that statute.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

OML-AO-3175

From: Robert Freeman
To: [redacted]
Date: 6/20/00 7:57AM
Subject: Re: Open Meetings Law

Dear Mr. Zimkin:

I believe that my response would have been that a gathering between the client (i.e., the Board of Trustees) and the attorney would be subject to the attorney-client privilege and, therefore, outside the coverage of the Open Meetings Law [see §108(3)]. However, if a person other than the client is present, such as the developer, there can be no claim of attorney-client privilege.

In the circumstance that you described, assuming that a majority of the Board and the developer or that person's representative attend, I believe that the gathering would constitute a "meeting" covered by the Open Meetings Law that must be preceded by notice, convened open to the public, and conducted open to the public until there is a basis for entry into executive session.

If you would like to discuss the matter, please feel free to contact me.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
Albany, NY 12231
(518) 474-2518 - Phone
(518) 474-1927 - Fax
Website - www.dos.state.ny.us/coog/coogwww.html

[redacted]

OML-AO-3176

From: Robert Freeman
To: Internet:fthomas@gvmail.oacs.k12.ny.us
Date: 6/22/00 8:11AM
Subject: Dear Ms. Thomas:

Dear Ms. Thomas:

I have received your note concerning the two BOE members meeting with a BOCES advisor and whether the gathering "constituted an open meeting".

In this regard, the definition of the phrase "public body" in §102(2) of the Open Meetings Law makes specific reference to committees and subcommittees of a public body. Therefore, if a BOE designates a committee of two or more of its own members, that committee would itself constitute a public body required to comply with the Open Meetings Law. If a committee does not consist wholly of Board members, it is unlikely that it would be a public body or, therefore, that the Open Meetings Law would apply.

Assuming that the safety committee consists solely of Board members, the question involves the number of members on committee. If it consists of more than three, the gathering in question would not have been subject to the Open Meetings Law, for less than a majority of the committee would have been present. On the other hand, if it consists of two or three members, the gathering of two, in their capacities as members of the safety committee, would have constituted a majority and, therefore, a "meeting" of the committee that fell within the coverage of the Open Meetings Law.

I hope that the foregoing is clear and that I have been of assistance. If you have further questions, please feel free to contact me.

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STATE OF NEW YORK
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OML-AO-3177

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June 28, 2000

Mr. Walter F. Matystik
[redacted]

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

Dear Mr. Matystik:

I have received your letter of May 24. As I understand your remarks, you have sought an opinion concerning the distinction between a meeting closed due to an executive session as opposed to closure based on the assertion of the attorney-client privilege.

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. As you may be aware, §102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded, and 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 a public body, such as a board of education, 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.

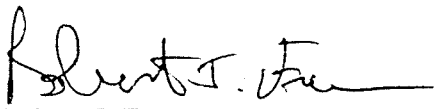
Although it is not my intent to be overly technical, as suggested earlier, the procedural methods of entering into an executive session and asserting the attorney-client privilege differ. In

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.

Lastly, with respect to the participation of members-elect, I note that §105(2) of the Open Meetings Law authorizes a public body to permit the attendance of persons other that its own members at an executive session. As such, the Board could, in my view, permit members-elect to attend an executive session. If, however, persons other than the client (i.e., the Board) are present when an attorney is offering legal advice, the presence of those persons results in a waiver of the attorney-client privilege. In that circumstance, an exemption from the Open Meetings Law could not be claimed.

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, Mount Pleasant Central School District

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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OML-AO-3128

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July 5, 2000

Ms. Anita DiMiceli
Executive Director
Town of Oyster Bay Housing Authority
P.O. Box 351
Plainview, NY 11803

The staff of the Committee on 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. DiMiceli:

I have received your letter of May 30 and the materials attached to it. You referred to an opinion addressed to you on May 8 in which it was advised, based on judicial decisions, that any person may use a tape recorder at an open meeting of a public body, so long as the use of the device is not obtrusive or disruptive.

Notwithstanding the opinion, the Authority resolved at a meeting held on May 11 that members of the public could use tape recorders at its meetings so long as the use of the recorders is "neither disruptive nor obtrusive", but that "members, agents, and/or employees of the Housing Authority present at the meeting and acting within the scope of their employment may use a tape recorder upon first obtaining the consent of the Board." You wrote that you and your attorney interpret that opinion of May 8 as advising that you do not need "permission" to record meetings of the Town of Oyster Bay Housing Authority, which you serve as Executive Director, and you asked whether you are "correct."

I believe that you are correct. In my view, a rule that provides members of the Authority or its agents or employees a lesser right than any member of the public would be found to be unreasonable and unsustainable.

The materials attached to your letter also indicate that even though the tape recording device that you used was in full view of all Board members, the tape recording of a meeting was taken from you. Here I direct your attention to the Freedom of Information Law. That statute pertains to agency records, i.e., those of a public housing authority, 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 an agency maintains a tape recording of a meeting, the tape would constitute a "record" that falls within the coverage of the Freedom of Information Law, irrespective of the reason for which the recording was prepared.

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].

In short, assuming that the tape recording is maintained by or for the Housing Authority, I believe that it would be available to you or any person.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town of Oyster Bay Housing Authority
Jack Tillem
Barry J. Peek

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

OML-AO-3179

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July 5, 2000

Hon. Tony Hay
Putnam County Legislature
40 Gleneida Avenue
Carmel, NY 10512

The staff of the Committee on 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 Hay:

I have received your letter of May 24. According to your letter, the Putnam County Legislature consists of nine members, and it has designated several committees consisting of three of its members. That being so, you raised the following question:

> "If two (2) or more members of a Committee meet and/or take a 'field trip' to review and discuss items under their purview, would the meeting or 'field trip' be required to be noticed to the public as a meeting of that Committee?"

In this regard, I offer the following comments.

First, 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)].

With respect to notice, §104 of the Open Meetings Law provides that:

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

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

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

I point out that the decision rendered by the Court of Appeals was precipitated by contentions made by public bodies that so-called "work sessions" and similar gatherings held for the purpose of discussion, but without an intent to take action, fell outside the scope of the Open Meetings Law. In discussing the issue, the Appellate Division, 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 the business of that body, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law.

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

Lastly, although the meaning of the phrase "field trip" is not entirely clear, there is case law dealing with might have been characterized as a field trip or site visit. In that situation, the members of a public body were in a van, and it was held that "the Open Meetings Law was not violated" [City of New Rochelle v. Public Service Commission, 450 AD 2d 441 (1989)]. In that case, members of the Public Service Commission toured the proposed route of a power line in order to acquire a greater understanding of evidence previously presented. Based upon the court's conclusion, a site visit or tour by a public body, particularly on private property, would apparently not constitute a meeting. It has been advised, however, that site visits or tours by public bodies should be conducted solely for the purpose of observation and acquiring information, and that any discussions or

deliberations regarding such observations should occur in public during meetings conducted in accordance with the Open Meetings Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
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OML-AO-3180

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July 6, 2000

Mr. H. Russell Young
[redacted]

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

Dear Mr. Young:

I have received your letter of June 1 and the correspondence attached to it. You have sought assistance in relation to certain activities and practices in the Village of Seneca Falls.

As I understand the issues that you described, many relate to what you what you characterized as the firing of "a capable and efficient Village Administrator without cause or explanation." In this regard, I was recently informed that the Village Administrator, following the initiation of a lawsuit, will be reinstated to her position. While the issues may relate to that incident, several deal generally with the implementation of the Open Meetings and Freedom of Information Laws, and in consideration of the advisory jurisdiction of the Committee on Open Government, the following comments will focus only on those matters.

First, there is nothing in the Open Meetings Law that directly addresses the matter of notice of special meetings. Nevertheless, that statute 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 the local news media and by posting notice in one or more designated locations.

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

> "Whether abbreviated notice is 'practicable' or 'reasonable' in a given case depends on the necessity for same. Here, respondents virtually concede a lack of urgency: They deny petitioner's characterization of the session as an 'emergency' and maintain nothing of substance was transacted at the meeting except to discuss the status of litigation and to authorize, pro forma, their insurance carrier's involvement in negotiations. It is manifest then that the executive session could easily have been scheduled for another date with only minimum delay. In that event respondents could even have provided the more extensive notice required by POL §104(1). Only respondent's choice in scheduling prevented this result.
>
> "Moreover, given the short notice provided by respondents, it should have been apparent that the posting of a single notice in the School District offices would hardly serve to apprise the public that an executive session was being called...
>
> "In White v. Battaglia, 79 A.D. 2d 880, 881, 434 N.Y.S.ed 637, lv. to app. den. 53 N.Y.2d 603, 439 N.Y.S.2d 1027, 421 N.E.2d 854, the Court condemned an almost identical method of notice as one at bar:
>
> "Fay Powell, then president of the board, began contacting board members at 4:00 p.m. on June 27 to ask them to attend a meeting at 7:30 that evening at the central office, which was not the usual meeting date or place. The only notice given to the public was one typewritten announcement posted on the central office bulletin board...Special Term could find on this record that appellants violated the...Public Officers Law...in that notice was not given 'to the extent

> practicable, to the news media' nor was it 'conspicuously posted in one or more designated public locations' at a reasonable time 'prior thereto' (emphasis added)" [524 NYS 2d 643, 645 (1988)].

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

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., Town Law, §63), the courts have found in a variety of contexts that such rules must be reasonable. For example, although a board of education may "adopt by laws and rules for its government and operations", in a case in which a board's rule prohibited the use of tape recorders at its meetings, the Appellate Division found that the rule was unreasonable, stating that the authority to adopt rules "is not unbridled" and that "unreasonable rules will not be sanctioned" [see Mitchell v. Garden City Union Free School District, 113 AD 2d 924, 925 (1985)]. Similarly, if by rule, a public body chose to permit certain citizens to address it for ten minutes while permitting others to address it for three, or not at all, such a rule, in my view, would be unreasonable.

Third, with respect to minutes of meetings, §106 of the Open Meetings Law provides that:

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

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

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

I point out that, as a general rule, a public body may take action during a properly convened executive session [see Open Meetings Law, §105(1)]. If action is taken during an executive session, minutes reflective of the action, the date and the vote must be prepared and made available to the extent required by the Freedom of Information Law within one week of the executive session. If no action is taken, there is no requirement that minutes of the executive session be prepared.

Lastly, since you referred to "untimely responses for public records under the Freedom of Information Law", I point out that that statute 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)].

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees
Deputy Village Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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July 11, 2000

Mrs. Susan Jordan
[redacted]

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

Dear Mrs. Jordan:

I have received your letter of May 30, as well as the materials attached to it. You have raised a series of questions and sought my opinion relating to the implementation of the Open Meetings Law by the Owen D. Young Board of Education.

First, you wrote that you were "told that boards of education are protected under 'Sunshine Laws'" and asked for an explanation of the "basis of these laws" and whether school boards are exempt from the open meetings laws. "Sunshine Laws" is a phrase generally used to describe provisions that require government to be accountable to the public and to disclose information, either through records or by conducting meetings open to the public. In New York, they are embodied in the Freedom of Information Law and the Open Meetings Law, both of which are based on presumptions of openness. Stated differently, government records are presumed to be accessible, except to the extent that one or more grounds for denial of access may be asserted under §87(2) of the Freedom of Information Law; similarly, meetings of government bodies, such as school boards, town boards, village boards of trustees, legislative bodies and the like, must be conducted open to the public, unless there is a basis for entry into an executive session. An executive session is defined in §102(3) to mean a portion of an open meeting during which the public may be excluded.

Boards of education are clearly subject to the requirements of both the Freedom of Information Law and Open Meetings Law. Therefore, they may not withhold records as they see fit, and they may not hold executive sessions to discuss the subject of their choice; on the contrary, the grounds for entry into executive session are specified and limited in paragraphs (a) through (h) of §105(1) of the Open Meetings Law. With respect to one of your questions, "a concern for alienating the public" would not constitute a valid reason for holding an executive session.

Enclosed for your review is "Your Right to Know", which describes both statutes. Additional information is available either from this office or via the Committee's website.

Second, the Open Meetings Law does not distinguish between regular and special meetings, and it requires that notice be given to the news media and posted prior to every meeting. Specifically, §104 of that statute provides that:

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

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

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

> "Whether abbreviated notice is 'practicable' or 'reasonable' in a given case depends on the necessity for same. Here, respondents virtually concede a lack of urgency: They deny petitioner's characterization of the session as an 'emergency' and maintain nothing of substance was transacted at the meeting except to discuss the status of litigation and to authorize, pro forma, their insurance carrier's involvement in negotiations. It is manifest then that the executive session could easily have been scheduled for another date with only minimum delay. In that event respondents could even have provided the more extensive notice required by POL §104(1). Only respondent's choice in scheduling prevented this result.
>
> "Moreover, given the short notice provided by respondents, it should have been apparent that the posting of a single notice in the School

> District offices would hardly serve to apprise the public that an executive session was being called...
>
> "In White v. Battaglia, 79 A.D. 2d 880, 881, 434 N.Y.S.ed 637, lv. to app. den. 53 N.Y.2d 603, 439 N.Y.S.2d 1027, 421 N.E.2d 854, the Court condemned an almost identical method of notice as one at bar:
>
> "Fay Powell, then president of the board, began contacting board members at 4:00 p.m. on June 27 to ask them to attend a meeting at 7:30 that evening at the central office, which was not the usual meeting date or place. The only notice given to the public was one typewritten announcement posted on the central office bulletin board...Special Term could find on this record that appellants violated the...Public Officers Law...in that notice was not given 'to the extent practicable, to the news media' nor was it 'conspicuously posted in one or more designated public locations' at a reasonable time 'prior thereto' (emphasis added)" [524 NYS 2d 643, 645 (1988)].

Based upon the foregoing, 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.

The reference to a "waiver" of notice appears to deal with the ability of members of a board of education to waive notice that they must receive, as members, in the event that there is need to meet quickly. However, there is no authority to waive the notice requirements imposed by the Open Meetings Law.

Third, the Open Meetings Law requires that a public body, including a board of education, accomplish a specified procedure prior to entry into 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 indicated in the language quoted above, a motion to enter into an executive session must be made during an open meeting and include reference to the "general area or areas of the subject or subjects to be considered" during the executive session.

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

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

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.

Fourth, 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. 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.

Next, with respect to the role of the clerk, there is nothing in the Open Meetings Law that deals with that issue. However, there may be policies or rules adopted by a board that address the matter.

Lastly, you asked how residents can "be sure that the board of education is discussing only those items noted in the motion to go into executive session and not other subjects that the board trustees find uncomfortable discussing in open session." In short, there may be no way to compel a board to prove that it complied with law. However, certainly you or any other person may ask board members whether they discussed only those subjects identified in motions to conduct executive sessions. I note, too, that there is nothing in the Open Meetings Law that would generally or uniformly prohibit a board member from describing what occurred during an executive session.

In an effort to enhance compliance with and understanding of "sunshine laws", a copy of this opinion will be forwarded to the Board of Education.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Board of Education

OML-AO-3182

From: Robert Freeman
To: [redacted]
Date: 7/12/00 9:08AM
Subject: Dear Ms. Brevda:

Dear Ms. Brevda:

In a board consisting of eight members with another disqualified, the total number of board members would be nine. In a nine person board, according to §41 of the General Construction Law entitled "Quorum and majority", a quorum would be five, and five affirmative votes would be needed to take any action or otherwise carry out the powers and duties of the board.

In short, the votes to which you referred in which there were four affirmative votes did not, in my opinion, carry and represent, in essence, a nullity.

To obtain more information on the subject, it is suggested that you use the index to advisory opinions rendered under the Open Meetings Law that is available on our website. You can click onto "Q" and scroll down to "quorum" or "a" for "abstention from voting". The higher numbered opinions are the most recent and are available in full text.

If you need additional information, 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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(518) 474-2518 - Phone
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STATE OF NEW YORK
DEPARTMENT OF STATE
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OML-AO-3183

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July 12, 2000

Mr. and Mrs. Charles Talbert
[redacted]

The staff of the Committee 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. and Mrs. Talbert:

As you are aware, I have received your letter of June 10. In view of our telephone conversations, I want to make clear that the Committee on Open Government is authorized to offer advice and opinions concerning the Open Meetings Law; it is not empowered to enforce that statute or compel a governmental body to comply with law.

You referred to meeting of the Perth Town Board that you attended soon after [redacted] in the Town. During the meeting, when the public was given the opportunity to speak and ask questions, you (Mr. Talbert) presented photographs of the road where the accident occurred and began to ask questions about its condition. When the Highway Superintendent began to speak, the Town Attorney "spoke up over anyone else and told [you] to leave and get an attorney." You wrote that you "were not boisterous or unruly", but that you left the meeting because you "did not know what would happen if [you] did not." It is your view that your rights were violated, and you have sought an opinion on the matter.

First and most importantly, §103(a) of the Open Meetings Law states in relevant part that "Every meeting of a public body shall be open to the general public..." A town board is clearly a "public body" [see Open Meetings Law, §102(2)], and, therefore, any member of the public may attend. Since the meeting to which you referred was open to the public, based on the information that you provided, I do not believe that any Town official would have had the right or authority to eject you from the meeting or insist that you leave. In short, you and any member of the public have the right to attend open meetings of public bodies in New York.

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., Town Law, §63), the courts have found in a variety of contexts that such rules must be reasonable. For example, although a board of education may "adopt by laws and rules for its government and operations", in a case in which a board's rule prohibited the use of tape recorders at its meetings, the Appellate Division found that the rule was unreasonable, stating that the authority to adopt rules "is not unbridled" and that "unreasonable rules will not be sanctioned" [see Mitchell v. Garden City Union Free School District, 113 AD 2d 924, 925 (1985)]. Similarly, if by rule, a public body chose to permit certain citizens to address it for ten minutes while permitting others to address it for three, or not at all, such a rule, in my view, would be unreasonable.

I note that there are federal court decisions indicating that if commentary is permitted within a 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, a federal

law requiring the confidentiality of information identifiable to students, and that expressions of opinions concerning "the shortcomings" of a law school professor could not be restrained.

In short, based on the decisions cited above, unless the Town Board adopted a rule or policy restricting the public from discussing or raising questions during a meeting involving a certain subject area, it does not appear that your ability to speak should have been restricted.

In an effort to enhance compliance with and understanding of applicable 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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July 12, 2000

Mr. Scott A. Bylewski
[redacted]

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

Dear Mr. Bylewski:

I have received your letter of June 5 in which sought an advisory opinion in response to the following question:

> "Whether the Town of Clarence Planning Board violated the Open Meetings Law when it conducted a regularly scheduled and properly noticed meeting, adjourned the meeting, went to another location, and conducted a vote at this other location without prior written notification of the time and place of the vote."

The news article attached to your letter indicates that the Board visited private property to inspect the site and voted on an issue "in the driveway" of a homeowner.

From my perspective, the Board should have voted at a meeting held in accordance with the Open Meetings Law after its site visit.

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

It is emphasized, however, that the Commission, prior to the tour, informed the public and the news media that it would not engage in any discussion during the tour, that it would merely observe, and that any discussion of its observations would occur after the tour during an open meeting. Based on the decision it has been advised that site visits or tours by public bodies should be conducted solely for the purpose of observation and acquiring information, and that any discussions or deliberations regarding such observations should occur in public during meetings conducted in accordance with the Open Meetings Law.

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
DEPARTMENT OF STATE
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July 18, 2000

Ms. Mary Lee Lasota
[redacted]

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

Dear Ms. Lasota:

I have received your letter of June 12, which reached this office on June 19. You questioned the propriety of "retreats" held by the Hilton Central School District Board of Education. Those gatherings, according to your letter, are not open to the public, and the agenda pertaining to one such retreat indicated that its focus would involve "roles and responsibilities of the President and Vice President (transition) and board committees."

You asked whether "this type of retreat [is] allowed under the Open Meetings Law", particularly in view of your belief that "decisions made during this retreat will affect how the board operates...and clarify the roles and responsibilities of board committees", whether records of the retreat should be made available under the Freedom of Information Law, and whether Board members are "free to discuss with the public details of what was talked about or decided at the retreat."

In this regard, I offer the following comments.

First, the Open Meetings Law applies to meetings of public bodies, and a board of education clearly constitutes a public body required to comply with that statute. Section 102(1) of the Open Meetings Law defines the term "meeting" to mean "the official convening of a public body for the purpose of conducting public business". It is emphasized that the definition of "meeting" has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be convened open to the public, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

Inherent in the definition and its judicial interpretation is the notion of intent. If there is an intent that a majority of a public body will convene for the purpose of conducting public business, such a gathering would, in my opinion, constitute a meeting subject to the requirements of the Open Meetings Law.

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

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

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

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

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

From my perspective, a retreat that dealt with the roles and responsibilities of Board officers and committees constituted a "meeting" that should have been conducted open to the public in accordance with the Open Meetings Law and preceded by notice given pursuant to §104 of that statute.

Second, if indeed decisions were made, I believe that they would have been made in a manner inconsistent with law. Stated differently, a public body has the authority to make decisions

only at meetings held in compliance with the Open Meetings Law. Further, if decisions were made involving policy, i.e., regarding the duties and functions of officers and committees, I believe that those issues should have been discussed in public, for there would have been no basis for conducting an executive session (see §105), and that any action must be memorialized in minutes.

Assuming that the retreat should have been open to the public and decisions were made, minutes should have been prepared pursuant to §106 of the Open Meetings Law, which provides what might be characterized as minimum requirements concerning the contents of minutes and states in relevant part 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...
>
> 3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meetings except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

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

If other records of the proceedings were prepared, such as notes or summaries, they would be subject to rights of access conferred by the Freedom of Information Law. That statute pertains to agency records, and §86(4) defines the term "record" to mean:

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

In view of the breadth of the definition of "record", notes or summaries, for example, would fall within the scope of rights of access.

The Freedom of Information Law is based on a presumption of access; all agency records are accessible, except to the extent that they may be withheld in accordance with one or more of the grounds for denial appearing in paragraphs (a) through (i) of §87(2). In my view, one of the grounds for denial would be pertinent in ascertaining rights of access to summaries or notes. Specifically, §87(2)(g) enables an agency to deny access to 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.

To the extent that notes or summaries consist of a factual rendition of what transpired, I believe that they would be available. Again, if action was taken, minutes, in my opinion, must be prepared indicating the nature of the action and the vote of the members.

Lastly, I am unaware of any statute that would prohibit Board members from discussing the events that occurred during a retreat. 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 kinds of issues 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).

In short, I believe that Board members are free to share details of the retreat with the public, especially since it appears that the retreat constituted a "meeting" that should have been held open to the public.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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July 18, 2000

E-Mail

TO: Robert F. Reninger [redacted] RFR

FROM: Robert J. Freeman, Executive Director

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

Dear Mr. Reninger:

I have received your correspondence of June 18, 19 and 22, all of which pertains to minutes of meetings of the Town of Greenburgh Planning Board.

In the first, you indicated that the Board meets at least once a month, but that it has not published minutes of its meetings since March 15. In the second, you wrote that you were informed that "minutes are lost, cannot be found and it is unknown who recorded the minutes and/or whether any minutes were taken." In the third, you referred to a recent meeting of the Board during which the Secretary to the Board said that "there were some gaps" in the minutes of an earlier meeting and that an effort would be made to "reconstruct from memory or guess what happened at that meetings."

You have sought my views concerning the foregoing, and in this regard, I offer the following comments.

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

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.

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

Based upon the foregoing, although it is clear that minutes need not consist of a verbatim account of every comment made at a meeting, it is equally clear that minutes must be prepared and made available within two weeks of a meeting. From my perspective, to comply with the Open Meetings Law, a public body, such as a planning board, must ensure that a person is designated to take notes in order that appropriate minutes may later be prepared.

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

With respect to the possibility that minutes cannot be found, it emphasized that minutes serve as the official record of the actions of a public body. If they cannot be found, the Board and the Town may be unable, in the near or especially in the distant future, to know what actions were taken. That failure could result in serious consequences in relation to the possibility that certain actions may be required to be justified or proven.

Pertinent 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. 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 must be preserved and 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, and I believe that the provision pertaining to the retention of minutes requires that those records be kept and preserved permanently.

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

I hope that I have been of assistance.

RJF:jm

cc: Planning Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3187

41 State Street, Albany, New York 12231
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July 24, 2000

Hon. Dinah Miller
Town Clerk
P.O. Box 175
Churubusco, NY 12923

The staff of the Committee on 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. Miller:

I have received your letter dated May 30, which reached this office on June 20. Attached is a resolution adopted by the Clinton Town Board that deals with the manner in which you are to carry out certain of your duties as Town Clerk. The beginning of the resolution refers to §30 of the Town Law and asserts that the cited provision states that the Town Clerk "has no discretion to include in the minutes only those discussions which he thinks are important, but rather he must include in the minutes all activities and considerations of the board."

You have requested an advisory opinion relating to the resolution and other related matters. In this regard, it is emphasized that the advisory jurisdiction of the Committee on Open Government is limited to issues relating to public access to government information. Insofar as the questions that you raised relate to the duties of this office, I offer the following comments.

First, although the resolution presented the statement quoted above as a verbatim passage found within the Town Law, I do not believe that the statement exists anywhere in law.

Second, there is no law of which I am aware that requires that minutes be "posted". A Town Board or Town Clerk may choose to post minutes of meetings, but there is no obligation to do so. There is a requirement, however, that minutes be prepared an made available on request within two weeks, irrespective of whether the minutes have been approved. That issue will be considered more fully later in this response.

Third, the primary series of issues relates to the preparation of minutes, and in my view, four provisions are relevant. Section 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. 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". Next, subdivision (1) of §30 of the Town Law provides that the clerk "shall have such additional powers and perform such additional duties as are or hereafter may be conferred or imposed upon him by law, and such further duties as the town board may determine, not inconsistent with law". And fourth, §63 of the Town Law states in part that a town board "may determine the rules of its procedure".

In my opinion, inherent in each of the provisions cited is an intent that they be carried out reasonably, fairly, with consistency, and that minutes be accurate.

More specifically, §106 of the Open Meetings Law provides that:

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

Based on the foregoing, minutes need not consist of a verbatim account of everything that was said; on the contrary, so long as the minutes include the kinds of information described in §106, I believe that they would be appropriate and meet legal requirements. Certainly if a clerk wants to include more information than is required by law, he or she may do so, as long as that addition is balanced and is not based on personal preferences.

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). It is unlikely in my view that a town board has the authority to require the exclusion of information from minutes of an open meeting that is accurate.

Although as a matter of practice, policy or tradition, many public bodies approve minutes of their meetings, there is nothing in the Open Meetings Law or any other statute of which I am aware that requires that minutes be approved. In another opinion of the State Comptroller, it was found that there is no statutory requirement that a town board approve minutes of a meeting, but that it was "advisable" that a motion to approve minutes be made after the members have had an opportunity to review the minutes (1954 Ops.St.Compt. File #6609). While it may be "advisable" if not proper for a board to review minutes, due to the clear authority conferred upon town clerks under §30 of the Town Law, I do not believe that a town board can require that minutes be approved prior to disclosure. To comply with the Open Meetings Law, it has consistently been advised that minutes be prepared and made available within two weeks, and that if the minutes have not been approved, they may be marked "unapproved", "draft" or "non-final", for example. By so doing within the requisite time limitations, the public can generally know what transpired at a meeting; concurrently, the public is effectively notified that the minutes are subject to change. If minutes have been prepared within less than two weeks, I believe that those unapproved minutes would be available as soon as they exist, and that they may be marked in the manner described above.

It is my view that you, in your position as clerk, have the responsibility and the authority to prepare minutes and to ensure their accuracy. While the Board and/or the Supervisor may have other areas of authority, I do not believe that they could validly remove or insist upon the removal of information from minutes, so long as the information is accurate and, again, presented reasonably, fairly and in a manner consistent with the contents of minutes as they are generally prepared.

Lastly, you asked what your role should be in a situation in which the Board might enter into and take action during an executive session. As you may be aware, §105(2) of the Open Meetings Law permits the Board to enable you to be present during an executive session. However, you have no right to attend, because you are not a member of the Board.

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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Town Board

OML-AO-3188

From: Robert Freeman
To: [redacted]
Date: 7/25/00 7:56AM
Subject: Re: Question

Dear Ms. Jones:

Thank you for your kind words.

In general, there is no provision that would preclude a person present at an executive session from divulging what occurred during the executive sessions. Whether it is wise or ethical is a different matter from whether it is illegal. The only instances in which a person present at an executive session could not disclose what occurred would involve situations in which a statute forbids disclosure. For instance, in the case of a school board, since federal law prohibits the disclosure (including verbal disclosure) of information contained in a record identifiable to a student without a parent's consent, such a disclosure would involve information that is exempted from disclosure by statute and would, in my opinion, be contrary to federal law.

To obtain additional and more detailed information on the subject, you can go to our website and the index to advisory opinions rendered under the Open Meetings Law. From there, click on to "E" and scroll down to "Executive session, disclosure of discussion after"; the higher the number, the more recent is the opinion. I recall that opinion #2581 includes an extensive explanation of the issue.

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

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
Albany, NY 12231
(518) 474-2518 - Phone
(518) 474-1927 - Fax
Website - www.dos.state.ny.us/coog/coogwww.html

[redacted]

OML-AO-3189

From: Robert Freeman
To: [redacted]
Date: 7/26/00 2:43PM
Subject: Dear Mr./Ms. Austin:

Dear Mr./Ms. Austin:

In response to your questions, first, there is no requirement that a town clerk tape record a meeting. Therefore, she may, in my view, turn the tape recorder on or off as she sees fit, unless dirrection to the contrary is given by the town board.

Second, the courts have held that anyone may use an audio or video recorder at an open meeting of a public body, so long as the use of the device is neither disruptive nor obtrusive. Further, advance notice is not required.

To obtain more detailed information on the subject, you can obtain opinions from our index to opinions rendered under the Open Meetings Law, which is available via our website. For instance, you can click on to "T" and scroll down to "Tape recorders, use of" and "v" for "Video equipment, use of". The higher the number of the opinion, the more recent it is.

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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OML-AO-3190

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July 27, 2000

Mr. Matthew Shulman
Publisher
Lansing Community News
204 Wilson Road
Lansing, NY 14882-9065

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

Dear Mr. Shulman:

I have received your letter of July 3 and the materials relating to it. You have sought an opinion concerning the status under the Open Meetings Law of an "intermunicipal group" consisting of representatives of several entities of local government. The group has met with officials of the Department of Environmental Conservation to discuss a regional sewer project, and it is your view that a recent meeting may have been closed due to the content of your publication, the *Lansing Community News*.

As I understand the matter, the Open Meetings Law would not have been 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, a public body is, in my view, an entity required to conduct public business by means of a quorum that performs a governmental function and carries out its duties collectively, as a body. In order to constitute a meeting subject to the Open Meetings Law, a majority of the total membership of a public body, a quorum, must be present for the purpose of conducting public business. I note, too, that the definition refers to committees, subcommittees and similar bodies of a public body. Based on judicial interpretations, if a committee, for example, consists solely of members of a particular public body, it, too, would constitute a public body. For instance, in the case of a board of education consisting of seven members, four would constitute a quorum, and a

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

Several judicial decisions, however, indicate generally that advisory bodies, other than those consisting of members of a particular governing body, that have no power to take final action fall outside the scope of the Open Meetings Law. As stated in those decisions: "it has long been held that the mere giving of advice, even about governmental matters is not itself a governmental function" [Goodson-Todman Enterprises, Ltd. v. Town Board of Milan, 542 NYS 2d 373, 374, 151 AD 2d 642 (1989); Poughkeepsie Newspaper v. Mayor's Intergovernmental Task Force, 145 AD 2d 65, 67 (1989); see also New York Public Interest Research Group v. Governor's Advisory Commission, 507 NYS 2d 798, aff'd with no opinion, 135 AD 2d 1149, motion for leave to appeal denied, 71 NY 2d 964 (1988)]. In one of the decisions, Poughkeepsie Newspaper, supra, a task force was designated by then Mayor Koch consisting of representatives of New York City agencies, as well as federal and state agencies and the Westchester County Executive, to review plans and make recommendations concerning the City's long range water supply needs. The Court specified that the Mayor was "free to accept or reject the recommendations" of the Task Force and that "[i]t is clear that the Task Force, which was created by invitation rather than by statute or executive order, has no power, on its own, to implement any of its recommendations" (id., 67). Referring to the other cases cited above, the Court found that "[t]he unifying principle running through these decisions is that groups or entities that do not, in fact, exercise the power of the sovereign are not performing a governmental function, hence they are not 'public bod[ies] subject to the Open Meetings Law..."(id.).

In the context of your inquiry, while the intermunicipal group consists of members of several public bodies, it apparently does not include a majority of any particular public body. Further, based on your remarks, it has no authority to take any final and binding action for or on behalf of a municipality. If those assumptions are accurate, the intermunicipal group, in my view, would not constitute a public body and, therefore, would not be obliged to comply with the Open Meetings Law.

The foregoing is not intended to suggest that the intermunicipal group cannot hold open meetings. On the contrary, it may choose to conduct meetings in public, and similar entities have done so, even though the Open Meetings Law does not require that they do so.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

OML-AO-3191

From: Robert Freeman
To: [redacted]
Date: 8/2/00 9:38AM
Subject: Dear Mr. Sears:

Dear Mr. Sears:

I have received your question and do not have sufficient information to fully respond. It is noted, however, that there is no general right to speak at a meeting, but that it has been advised that if a public body has authorized the public to speak, it should do so based on reasonable rules that treat members of the public equally.

If you can supply additional information, perhaps I could offer more substantial guidance. If you want discuss the matter, you can call or leave your phone number so that I can call you.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
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Albany, NY 12231
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OML-AO-3192

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August 3, 2000

Mr. Donald G. Symer
[redacted]

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

Dear Mr. Symer:

I have received your letter of June 29. You asked whether "the Open Meetings Law, based on the presumption of openness, precludes the [Town of Lancaster] Planning Board from disallowing non-disruptive use of video cameras by spectators during its regular meetings." If the use of video cameras is permissible, you asked what "immediate recourse is provided in the Law" when a public body refuses to permit their use.

In this regard, neither the Open Meetings Law, nor any other statute of which I am aware, addresses the matter of the use of recording devices at meetings of public bodies. However, there are several judicial decisions pertaining to the use of recording equipment at open meetings, and in my view, those decisions consistently apply certain principles. One is that a public body has the ability to adopt reasonable rules concerning its proceedings. The other involves whether the use of the equipment would be disruptive.

By way of background, until 1978, there had been but one judicial determination regarding the use of the 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 short, unless the use of a video camera is disruptive, I do not believe that the Planning Board or any public body may, according to judicial decisions, prohibit its use at a open meeting.

In terms of the possibility of "immediate recourse", I know of none. If it is known in advance that the use of recording equipment will be prohibited, it is possible that the person seeking to use the equipment may seek an injunction. My hope, however, is that members of public bodies will become familiar with judicial interpretations and recognize the spirit and intent of the Open Meetings Law.

In an effort to enhance their understanding of the issue, a copy of this opinion will be sent to the members of the Planning Board.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Planning Board, Town of Lancaster

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-12267
OML-AO-3193

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August 3, 2000

E-Mail

TO: Josepha Gutelius [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. Gutelius:

As you are aware, I have received your letter of July 5. You have raised a series of questions relating to the activities of the Festival Development Corporation ("the FDC"), which was created by the Town Board of the Town of Saugerties, initially to deal with the Woodstock Festival. The Board of Directors of the FDC consists of the five members of the Town Board, and that entity recently voted to use the proceeds from the Festival to build a new town hall. However, you wrote that the "Town Supervisor announced that there not be a public debate or discussion/hearing on the subject", and that the FDC "will continue to act as a private body negotiating with the seller, who will arrange the construction of the new Town Hall." Following its construction, the FDC will "donate" the building to the Town.

From my perspective, the FDC and its Board are subject to the same requirements under the Open Meetings and Freedom of Information Laws as the Town Board itself, for it is essentially the *alter ego* of the Town Board..

It is emphasized at the outset that the advisory jurisdiction of the Committee on Open Government involves the statutes cited above, and that several of your questions are beyond the scope of its jurisdiction or expertise. With respect to those issues, it is suggested that you contact the Office of the State Comptroller. As your questions relate to matters within the Committee's jurisdiction, I offer the following comments.

Judicial decisions indicate that not-for-profit corporations that are creations of government or which under substantial governmental control are subject to both the Open Meetings and Freedom of Information Laws.

By way of backgound, the Freedom of Information Law pertains to agency records, and §86(3) of that statute defines the term "agency" to mean:

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

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

However, there is precedent indicating that in some instances a not-for-profit corporation may indeed be an "agency" required to comply with the Freedom of Information Law. In Westchester-Rockland Newspapers v. Kimball [50 NYS 2d 575 (1980)], a case involving access to records relating to a lottery conducted by a volunteer fire company, the Court of Appeals, the state's highest court, 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].

In the same decision, the Court noted that:

> "...not only are the expanding boundaries of governmental activity increasingly difficult to draw, but in perception, if not in actuality, there is bound to be considerable crossover between governmental and nongovernmental activities, especially where both are carried on by the same person or persons" (id., 581).

The point made in the final sentence of the passage quoted above appears to be especially relevant, for there is clearly "considerable crossover" in the activities of town Board members in the performance of their duties for the Town government and the FDC.

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).

Based on the foregoing, since the relationship between the FDC and the Town of Saugerties is even more direct than that of the BEDC and the City of Buffalo, I believe that the FDC constitutes an "agency" required to comply with the Freedom of Information Law.

Because the Supervisor serves as the Chairman of the FDC and the members of the Town Board and the FDC Board are one and the same, it is clear that the Town of Saugerties exercises substantial control over the FDC. If that is so, I believe that the FDC constitutes an "agency" required to comply with the Freedom of Information Law. In brief, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

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

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

By breaking the definition into its components, I believe that each condition necessary to a finding that the board of FDC is a "public body" may be met. It is an entity for which a quorum is required pursuant to the provisions of the Not-for-Profit Corporation Law. It consists of more than two members. In view of its membership the degree of governmental control exercised by the Town, I believe that it conducts public business and performs a governmental function for a public corporation, in this instance, the Town of Saugerties. It is noted, too, that the same conclusion was reached recently in VanNess v. The Center for Animal Control (Supreme Court, New York County, January 28, 1999). In that instance, "The Center is a not-for profit corporation with its four Board members appointed by the Mayor, with three New York City Commissioners also sitting as *ex officio* Board members."

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

Lastly, you asked whether notice of a meeting must specify it purpose. Since the FDC Board is in my view a public body subject to the Open Meetings Law, it is required to provide notice in accordance with §104 of that statute, which states that:

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

I point out that the foregoing requires that notice of the time and place of a meeting must be given. Although a public body may include an indication of the subject matter to be considered, there is no obligation to do so.

I hope that I have been of assistance.

RJF:jm

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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August 8, 2000

Mr. Harold Oliver
[redacted]

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

Dear Mr. Oliver:

I have received your letter of July 5 in which you questioned the status of the Canandaigua Recreation Development Corporation ("the Corporation"), which was established by the City of Canandaigua. You wrote that the City "wants to build a water park financed by bonds using I.R.S. ruling 63-20" and that in order to comply with the tax ruling, the city established the corporation...." A document prepared by the City's Office of Development and Planning indicates that the City Council adopted resolutions to appoint the members of the Corporation's Board of Directors.

In this regard, judicial decisions indicate that not-for-profit- corporations that are creations of government are subject to both the Open Meetings Law and the Freedom of Information Law. That being so, from my perspective, the Corporation is required to comply with those statutes.

By way of background, the Freedom of Information Law pertains to agency records, and §86(3) of that statute defines the term "agency" to mean:

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

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

However, there is precedent indicating that in some instances a not-for-profit corporation may indeed be an "agency" required to comply with the Freedom of Information Law. In Westchester-Rockland Newspapers v. Kimball [50 NYS 2d 575 (1980)], a case involving access to records relating to a lottery conducted by a volunteer fire company, the Court of Appeals, the state's highest court, 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].

In the same decision, the Court noted that:

> "...not only are the expanding boundaries of governmental activity increasingly difficult to draw, but in perception, if not in actuality, there is bound to be considerable crossover between governmental and nongovernmental activities, especially where both are carried on by the same person or persons" (id., 581).

The point made in the final sentence of the passage quoted above appears to be especially relevant, for there is clearly "considerable crossover" in the activities of City officials in the performance of their duties for the City government and the Corporation.

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).

Based on the foregoing, since the relationship between the Corporation and the City of Canandaigua is analogous to that of the BEDC and the City of Buffalo, I believe that the Corporation constitutes an "agency" required to comply with the Freedom of Information Law.

Because the City Council appoints the members of the Corporation's Board of Directors, it is clear that the City exercises substantial control over the Corporation. If that is so, I believe that the Corporation constitutes an "agency" required to comply with the Freedom of Information Law. In brief, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

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

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

By breaking the definition into its components, I believe that each condition necessary to a finding that the board of the Corporation is a "public body" may be met. It is an entity for which a quorum is required pursuant to the provisions of the Not-for-Profit Corporation Law. It consists of more than two members. In view of its membership the degree of governmental control exercised by the City, I believe that it conducts public business and performs a governmental function for a public corporation, in this instance, the City of Canandaigua. It is noted, too, that the same conclusion was reached recently in VanNess v. The Center for Animal Control (Supreme Court, New York County, January 28, 1999). In that instance, "The Center is a not-for profit corporation with its four Board members appointed by the Mayor, with three New York City Commissioners also sitting as *ex officio* Board members."

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

In an effort to share the foregoing with City officials, a copy of this opinion will be forwarded to the City Council.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: City Council

STATE OF NEW YORK
DEPARTMENT OF STATE
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August 16, 2000

Ronald B. McGuire, Esq.
[redacted]

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

Dear Mr. McGuire:

I have received your letter of July 17 in which you questioned the status of personnel and budget committees created pursuant to CUNY bylaws under the Freedom of Information and Open Meetings Laws. You also referred to a provision in the bylaws requiring that the committees at issue vote by means of secret ballot.

From my perspective, the committees are subject to both statutes. In this regard, I offer the following comments.

First, by way of background, Section 8.9 of the bylaws adopted by the CUNY Board of Trustees states in subdivision a. that: "There shall be in each college....a committee on faculty personnel and budget or equivalent committee. The chairperson of this committee shall be the president. The members of the committee shall be a dean designated by the president and the department chairman." Subdivision b. states that:

> "This committee shall receive from the several departments all recommendations for appointments to the instructional staff, reappointments thereto, with or without tenure, and promotions therein, together with compensation; it shall recommend action thereon to the president. If the recommendations are adverse to the person concerned and if he/she considers himself/herself aggrieved within the terms and conditions of an existing collective negotiation agreement, he/she may avail himself/herself of the grievance procedure set forth in said agreement. The committee may also recommend to the president special salary increments. The president shall consider such recommendations in making his/her recommendations on such matters to the board."

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

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

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

In the decisions cited above, each of the entities had purely advisory functions. More analogous to the matter in my view is the decision rendered in MFY Legal Services v. Toia [402 NYS 2d 510 (1977)]. That case involved an advisory body created to advise the Commissioner of the State Department of Social Services. In MFY, it was found that "[a]lthough the duty of the committee is only to give advice which may be disregarded by the Commissioner, the Commissioner may, in some instances, be prohibited from acting before he receives that advice" (id. 511) and that, "[t]herefore, the giving of advice by the Committee either on their own volition or at the request of the Commissioner is a necessary governmental function for the proper actions of the Social Services Department" (id. 511-512).

Again, subdivision b. of Section 8.9 of the bylaws indicates that "The president *shall consider* the recommendations of a personnel and budget committee in making his/her recommendations...to the board." That being so, I believe that the committees at issue carry out necessary functions in the decision making process, perform a governmental function and, therefore, are public bodies subject to the Open Meetings Law.

In my opinion, the same conclusion can be reached by viewing the definition of "public body" in terms of its components. A personnel and budget committee is an entity consisting of at least two members; it is required in my view to conduct its business subject to quorum requirements (see General Construction Law, §41); and, based upon the preceding commentary, it conducts public business and performs a governmental function for a public corporation, i.e., the City of New York.

Next, the Freedom of Information Law is applicable to agencies, and §86(3) of that statute defines the term "agency" to include:

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

I believe that the entities in question may be characterized as "municipal...committees" or as governmental entities performing governmental functions for a municipality.

Lastly, Section 8.12 of the bylaws states in part that "The action of the committee shall be by secret ballot." In my view, insofar as a provision of a bylaw or similar enactment is inconsistent with the requirements of a statute, it is of no effect. In this instance, §87(3)(a) of the Freedom of Information Law requires that "Each agency shall maintain...a record setting forth the final vote of each member in every agency proceeding in which the member votes." In a case that you litigated, which also involved an entity functioning within CUNY, it was held that "Entities covered by the OML or the FOIL may not take action by secret ballot" Wallace v. The City University of New York, Supreme Court, New York County, NYLJ, July 7, 2000).

In sum, it is my opinion that the personnel and budget committees created pursuant to CUNY bylaws are required to comply with both the Freedom of Information and Open Meetings Laws. This is not to suggest, however, that meetings of those committees must be conducted open to the public in their entirety or that records generated by them must be disclosed in their entirety. I would conjecture that much of the deliberative process of the committees could be conducted in executive session pursuant §105(1)(f) of the Open Meetings Law, and that their recommendations could likely be withheld in great measure under §87(2)(g) of the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Roy Moskowitz
Dave Fields

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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August 22, 2000

Hon. Robert S. Pekarek
Town Councilman
[redacted]

The staff of the Committee on 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 Pekarek:

Your letter sent to the Office of the State Comptroller has been forwarded to the Committee on Open Government. The Committee, a unit of the Department of State, is authorized to offer advice and opinions concerning the Freedom of Information and Open Meetings Laws, and I will attempt to address the issues that you raised that relate to those statutes.

The first area of inquiry involves the time in which minutes must be prepared. In this regard, subdivision (3) of §106 of the Open Meetings Law states that:

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

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

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

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

With respect to the "recess" involving a meeting held on May 30 and recessed to June 20, it is my view that the second gathering constituted a new meeting. That meeting should have been preceded by notice given in accordance with §104 of the Open Meetings Law and, again, I believe that minutes of the meeting of May 30 were required to have been prepared and disclosed on request within two weeks of the meeting.

Second, you asked whether a person seeking records must provide a reason for the request. Here I direct your attention to the Freedom of Information Law. In general, a person seeking records under that statute need not offer a reason, and 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)].

You also asked whether you, as a member of the Town Board, can be required to pay for copies of records. In my view, 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 board rule or policy to the contrary, I believe that a member of the board 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 board, including a supervisor, member 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 right conferred upon a board member by means of law or rule. In such a case, a member seeking records could presumably be treated in the same manner as the public generally.

Lastly, you asked whether the Records Access Manager may refuse to make copies requested by the public and instead "tell them to come and look it up for themselves even if they have no way getting to her house."

Before considering the substance of your question, it is noted that the person designated by a town board, for example, to deal with requests for records is the "records access officer." That person, pursuant to the regulations promulgated by this office, has the duty of coordinating an agency's response to requests for records (see 21 NYCRR §1401.2).

With respect to the issue, I do not believe that an agency or its records access officer can require a person to travel to a town hall or the officer's home as a condition precedent to gaining

is willing to pay the appropriate fees for copying, the records access officer must, in my opinion, make copies of the records sought and mail them to the applicant. The applicant in that circumstance may also be required to pay for postage.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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August 22, 2000

Ms. Elizabeth Dean, President
Joint Civics of Lindenhurst
[redacted]

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

Dear Ms. Dean:

I have received your letter of July 14, which reached this office on July 24. On behalf of the Joint Civics of Lindenhurst, you have raised a series of questions and sought guidance concerning the operation of the Village of Lindenhurst.

As you may recall, the Committee on Open Government is authorized to offer opinions relating to the Freedom of Information and Open Meetings Laws. Consequently, my remarks will be limited to matters involving those statutes.

You referred initially to a request for a tape recording of a Village Board meeting that had not been answered. In this regard, first, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in

accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

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

Second, 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 upon the foregoing, a tape recording of a meeting prepared by a Village official would constitute a "record" that falls within the coverage of the Freedom of Information Law.

Further, 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 you were 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].

Since a person present at an open meeting of a public body could have tape recorded the proceedings [see Mitchell v. Board of Education of the Garden City Union Free School District, 113 AD 2d 924 (1985)], I do not believe that there would be a valid basis for withholding the tape, particularly since many were apparently present.

Next, you alluded to a request for records of the Center for the Community Interest. While I am not familiar with that organization, I point out that the Freedom of Information Law applies to agencies and that §86(3) defines the term "agency" to mean:

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

If the entity in question is not governmental in nature, the Freedom of Information Law would not be applicable.

In a matter relating to the Open Meetings Law, you indicated that the secretary to the Planning Board does not prepare minutes; she prepares only notes of meetings. In my view, the notes are inadequate and do not reflect compliance with law. The Open Meetings Law is applicable to meetings of public bodies, and §102 (2) of that statute defines the term "public body" to mean:

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

I believe that a village planning board clearly constitutes a "public body" that is subject to the requirements of the Open Meetings Law.

The Open Meetings Law offers direction concerning minutes and their contents and states in §106 that:

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

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

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

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

Lastly, as I understand the remaining area of inquiry, a resolution appears to have been adopted outside of a meeting. If that is so, relevant to the issue in my view is §41 of the General Construction Law which provides guidance concerning quorum and voting requirements. Specifically, the cited provision states that:

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

Based upon the language quoted above, a public body cannot carry out its powers or duties except by means of an affirmative vote of a majority of its total membership taken at a meeting duly held upon reasonable notice to all of the members.

Section 102(1) of the Open Meetings Law defines the term "meeting" to mean "the official convening of a public body for the purpose of conducting public business". Based upon an ordinary dictionary definition of "convene", that term means:

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

In view of the ordinary definition of "convene", I believe that a "convening" of a quorum requires the physical coming together of at least a majority of the total membership of a board of trustees, that a majority of a board would constitute a quorum, and that an affirmative majority of votes would be needed for a board to take action or to carry out its duties.

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

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

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

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

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

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Trustees
Planning Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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August 22, 2000

Mr. Thomas F. Moore
[redacted]

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

Dear Mr. Moore:

I have received your letter of July 18. You wrote that you are a new member of the Westhampton Beach Union Free School District Board of Education, and you questioned the propriety of several executive sessions held recently by the Board.

First, you referred to an executive session that was preceded by the following motion: "I move we enter into executive session"; there was no reference to the basis for the motion. In this regard, 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 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.

Next, you described an executive session held to discuss hiring a former Board member as a consultant. The discussion did not deal with that person's qualifications, but rather "on whether such a task of making revisions and additions to the board's policy...was a matter that should or should not be delegated to a private citizen", and whether the District should pay that person to travel to Albany to file the final policy with the State Education Department.

From my perspective, it is unlikely that there would have been any valid basis for conducting an executive session. The only provision of apparent significance, §105(1)(f), the so-called "personnel" exception, 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..."

When a discussion concerns matters of policy, such as whether private citizens should be retained to draft revisions to the Board's policy, the issue would not focus on the characteristics, strengths or weaknesses of a "particular person." That being so, and if your description of the executive session is accurate, I believe that the matter should have been discussed in public.

Lastly, you wrote that the Board conducted an executive session to discuss the drafting of a bond resolution. Present during the executive session with the Board and the superintendent were an architect, representatives of a construction company and a public relations firm, and the District's bond counsel. You indicated that the discussion began "with the architect and pertained to the scope of the proposed work" and then moved "to the propriety of the board's policy of seeking to expand the size of the school in order to accept more out-of-district students..." Bond counsel offered the opinion that the executive session was proper and then "proceeded to describe the various methods available to offer two bond proposals to the public..." You added that "[t]hese conversations were interspersed with various board inquiries directed to the representative of the public relations firm as to whether he thought either one or both bond propositions could be sold to the public and the pros and cons of various approaches to be used to achieve public support."

Based on your description of the executive session, it appears that the matters at issue should have been discussed in public. In short, in consideration of the eight grounds for entry into executive session appearing in §105(1) of the Open Meetings Law, I do not believe that any could properly have been asserted.

I note that, in addition to the executive session, another 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 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 the circumstance that you described, I do not believe that the discussions would have fallen within the ambit of the attorney-client privilege, for persons other than the client, i.e., the Board and other District officials, were present. Their presence, in my view, eliminated the possibility of reliance on the assertion of the attorney-client privilege as a basis for excluding the public from the meeting. Further, the representative of the public relations firm clearly would not have been offering legal advice, and as suggested earlier, a discussion of policy ordinarily would not fall within any of the grounds for entry into executive session.

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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OMC-AO-3199

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August 24, 2000

Trustee Wendy Lukas
[redacted]

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 Trustee Lukas:

I have received your memorandum of August 21, as well as your letter of July 24. As indicated to you by phone, for reasons unknown, your earlier communication did not reach this office. Nevertheless, I apologize for the delay in response.

You referred initially to minutes of the Joint Village of Schuylerville/Victory Water Commission, a creation of a statute, and the minutes of its meetings, which apparently are not available for a month following meetings. You asked what the consequences might be if minutes are not prepared within the statutory time. Additionally, you questioned whether the minutes should include reference to those who offer comments at meetings and noted that the minutes are "very subjective as to whose name and comments make it in the minutes."

In this regard, first, I believe that the Commission is required to comply with the Open Meetings Law. That statute is applicable to the 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."

The Commission 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 information you provided, it conducts public business and performs a governmental function for two public corporations, the Villages of Schuylerville and Victory.

Second, with respect to minutes of meetings, §106 of the Open Meetings Law states that:

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

Based on the foregoing, minutes need not consist of a verbatim account of everything that was said; on the contrary, so long as the minutes include the kinds of information described in §106, I believe that they would be appropriate and meet legal requirements. Certainly if a public body wants to include more information than is required by law, it may do so. From my perspective, in view of the language of §106, there is no obligation to include reference to comments made at meetings or the names of those who offered comments. However, in my opinion, inherent in every law is the principle that it must be implemented reasonably and fairly. If, for example, reference is made only to speakers who offer positive commentary, and no reference is made to those who offer criticism, I believe that a practice of that nature would be unreasonable. Stated differently, if the minutes are to include reference to those who offer comments and their names, I believe that they should include reference to all who do so.

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

With respect to the consequences of a failure to prepare minutes within two weeks, it is possible that a public body or officer could be compelled by a court to comply with law, and that attorneys' fees could be awarded to the member of the public initiating the proceeding.

The next area of inquiry relates to the "absence of Village records from the Village office." That practice has resulted in delays in the disclosure of records to you and perhaps others. Here I direct you to the Freedom of Information Law. That statute pertains to all records of an agency, such as a village, 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, whether records are kept at Village Hall or at the home of the Mayor or the Village Engineer is irrelevant; they would fall within the coverage of the Freedom of Information Law.

In my opinion, if records are being used by the Mayor, the Engineer or another Village official, it would reasonable for that person to maintain those records temporarily at his or her home during the time in which they are being used. However, when the records are not being actively used, I believe that they should be maintained by the Village Clerk. Section 4-402 of the Village Law states in part that the clerk "shall have custody of the corporate seal, books, records, and papers of the village and all the official reports and communications of the board of trustees." In addition, §57.19 of the Arts and Cultural Affairs Law states in part that village clerk is the "records management officer" for a village.

Further, §57.25 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..."

A failure to share records or to inform the clerk of their existence may effectively preclude the clerk from carrying out her duties as records management, officer or if she or someone else

designated as records access officer for purposes of responding to requests under the Freedom of Information Law, from complying with that statute.

Pursuant to subdivision (2) of §57.25 of the Arts and Cultural Affairs Law, local governments must retain records for certain periods before the records may be disposed of or destroyed. That provision states that:

> "No local officer shall destroy, sell or otherwise dispose of any public record without the consent of the commissioner of education. The commissioner of education shall, after consultation with other state agencies and with local government officers, determine the minimum length of time that records need to be retained. Such commissioner is authorized to develop, adopt by regulation, issue and distribute to local governments 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. That entity prepares detailed schedules indicating minimum retention periods for records typically maintained by villages. Records may be retained longer than the retention period.

With respect to your ability to obtain records, 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 member of a public body 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 public body generally act 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 acting unilaterally, without the consent or approval of a majority of the total membership of the public body, has the same rights as those accorded to a member of the public, unless there is some right conferred upon a member by means of law or rule. In such a case, a member seeking records could presumably be treated in the same manner as the public generally. When that is so, a request by a member of a public body could, in my opinion, be considered as a request made under the Freedom of Information Law by a member of the public, and that person could be assessed at the same rate as any member of the public.

When a request is made under the Freedom of Information Law, that statute provides direction concerning the time and manner in which an agency must respond. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

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

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

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

Lastly, you asked whether it is proper for the Mayor to serve as the paid secretary to the Commission. Since the advisory jurisdiction of this office is limited to matters relating to public access to government information, that question is beyond the scope of our expertise or jurisdiction. It is suggested that you raise the issue with the Village Attorney or contact the Division of Appeals and Opinions at the Office of the Attorney General at 474-3429.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

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August 28, 2000

Ms. Linda Mangano
[redacted]

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

Dear Ms. Mangano:

I have received your letter of July 26. You complained that the agendas prepared prior to meetings of the Board of Trustees of the Village of Ossining are incomplete and frequently changed, and that the documents to be used by the Board at meetings are not disclosed before meetings. You asked whether "there [is] anything that can be done about the Village's failure to FULLY INFORM the public 72 hours prior to a meeting as to what PRECISELY will be discussed at a meeting" (emphasis yours).

From my perspective, there is no requirement that a public body fully inform the public of the subjects to be considered at a meeting. In this regard, I offer the following comments.

First, §104 of the Open Meetings Law pertains to notice of meetings, and that provision merely requires that notice of a meeting indicate the time and place of the meeting; there is no requirement that the subjects to considered be included in the notice.

Second, in a similar vein, there is nothing in the Open Meetings Law or any other statute of which I am aware that requires that an agenda be prepared prior to a meeting. Further, even if an agenda has been prepared, there is no general requirement that a public body follow the agenda.

Third, with respect to the materials prepared or distributed to Board members prior to a meeting, which some have characterized as an "agenda packet", I direct your attention to the Freedom of Information Law. As you are aware, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, the contents of the records in question serve as the factors relevant to an analysis of the extent to which the records may be withheld or must be disclosed. In my view, several of the grounds for denial may be relevant to such an analysis.

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

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

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

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

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

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

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

Section 87(2)(c) of the Freedom of Information Law permits an agency to withhold records to the extent that disclosure "would impair present or imminent contract awards or collective

bargaining negotiations". Items within an agenda packet might in some instances fall within that exception.

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

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

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

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

It is also emphasized that the grounds for withholding records under the Freedom of Information Law and the grounds for entry into executive session are separate and distinct, and that they are not necessarily consistent. In some instances, although a record might be withheld under the Freedom of Information Law, a discussion of that record might be required to be conducted in public under the Open Meetings Law, and vice versa. For instance, if an administrator transmits a memorandum to the Board suggesting a change in policy, that record could be withheld. It would consist of intra-agency material reflective of an opinion or recommendation. Nevertheless, when the Board discusses the recommendation at a meeting, there would be no basis for conducting an executive session. Consequently, there may be no significant reason for withholding the record even though the Freedom of Information Law would so permit.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Trustees

STATE OF NEW YORK
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August 29, 2000

Ms. Mona Goodman
[redacted]

The staff of the Committee on 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. Goodman:

I have received your letter of July 21. You described a situation in which the City of Long Beach Zoning Board of Appeals took action "after a ten minute session behind closed doors without notification of such..." Further, although you intended to send the minutes of the meeting for review, they had not been made available, even though nearly a month had passed since the meeting.

In this regard, first, it does not appear that the Board could validly have considered the matter in private. By way of background, numerous problems and conflicting interpretations arose under the Open Meetings Law as originally enacted with respect to the deliberations of zoning boards of appeals. In §108(1), the Law had exempted from its coverage "quasi-judicial proceedings". When a zoning board of appeals deliberated toward a decision, its deliberations were often considered "quasi-judicial" and, therefore, outside the requirements of the Open Meetings Law. As such, those deliberations could be conducted in private. Nevertheless, in 1983, the Open Meetings Law was amended. In brief, the amendment to the Law indicates that the exemption regarding quasi-judicial proceedings may not be asserted by a zoning board of appeals. As a consequence, zoning boards of appeals are required to conduct their meetings pursuant to the same requirements as other public bodies subject to the Open Meetings Law. Stated differently, due to the amendment, a zoning board of appeals must deliberate in public, except to the extent that a topic may justifiably be considered during an executive session or in conjunction with an exemption other than §108(1).

Under the circumstances that you described, I do not believe that the Zoning Board could validly have conducted an executive session. Paragraphs (a) through (h) of §105(1) of the Open Meetings Law specify and limit the grounds for entry into an executive session. Unless one or more of those topics arises, a zoning board of appeals must deliberate in public. None of the grounds for entry into executive session appear to have been pertinent.

Second, §106 of the Open Meetings Law concerns minutes of meetings and states that:

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

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

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Zoning Board of Appeals

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-12312
OML-AO-3202

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September 5, 2000

Ms. Sandra G. Mallah
Superintendent of Schools
Greenburgh Eleven Union Free School District
P.O. Box 501
Dobbs Ferry, NY 10522-0501

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

Dear Superintendent Mallah:

I appreciate having received a copy of your determination of an appeal made under the Freedom of Information Law rendered on August 4. In response to a request for minutes of an executive session, you wrote that "the records and minutes of an executive session conducted pursuant to the provisions of Section 105 of the Public Officers Law are exempt from disclosure under the Freedom of Information Law."

From my perspective, your understanding of the matter is inaccurate. In this regard, §106 of the Open Meetings Law pertains to minutes and states that:

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

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

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. Those minutes are available to the extent required by the Freedom of Information Law. If no action is taken, there is no requirement that minutes of the executive session be prepared.

I note, too, that various interpretations of the Education Law, §1708(3) indicate that, except in situations in which action during a closed session is permitted or required by statute, a school board cannot take action during an executive session [see United Teachers of Northport v. Northport Union Free School District, 50 AD 2d 897 (1975); Kursch et al. v. Board of Education, Union Free School District #1, Town of North Hempstead, Nassau County, 7 AD 2d 922 (1959); Sanna v. Lindenhurst, 107 Misc. 2d 267, modified 85 AD 2d 157, aff'd 58 NY 2d 626 (1982)]. Stated differently, based upon judicial interpretations of the Education Law, a school board generally cannot vote during an executive session, except in rare circumstances in which a statute permits or requires such a vote. If no vote is taken, again, 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:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12313
OML-AO-3203

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

September 5, 2000

Ms. Judy Freeman
[redacted]

Dear Ms. Freeman:

I have received your letter of August 9. In your capacity as a member of the City of Auburn Board of Education, you have sought an advisory opinion concerning the propriety of an executive session held to discuss two matters.

With regard to the first, you wrote that the administration wanted to know whether the Board favored "reinstating bus aides who were eliminated in the 2000-2001 budget", that the Board "was polled and each member was given the opportunity to express an opinion and vote yes or no", and that "[t]he majority favored not reinstating the bus aides." The second involved an explanation of the "the interview process for the assistant principal position" at a certain school and "the desire to offer the position to one individual whose name was given." Again, the Board was polled, and a majority "favored offering that individual the position."

In this regard, I offer the following comments.

First, 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.

Second, 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 "personnel" 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".

In the context of the issues that you described, the first concerning the reinstatement of bus aides should, in my opinion, have been discussed in public. The focus would not have apparently involved any "particular person"; on the contrary, the matter appears to have related to the needs and resources of the District. With regard to the second, an explanation of the interview process should have been considered in public in my opinion; again, that aspect of the discussion would not have

focused on a particular person, but rather a procedure. The other aspect of the discussion apparently did focus on a named individual, and if that is so, it could have been conducted in executive session pursuant to §105(1)(f).

Third, it is unclear on the basis of your letter whether votes were cast or action taken. Here I direct your attention to §106 of the Open Meetings Law, which pertains to minutes and states that:

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

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. Those minutes are available to the extent required by the Freedom of Information Law. If no action is taken, there is no requirement that minutes of the executive session be prepared.

Lastly, if a public body reaches a consensus upon which it relies, I believe that minutes reflective of decisions reached must be prepared and made available. In Previdi v. Hirsch [524 NYS 2d 643 (1988)], the issue involved access to records, i.e., minutes of executive sessions held under the Open Meetings Law. Although it was assumed by the court that the executive sessions were properly held, it was found that "this was no basis for respondents to avoid publication of minutes pertaining to the 'final determination' of any action, and 'the date and vote thereon'" (id., 646). The court stated that:

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

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

Therefore, if the Board reached a "consensus" 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; on the contrary, if a final action is taken, a record must be prepared that indicates how each member cast his or her vote.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12319
OML-AO-3204

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September 11, 2000

E-Mail

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 Ms. Berger:

I have received your letter of August 9 concerning difficulties that you have encountered relative to the Village of Elmsford Zoning Board of Appeals.

The first issue that you described concerns what appears to be an unwritten policy that receipts be presented as proof of mailing before the Board would approve your application to build a deck onto your home. In this regard, the advisory jurisdiction of the Committee relates to matters involving the Freedom of Information and Open Meetings Laws. Neither of those statutes deals with the issue, and I cannot appropriately address it.

The second issue involves your efforts in obtaining a stenographic transcript of a meeting, and I believe that both of the statutes cited above are pertinent.

It is noted at the outset that the Open Meetings Law offers direction on the subject and provides what might be characterized as minimum requirements concerning the contents of minutes. Specifically, §106 of that statute states that:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.

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

Based upon the foregoing, although minutes must be prepared and made available within two weeks, it is clear that minutes need not consist of a verbatim account of every comment that was made. A public body, such as the Zoning Board of Appeals, may choose to prepare a stenographic transcript of a meeting, but the transcript typically is separate from the minutes. Minutes are generally not verbatim, but rather a summary of the kinds of activities described in subdivision (1) of §106 that occur at a meeting.

As indicated in subdivision (3) of §106, the Open Meetings Law, minutes of open meetings must be prepared and made available within two weeks, and I point out there is nothing in that statute or any other statute of which I am aware that requires that minutes be approved. Nevertheless, as a matter of practice or policy, many public bodies approve minutes of their meetings. In the event that minutes have not been approved, to comply with the Open Meetings Law, it has consistently been advised that minutes be prepared and made available within two weeks, and that they may be marked "unapproved", "draft" or "non-final", for example. By so doing within the requisite time limitations, the public can generally know what transpired at a meeting; concurrently, the public is effectively notified that the minutes are subject to change.

Lastly, assuming that the minutes are separate from a stenographic transcript, I note that there is no requirement that a transcript be prepared. That being so, I do not believe that there is any time limit within which a transcript must be prepared. Once it is prepared, however, it would fall within the coverage of the Freedom of Information Law. That statute pertains to agency records, and §86(4) defines the term "record" expansively to mean:

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

Based on the foregoing, as soon as a transcript of a meeting of the Board exists, it would constitute a "record" subject to rights of access.

In brief, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, a transcript of an open meeting would be available, for none of the grounds of denial could justifiably be asserted. Further, anyone present would have had the right to record the proceedings [see e.g., Mitchell v. Board of Education, 113 AD2d 924 (1985)].

I hope that I have been of assistance.

RJF:jm

cc: Zoning Board of Appeals

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3205

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

September 12, 2000

Mr. Robert Sears
[redacted]

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

Dear Mr. Sears:

I have received your letter of August 3, as well as related correspondence, all of which deals with procedures followed by the Board of Trustees of the Village of Elmira Heights at its meetings. Having reviewed the materials, I offer the following comments.

First, Robert's Rules is not law, and there is no obligation on the part of a public body to follow Robert's Rules. On the contrary, I believe that those rules are unnecessarily complex and confusing and that they may, in some instances, be contrary to law. Pursuant to subdivision (2) of §4-412 of the Village Law, the Board of Trustees "may determine the rules of its procedure." Section 4-400 states that it is the Mayor's responsibility to "preside at meetings of the board of trustees." As such, the Mayor has the ability to ensure that rules of procedure relating to the conduct of the meeting are followed.

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

While public bodies have the right to adopt rules to govern their own proceedings, the courts have found in a variety of contexts that such rules must be reasonable. For example, although a board of education may "adopt by laws and rules for its government and operations", in a case in which a board's rule prohibited the use of tape recorders at its meetings, the Appellate Division found

that the rule was unreasonable, stating that the authority to adopt rules "is not unbridled" and that "unreasonable rules will not be sanctioned" [see Mitchell v. Garden City Union Free School District, 113 AD 2d 924, 925 (1985)]. Similarly, if by rule, a public body chose to permit certain citizens to address it for ten minutes while permitting others to address it for three, or not at all, such a rule, in my view, would be unreasonable.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-12324
OML-AO-3206

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September 18, 2000

Ms. Sally Sonne
[redacted]

The staff of the Committee on 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. Sonne:

I have received your letter of September 17 in which you questioned the sufficiency of motions by the Board of Trustees of the Village of Tuxedo Park to enter to executive session that described the subject matter as "litigation" and "personnel." Additionally, you asked whether the Board may "conduct all of their discussion of a 3-year police contract in executive session....and not reveal its content to the public at the next public meeting."

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

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

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

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

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

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

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

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

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

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 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 the discussion of the police contract, it is assumed that the matter involves a public employee union. If that is so, §105(1)(e) would be pertinent. That provision permits a public body to enter into executive session to discuss "collective negotiations pursuant to article fourteen of the civil service law." Article 14 is commonly known as the Taylor Law, and it deals with the relationship between a public employer (i.e., a village) and a public employee union. Therefore, insofar as the Board discussed or engaged in collective bargaining negotiations involving a police union, I believe that executive sessions could properly have been held. If there is no union, it is unlikely that there would have been any basis for conducting an executive session.

Lastly, with respect to rights of access to the content of a contract that has been approved, I direct your attention to the Freedom of Information Law. That statute, in brief, is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

From my perspective, only one of the grounds for denial would be relevant. Section 87(2)(c) permits an agency to withhold records to the extent that disclosure "would impair present or imminent contract awards or collective bargaining negotiations." Since an agreement would effectively end the negotiations, I believe that the contents of records reflective of the elements of the agreement would be accessible. I recognize that there may be no written contract immediately

in existence; nevertheless, in my view, other records that contain the points upon which there was agreement must in my view be disclosed.

In an effort to enhance compliance with and understanding of the Open Meetings and Freedom of Information Laws, a copy of this response will be sent to the Board of Trustees.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees

FOIL-AO-12325
OML-AO-3201

From: Robert Freeman
To: Internet:tbarnes@suffolk.lib.ny.us
Date: 9/18/00 5:18PM
Subject: You have asked what term "available" means in the context of minutes of meetings being made "availab

You have asked what term "available" means in the context of minutes of meetings being made "available" under the Open Meetings Law.

In this regard, subdivision of (3) of §106 of the Open Meetings Law requires that minutes of open meetings be prepared and made available within two weeks. Based on the direction provided by the Freedom of Information Law, "available" in my view means being made accessible to the public for inspection and copying, again, within two weeks of a meeting to which the minutes pertain.

If you have additional questions, please feel free to contact me.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
Albany, NY 12231
(518) 474-2518 - Phone
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Website - www.dos.state.ny.us/coog/coogwww.html

FOIL-AO-12333
OML-AO-3208

From: Robert Freeman
To: [redacted]
Date: 10/6/00 9:47AM
Subject: Dear Ms. Cudequest:

Dear Ms. Cudequest:

This a mountain out of a molehill. Anyone can tape record an open meeting so long as the device is used in a manner that is not disruptive or obtrusive. Also, regulations indicate that tape recordings of meetings must be retained for a minimum of four months; after that time, they can be erased or destroyed.

Robert J. Freeman
Executive Director
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OMC-AO-3209

41 State Street, Albany, New York 12231
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October 10, 2000

Hon. Arthur DeAngelis
Mayor
The Village of Elmsford
15 South Stone Avenue
Elmsford, NY 10523

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

Dear Mayor DeAngelis:

I have received your letter of July 20, and in all honesty, it had been filed until you called recently. Based on my review of the letter, you did not raise questions or seek an advisory opinion, and I did not believe that you expected a written response. However, based on our brief discussion, I offer the following comments.

First, with respect to meeting held to "join forces" in a lawsuit, as you are aware, the Open Meetings Law is based on a presumption of openness. Stated differently, meetings of public bodies must be conducted open to the public, except to the extent that an executive session may 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.

The 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.

If my memory is correct, when I was called regarding the matter, I was informed that the Board intended to meet with its adversary, and my opinion was that, in that circumstance, there would have been no basis for conducting an executive session. However, if, as you indicated, the meeting was held with a party in interest, an ally in litigation, I believe that an executive session could properly have been held.

Second, you referred to work sessions and that three of the members of the Board "want all their friends to sit at the Board table." You wrote that seats at the table are assigned to Village officials and that others can use folding chairs. I know of no provision that specifies where members of a public body or others should sit at a meeting. However, §4-412 of the Village Law, which pertains to boards of trustees, states in part in subdivision (2) that "The board may determine the rules of its procedure..." In my view, the issue could be resolved by means of a rule adopted by the Board.

Third, you referred to gatherings of three members of the Board meeting at the home of one of them to "plan their moves." If the Board consists of five members and three of them gather to discuss public business, the gathering would appear to be subject to the requirements of the Open Meetings Law. By way of background, it is noted that the definition of "meeting" has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be convened open to the public, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

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

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

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

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

Based upon the direction given by the courts, if a majority of a public body gathers to discuss public business, any such gathering, in my opinion, would ordinarily constitute a "meeting" subject to the Open Meetings Law that must be preceded by notice given in accordance with §104 of the Law.

Lastly, on the basis of your comments, it appears to be your belief that information expressed or acquired during an executive session is confidential. In general, I do not believe that to be so. 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 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 a case in which the issue was whether discussions occurring during an executive session held by a school board could be considered "privileged", it was held that "there is no statutory provision that describes the matter dealt with at such a session as confidential or which in any way restricts the participants from disclosing what took place" (Runyon v. Board of Edcuation, West Hempstead Union Free School District No. 27, Supreme Court, Nassau County, January 29, 1987).

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
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October 12, 2000

Ms. Jody Adams
[redacted]

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

Dear Ms. Adams:

I have received your letter of August 16 and the materials attached to it . You have raised a series of issues relating to the implementation of the Freedom of Information and Open Meetings Laws by the Town of Southold.

You referred initially to an agenda listing subjects to be considered by the Town Board in executive session and asked whether more specificity is required. The subjects were identified as "real estate", "contracts", "litigation" and "negotiations." In this regard, there is nothing in the Open Meetings Law or any other statute of which I am aware that requires that an agenda be prepared or followed. As such, there is no obligation that an agenda include more specific information than that presented.

However, as you may be aware, §105(1) of the Open Meetings Law requires that an executive session may be held only after having accomplished a procedure during an open meeting, and one element of the procedure includes a motion for entry into executive session that indicates the subject to be discussed. In my view, irrespective of the manner in which items appear on an agenda, a public body would be complying with that aspect of the law if its motions for entry into executive session include sufficient detail to enable the public to know, with reasonable certainty, that the subject may properly be considered during an executive session. For instance, it has been held that a motion that merely reiterates the statutory of an exception, i.e., "proposed, pending or current litigation", is inadequate, and that a motion under that provision should name the litigation [see Daily Gazette v. Town of Cobleskill, 444 NYS2d 44 (1981)]. A proper motion might be: "I move to enter into executive session to discuss the case of the XYZ Corp. v. the Town of Southold." Similarly, if a matter involves collective bargaining negotiations, it has been held that a motion should identify the union with which the agency is negotiating, i.e., "I move to enter into executive session to discuss the negotiations with the police union" (Doolittle v. Board of Education, Supreme Court, Chemung County, July 21, 1981).

Your next area of inquiry involves the "legally mandated procedure" in relation to the disclosure of certain records prior to a public hearing. The procedure relative to hearings may differ from one situation to the next; there is no generally applicable "legally mandated procedure" of which I am aware. For example, towns, villages and school districts must conduct public hearings prior to the adoption of their budgets; those hearings are not held under any general provision of law, but rather under specific provisions of the Town Law, the Village Law and the Education Law, and each such provision is unique. Moreover, the question does not directly involve within the advisory jurisdiction of the Committee on Open Government.

Next, you referred to the time in which agencies should respond to requests for records and asked who enforces the requirements imposed by the Freedom of Information Law. That statute 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..."

Based on the foregoing, an agency must grant access to records, deny access or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgement is given, it must include an approximate date indicating when it can be anticipated that a request will be granted or denied. The acknowledgement by the records access officer did not make reference to such a date.

I note that 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.

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)].

There is no agency that enforces the Freedom of Information Law. If a person believes that an agency has failed to comply with law, he or she may initiate a proceeding under Article 78 of the Civil Practice Law and Rules.

Lastly, you asked what you might do if you are informed that a request is "too general." From my perspective, the issue involves whether or the extent to which a 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 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. 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 the request, to that extent, the request would not in my opinion meet the standard of reasonably describing the records. If, for instance, a request is made for complaints made to the Building Department, and the Department maintains all complaints in a single central file, I believe that the request would meet the standard that a request be reasonably described. If, however, complaints are filed with records pertaining to individual properties and can be located only by reviewing records individually relating to every property in the Town, I do not believe that the request would meet that standard. It is suggested that you ascertain how records are kept or filed in order to attempt to ensure that requests are made in a manner consistent with an agency's filing or record-keeping system.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board
Elizabeth A. Neville, Town Clerk

STATE OF NEW YORK
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October 17, 2000

TO: "david d stone"<[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, unless otherwise indicated.

Dear Mr. Stone:

As you are aware, I have received your letter of August 20. Please accept my apologies for the delay in response.

You questioned the propriety of an executive session held by the Village of Fort Plain Board of Trustees to "adjust the proposed budget by eliminating the dog warden position..." You asked what recourse there might be if the Open Meetings Law is violated and whether information acquired during an executive session is confidential. In this regard, I offer the following comments.

First, I do not believe that a public body, such as a village board of trustees, may validly discuss the elimination of a position during an executive session. As 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.

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

The application 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).

Second, with respect to your "recourse", 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 Trustees. While it cannot alter events of the past, my hope is that the opinion will be educational and persuasive, and that it will have an impact on the Board's activities in the future. In addition, if a person believes that the statute has been or will be violated, §107(1) of the Open Meetings Law states in part that:

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

Further, subdivision (2) of §107 provides that a court may award attorneys' fees to the successful party.

Lastly, 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 right to do so. The introductory language of §105(1), which prescribes a procedure that must be accomplished before an executive session may be held, clearly indicates that a public body "may" conduct an executive session only after having completed 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 occurring during an executive session held by a school board could be considered "privileged", it was held that "there is no statutory provision that describes the matter dealt with at such a session as confidential or which in any way restricts the participants from disclosing what took place" (Runyon v. Board of Edcuation, West Hempstead Union Free School District No. 27, Supreme Court, Nassau County, January 29, 1987).

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

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

On the other hand, if a disclosure involves information considered during an executive session that was improperly held, I do not believe that it would be inappropriate to divulge information that should have been discussed during an open meeting.

I hope that I have been of assistance.

cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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Committee Members

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October 17, 2000

E-Mail

TO: Elizabeth Passer [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, unless otherwise indicated.

Dear Ms. Passer:

I have received your letter of August 18 in which you sought assistance in obtaining the names of individuals who purchased bricks to be placed in a walkway at the Mexico High School whose bricks were removed. You indicated that letters were sent by the District to those persons, and that it is your understanding that the letters do not include the language of the inscriptions that had appeared on the bricks. You added that the District might have indicated in the letters that the bricks had been removed and destroyed "due to religious or political content."

If your assumptions are accurate, I believe that the names of the individuals in question must be disclosed. In this regard, I offer the following comments.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. I point out that the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within one or more of the grounds for denial that follow. The phrase highlighted in the preceding sentence in my view evidences a recognition on the part of the State Legislature that in some instances a single record might include both accessible and deniable information, and that it is an agency's duty to disclose those portions that do not fall within an exception to rights of access..

Under the circumstances, it appears that only one of the grounds for denial is pertinent to the matter. Specifically, §87(2)(b) states that an agency may withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." According to the Court of Appeals, the State's highest court, "the essence of exemption" involves an intent to enable an agency to withhold items "that would ordinarily and reasonably be regarded as intimate, private information" [Hanig v. State Department of Motor Vehicles, 79 NY2d 106, 112 (1992)].

From my perspective, insofar as information found within a record names an individual and also expresses a religious belief, for example, since such belief is inherently personal, either the name or the expression of the religious belief could be withheld; the combination of the name and the indication of one's personal belief would, in my view, constitute information of an intimate, personal nature, and therefore, would result in an unwarranted invasion of personal privacy if disclosed. Similarly, if a record of the inscription on a brick included a statement reflective of one's views on a political matter (i.e., in favor of or against abortion, gun control, a particular candidate or office holder), that information coupled with one's identity would in my opinion constitute an unwarranted invasion of privacy if made available to the general public.

However, if the portion of a record indicating one's religious or political belief is deleted, and the remainder of the record merely includes a name, I do not believe that disclosure of the name alone would, if disclosed, result in an unwarranted invasion of personal privacy. In short, without the information reflective of one's personal belief, there would be nothing intimate involved in merely disclosing the name. For that reason, if the District maintains a record or records indicating that bricks had been removed, the names of those whose bricks were removed should be disclosed. If such a record or records also include intimate, personal information, such as an indication of one's religious or personal beliefs, those portions may in my view be withheld in accordance with commentary offered in the preceding paragraphs.

You also referred by phone to a recent executive session held by the Board of Education prior to a meeting, and you indicated that the Superintendent asserted that it was proper do so. If that is his contention, I respectfully disagree.

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

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

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

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

> "The respondent Board prepared an agenda for each of the five designated regularly scheduled meetings in advance of the time that

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

For the reasons expressed in the preceding commentary, a public body cannot in my view schedule an executive session in advance of a meeting. In short, because a vote to enter into an executive session must be made and carried by a majority vote of the total membership during an open meeting, it cannot be known in advance of that vote that the motion will indeed be approved.

In an effort to enhance compliance with and understanding of the Freedom of Information and Open Meetings Laws, copies of this opinion will be sent to the Board of Education and the Superintendent.

I hope that I have been of assistance.

RJF:jm

cc: Board of Education
Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
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October 18, 2000

Mr. Howard I. Block
[redacted]

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

Dear Mr. Block:

I have received your letter in which you wrote that the Franklin Square & Munson Fire District failed to produce the records that you requested and asked which department might assist you. The records sought include minutes of meetings and copies "fuel inventory forms" and reports of mileage on vehicles.

In this regard, this office, the Committee on Open Government, a unit of the Department of State, is authorized by law to offer advice and guidance concerning the Freedom of Information Law. While the advisory opinions rendered by the Committee are not binding, it is our hope that they are educational and persuasive, and that they encourage compliance with law when transmitted to agencies.

With respect to the matter that you described, first, the Freedom of Information Law is applicable to agency records, and §86(3) of that statute defines the term "agency" to mean:

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

A fire district is a public corporation [see General Construction Law, §66, and Town Law, §174(7)]. Consequently, I believe that a fire district is required to comply with the Freedom of Information Law.

Second, I point out that the Freedom of Information Law, pertains to existing records, and that §89(3) states in part that an agency is ordinarily not required to create a record in response to a request. Therefore, if, for example, there are no records indicating mileage on vehicles, the District would not be obliged to prepare new records containing the information sought.

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

From my perspective, if fuel inventory forms or records indicating mileage exist for the periods to which you referred, they must be disclosed, for none of the grounds for denial would apply. It is noted that §87(2)(g)(i) specifies that "statistical or factual tabulations or data" found within internal agency materials must be disclosed, unless a separate basis for denial may be properly cited.

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

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

Based on the foregoing, it is clear that minutes of meetings of the Board of Fire Commissioners must be prepared and made available within two weeks.

As suggested above, in an effort to enhance compliance with and understanding of applicable law, a copy of this opinion will be sent to the Board of Fire Commissioners.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Fire Commissioners

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-12348
OML-AO-3214

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October 19, 2000

Mr. Robert Williams
[redacted]

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

Dear Mr. Williams:

I have received your letter of August 30 in which you raised a series of questions relating to the Village of Elmsford.

First, if a member of the Board of Trustees "E-Mails the Village Clerk instructing her to perform tasks and pass on instructions to the Building Inspector and the Mayor", you asked whether the e-mail is "subject to FOIL." In this regard, the Freedom of Information Law pertains to all agency records, and §86(4) of that statute defines the term "record" expansively to include:

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

Based on the foregoing, I believe that an e-mail communication between Village officials would clearly constitute a "record" that falls within the coverage of the Freedom of Information Law.

As a general matter, that 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.

Pertinent to the matter is §87(2)(g), which enables an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld. Whether a single trustee has the authority to "instruct" is questionable. Nevertheless, if the communication could be characterized as an "instruction to staff that affects the public", I believe that it would be accessible under §87(2)(g)(ii).

Second, if three trustees meet or otherwise communicate and instruct the clerk to carry out certain activities, you asked whether "this is in violation of the Open Meetings Law." In my view, a board of trustees may exercise its authority only at a meeting during which a majority is physically present that is preceded by notice to all of the members.

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

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

Based on the foregoing, a village board of trustees clearly constitutes a "public body."

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

"Whenever three of more public officers are given any power or authority, or three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of the whole number of such persons or officers, gathered together in the presence of each other or through the use of videoconferencing, 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, even if a majority of the Board is present, but they convene without informing the other two members, there would be no quorum, and the three would have no authority, in my view, to vote or otherwise take action.

Third, you asked whether you must submit separate requests for each record sought under the Freedom of Information Law. There is no statutory limitation on the number of records that may be requested in a single application for records, and there is no requirement that each record sought must be requested separately.

Fourth, if I understand the question accurately, you asked whether draft minutes may be changed before a meeting and then later approved with the alteration. Pursuant to the Village Law, §4-402, the village clerk has the duty to "act as clerk of the board of trustees...and shall keep a record of their proceedings." Based on that provision, I believe that the clerk is responsible for preparing minutes, and that the minutes that he or she prepares can be amended or altered only at a meeting of the board of trustees.

Lastly, you referred to a meeting that "doesn't get noticed anywhere." 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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees
Village Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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OMC-AO-3215

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October 23, 2000

TO: Amy Csorny <[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, unless otherwise indicated.

Dear Ms. Csorny:

I have received your letter, as well as a videotape of a meeting held by the Shoreham-Wading River School District Board of Education. The Board is considering the adoption of a policy that would enable a person present at an open meeting to ask that the use of audio or video equipment be discontinued. Such a request could be granted by the Board president, unless overruled by a majority of the Board.

During the Board's discussion of the issue, the Superintendent suggested that videotapes of meetings may be intended to be used as a "political mechanism" and would cause divisiveness in the District. A Board member echoed that view and suggested that videotaping a meeting is "inherently more obtrusive" and "inherently more likely to detract from the deliberative process" than audio recording. In essence, he opined that the use of video recording devices discourages people from speaking at meetings, for it is intimidating to some. It was also stated that the Board was advised that the proposed policy would "pass legal muster."

Based on judicial decisions, the proposed policy would not, in my view, pass legal muster. While it is true that the terms used during the discussion by the Board appear in those decisions, the courts have referred to the nature and use of the equipment being obtrusive or disruptive, rather than the impact on or sensibilities or preferences of persons who might speak at meetings. You have raised a variety of issues relating to the matter, and although I will not address them separately or conjecture as to the questions dealing with the possibility of arrests, the following paragraphs will deal the substance of those issues.

It is noted at the outset that the Open Meetings Law is applicable to meetings of public bodies, such as boards of education, and that any gathering of a public body for the purpose of

conducting public business, collectively, as a body constitutes a "meeting" that falls within the coverage of that statute [see Open Meetings Law, §102(1) and (2)].

The decision to which you referred, Peloquin v. Arsenault [162 Misc. 2d 306, 616 NYS2d 716 (1994)], is the only decision of which I am aware that deals with the use of video recording devices at open meetings. However, it is the latest in a series of decisions pertaining to the use of recording equipment at meetings. In my opinion, those decisions consistently apply certain principles. One is that a public body has the ability to adopt reasonable rules concerning its proceedings. The other involves whether the use of the equipment would be disruptive.

By way of background, until 1978, there had been but one judicial determination regarding the use of the recording devices at meetings of public bodies. 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, which at that time was a large, conspicuous machine, 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 case 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"(id., 509-510; emphasis mine).

Several years later, the Appellate Division, Second Department, which includes Suffolk County, 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).

In consideration of the "obtrusiveness" or distraction caused by the presence of a tape recorder, it was determined by the Court that " the unsupervised recording of public comment by portable , hand-held tape recorders is not obtrusive, and will not distract from the true deliberative process" (id., 925). Further, the Court found that the comments of members of the public, as well as public officials, may be recorded. As stated in Mitchell:

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

In short, the nature and use of the equipment were the factors considered by the Court in determining whether its presence affected the deliberative process, not the privacy or sensibilities of those who chose to speak.

In view of the judicial determination rendered by the Appellate Division, a member of the public may tape record open meetings of public bodies, so long as tape recording is carried out unobtrusively and in a manner that does not detract from the deliberative process. While Mitchell pertained to the use of audio tape recorders, I believe that the same points as those offered by the Court would be applicable in the context of the use of video recorders. Just as the words of members of the public can be heard at open meetings, those persons can also been seen by anyone who attends.

In Peloquin, supra, the court focused primarily on the manner in which camera equipment is physically used and found that the unobtrusive use of cameras at open meetings could not be prohibited by means of a "blanket ban." The Court expansively discussed the notion of what may be "obtrusive" and referred to the Mitchell holding and quoted from an opinion rendered by this office as follows:

> "On August 26, 1986 the Executive Director of the Committee on Open Government opined (OML-AO-1317, p.3) with respect to *video* recording as follows:
>
> > 'If the equipment is large, if special *lighting* is needed, and if it is obtrusive and distracting, I believe that a rule prohibiting its use under those circumstances would be reasonable. However, if advances in technology permit video equipment to be used without special lighting, in a stationary location and in an unobtrusive manner, it is questionable in my view whether a prohibition under those circumstances would be reasonable.'
>
> On April 1, 1994, Mr. Freeman further opined (OML-AO-2324) that a county legislature's resolution limiting hand held camcorders to the spectator area in the rear of the legislative chamber was not per se unreasonable but rather, as challenged, it depended for its legitimacy on whether or not the camcorders could actually record the proceedings from that location.
>
> Blanket prohibition of audio recording is not permissible, and it is likely that the appellate courts would find that also to be the case with blanket prohibitions of video recording. However, what might be reasonable in one physical setting - a village board restricting camcording to the rear area of *its* meeting room - might not be in another - the larger chambers of a county legislature (OML-AO-1317, supra). It might well be reasonable in a village or other space-restricted setting to restrict the number of camcorders to one, as the court system may with its pooling requirement for video coverage of trials (22 NYCRR Parts 22 and 131). Such a requirement might be viewed as unreasonable in a large county legislative chamber or where a local board of education is conducting a meeting in a school auditorium.
>
> As Mr. Freeman observed with respect to video recording (OML-AO-1317, supra), if it is 'obtrusive and distracting', a ban on it is not unreasonable. It is here claimed to be distracting. Tupper Lake Village Board members and some segment of the public aver that they are distracted from the business at hand because they do not wish to appear on television - the sole justification offered in defense of the policy.
>
> *Mitchell,* supra, held that fear of public airing of one's comments at a public meeting is insufficient to sustain a ban on audio recording.
>
> Is Mr. Peloquin's (or anyone's else's) video recording of a village board proceedings obtrusive?...

> "...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 face 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., 717, 718; emphasis added by the court).

From my perspective, since the basis for the denial of the use of video recording devices in Peloquin, "distaste for appearing on public access television", is analogous to the basis of the proposed policy, that policy would, if adopted, be found by a court to be equally unreasonable and void.

A second issue involves access to records indicating "costs related to consulting district attorneys for advice on this policy." The records were sought by Board members, but the request was denied, because, in your words, "it did not come from the majority of the Board." If I understand the situation accurately, the records in question should be disclosed to the Board members, and to any person who seeks them under the Freedom of Information Law.

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

Pertinent with respect to the records at issue is a decision that involved a request for the amount of money paid in 1994 to a particular law firm for legal services rendered in representing the County in a landfill expansion suit, as well as "copies of invoices, bills, vouchers submitted to the county from the law firm justifying and itemizing the expenses for 1994" (id., 599). Although monthly bills indicating amounts charged by the firm were disclosed, the agency redacted "'the daily descriptions of the specific tasks' (the description material) 'including descriptions of issues researched, meetings and conversations between attorney and client'" (id.). The County offered several rationales for the redactions; nevertheless, the court rejected all of them, in some instances fully, in others in part.

The first contention was that the descriptive material is specifically exempted from disclosure by statute in conjunction with §87(2)(a) of the Freedom of Information Law and the assertion of the

attorney-client privilege pursuant to §4503 of the Civil Practice Law and Rules (CPLR). The court found that the mere communication between the law firm and the County as its client does not necessarily involve a privileged communication; rather, the court stressed that it is the content of the communications that determine the extent to which the privilege applies. Further, the court distinguished between actual communications between attorney and client and descriptions of the legal services provided, stating that:

> "Thus, respondent's position can be sustained only if such descriptions rise to the level of protected communications.
>
> "In this regard, the Court recognizes that not all communications between attorney and client are privileged. Matter of Priest v. Hennessy, supra, 51 N.Y.2d 68, 69, 409 N.E.2d 983, 431, N.Y.S.2d 511. In particular, 'fee arrangements between attorney and client do not ordinarily constitute a confidential communication and, thus, are not privileged in the usual case' (Ibid.). Indeed, '[a] communication concerning the fee to be paid has no direct relevance to the legal advice to be given', but rather "[i]s a collateral matter which, unlike communications which relate to the subject matter of the attorney's professional employment, is not privileged' Matter of Priest v. Hennessy, supra, 51 N.Y.2d at 69, 409 N.E.2d 983, 431 N.Y.S.2d 511.
>
> "Consequently, while billing statements which 'are detailed in showing services, conversations, and conferences between counsel and others' are protected by the attorney-client privilege (Licensing Corporation of America v. National Hockey League Players Association, 153 Misc.2d 126, 127-128, 580 N.Y.S.2d 128 [Sup. Ct. N.Y.Co. 1992]; see, De La Roche v. De La Roche, 209 A.D.2d 157, 158-159 [1st Dept. 1994]), no such privilege attaches to fee statements which do not provide 'detailed accounts' of the legal services provided by counsel..." (id., 602).

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

> "Respondent's denial of the FOIL request cannot be upheld unless the descriptive material is uniquely the product of the professional skills of respondent's outside counsel. The preparation and submission of a bill for fees due and owing, not at all dependent on legal expertise, education or training, cannot be 'attribute[d]...to the unique skills of an attorney' (Brandman v. Cross & Brown Co., 125 Misc.2d 185, 188 479 N.Y.S.2d 435 [Sup. Ct. Kings Ct. 1984]). Therefore, the attorney work product privilege does not serve as an absolute bar to disclosure of the descriptive material. (See, id.).

> "Nevertheless, depending upon how much information is set forth in the descriptive material, a limited portion of that information may be protected from disclosure, either under the work product privilege, or the privilege for materials prepared for litigation, as codified in CPLR 3101(d)...
>
> "While the Court has not been presented with any of the billing records sought, the Court understands that they may contain specific references to: legal issues researched, which bears upon the law firm's theories of the landfill action; conferences with witnesses not yet identified and interviewed by respondent's adversary in that lawsuit; and other legal services which were provided as part of counsel's representation of respondent in that ongoing legal action...Certainly, any such references to interviews, conversations or correspondence with particular individuals, prospective pleadings or motions, legal theories, or similar matters, may be protected either as work product or material prepared for litigation, or both" (emphasis added by the court) (id., 604).

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

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

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

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

> "...the Court concludes that respondent has failed to establish that petitioner should be denied access to the descriptive material as a

> whole. While it is possible that some of the descriptive material may fall within the exempted category of expressions of opinion, respondent has failed to identify with any particularity those portions which are not subject to disclosure under Public Officers Law §87(2)(g). See, Matter of Dunlea v. Goldmark, supra, 54 A.D.2d 449, 389 N.Y.S.2d 423. Certainly, any information which merely reports an event or factual occurrence, such as a conference, telephone call, research, court appearance, or similar description of legal work, and which does not disclose opinions, recommendations or statements of legal strategy will not be barred from disclosure under this exemption. See, Ingram v. Axelrod, supra" (id., 605-606).

In short, although it was found that some aspects of the records in question might properly be withheld based on their specific contents, a blanket denial of access was clearly inconsistent with law, and substantial portions of the records were found to be accessible.

In an effort to enhance compliance with and understanding of applicable law, copies of this opinion will be forwarded to the Board of Education and the Superintendent.

I hope that I have been of assistance.

cc: Board of Education
Superintendent of Schools

OML-AO-3215A

From: Robert Freeman
To: [redacted]
Date: 10/25/00 2:34PM
Subject: Dear Mr./Ms. Lineman:

Dear Mr./Ms. Lineman:

I have received your letter concerning your right to audio or video record an open meeting. You indicated that the mayor said that he had to grant permision before you could tape.

Based on judicial decisions, no permission is needed to audio or video record an open meeting of a public body subject to the Open Meetings Law, and recording devices may be prohibited only if their use is obtrusive or disruptive.

For an expansive explanation of the foregoing, go to our website and the index to opinions rendered under the Open Meetings Law, click on to "v", and scroll down to "Video Equipment, Use of". The higher the number of the opinion, the more recent it is. The latest will include reference to judicial decisions on the subject. If you locate an opinion worthwhile for your purposes, you may download it and do with it as you see fit.

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
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3216

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October 26, 2000

Charles Semowich, Ph.D.
[redacted]

The staff of the Committee on 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. Semowich:

I have received your letter of September 7 in which you asked whether a meeting described in a news article that you attached "was illegal under the Open Meetings Law." The article referred to a democratic caucus, "which includes all but one council member." As I understand the matter, the caucus would have been exempt from the Open Meetings Law.

In this regard, by way of background, 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. Consequently, the gathering described in the article appears to have been a political caucus legally held in private and exempt from the coverage of the Open Meetings.

I hope that the preceding remarks serve to enhance your understanding of the matter and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3217

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October 26, 2000

Hon. Arthur J. DeAngelis
Mayor
Village of Elmsford
15 South Stone Avenue
Elmsford, NY 10523

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

Dear Mayor DeAngelis:

I have received your letter of September 11 in which you questioned the legality of private discussions of Village business during political caucuses held by members of a particular party who serve on the Board of Trustees. You indicated that those persons "claim to have [my] blessing."

In this regard, it appears that the gatherings are exempt from the Open Meetings Law. By way of background, 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. Since several of those bodies are located in Westchester County, it is suggested that you ascertain whether the Village of Elmsford took such action, perhaps late in 1985 or soon thereafter.

With respect to members to whom you referred having "my blessing" concerning the closed caucuses, it is emphasized that this office attempts to offer responses that are based on and consistent with the law, irrespective of our views regarding the propriety of the law. In the context of your inquiry, while I believe that the gatherings in question fall outside the coverage of the Open Meetings, it is noted that the Committee has for years recommended legislation to amend the exemption pertaining to political caucuses in an effort to ensure that public business is discussed in public.

Lastly, the only provision of which I am aware that requires that caucuses be held in public is subdivision (28) of §1-104 of the Election Law, which states that:

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

The foregoing would not, in my view, be equivalent to the political caucuses conducted by the members of Board of Trustees.

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

STATE OF NEW YORK
DEPARTMENT OF STATE
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October 26, 2000

Ms. Darlisha Walker
Secretary of the Board
LI ACORN
91 N. Franklin St., #209A
Hempstead, NY 11550

The staff of the Committee on 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. Walker:

I have received our letter of September 9. You referred to a meeting of the Planning Board of the Village of Hempstead during which approximately fifty-five persons attended in order to hear the Board's consideration of an urban renewal plan. However, according to your letter, "the members of the Planning Board huddled around a conference table talking almost inaudibly among themselves", and persons in the audience could not hear their discussion. Although the Board was informed of the inability to hear, no action was taken to remedy the problem.

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

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

Based upon the foregoing, it is clear in my view that public bodies must conduct meetings in a manner that guarantees the public the ability to "be fully aware of" and "listen to" the deliberative

process. Further, I believe that every statute, including the Open Meetings Law, must be implemented in a manner that gives effect to its intent. In this instance, the Board must in my view situate itself and conduct its meetings in a manner in which those in attendance can observe and hear the proceedings. To do otherwise would in my opinion be unreasonable and fail to comply with a basis requirement of the Open Meetings Law.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Planning Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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OML-AO-3219

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October 26, 2000

Kevin A. Seaman, Esq.
[redacted]

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

Dear Mr. Seaman:

I have received your letter of September 12. You have asked for an advisory opinion concerning a situation in which a member of a board of education "disagrees with a matter being discussed in executive session" and whether that person is "entitled to breach confidentiality" or opt to initiate an Article 78 proceeding to nullify any board action.

In this regard, I believe that the member of the board or any other person could initiate a judicial proceeding to challenge action taken by the board in accordance with §107 of the Open Meetings Law. Further, in general, I do not believe that what is said or heard during an executive session may be characterized as "confidential."

To put the issue in perspective, 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)].

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 generally confer or require confidentiality with respect to the matters discussed in executive session.

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. 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.

Nevertheless, if a discussion occurring during an executive session should clearly have been conducted in public, I do not believe that divulging the nature of the discussion would represent a breach of ethics.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
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October 30, 2000

Mr. Dennis V. Tobolski
Cattaraugus County Attorney
303 Court Street
Little Valley, NY 14755

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

Dear Mr. Tobolski:

I have received your letter of September 18 in which you sought guidance concerning a request by a member of the news media for certain records of the Cattaraugus County Tourist Promotion Agency, Inc. ("TPA"). She also asked that the meetings of the board of the TPA be open to the public and preceded by notice.

According to your letter and its by-laws, the governing body of the TPA is its Board of Directors, which consists of twelve members, three of whom are named by the County. Eight members are elected from the "active membership." An "active member" is "A dues paying individual, company or business, governmental body, agency or organization, or public or private organization or association directly or indirectly involved in the promotion of the County's tourism..." As such, there is no particular governmental representation among active members who elect the majority of the Board of Directors.

In consideration of the by-laws, I do not believe that the TPA is subject to either the Freedom of Information or Open Meetings Laws. The former is applicable to agencies, and §86(3) defines the term "agency" to mean:

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

Based on the foregoing, an agency is generally a governmental entity, and the definition does not ordinarily include private or not-for-profit corporations. I note that it has been held that a not-for-profit corporation that is under the substantial control of a government agency is itself an agency subject to the Freedom of Information Law [see Buffalo News v. Buffalo Enterprise Development Corp., 84 NY2d 488 (1994)]. In that situation, the entity in question was created by and for the City of Buffalo, and its offices were located in City Hall. As I understand the matter at hand, the TPA, other than the membership of three representatives of the County, is independent of government. If that is so, it would not in my opinion constitute an "agency" for the purposes of the Freedom of Information Law.

The Open Meetings Law, like the Freedom of Information Law, pertains to entities that perform a governmental function. That statute applies to meetings of public bodies, and §102(2) defines "public body" to mean:

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

If the TPA does not perform a governmental function for the state or one or more municipalities, it would not constitute a public body subject to Open Meetings Law.

Notwithstanding the foregoing, I believe that the Freedom of Information Law is implicated due to the participation of representatives of the County. While the TPA is not subject to that statute, the County clearly is an "agency." Further, §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."

Since those on the Board of Directors "named by the County" participate by virtue of their positions in County government, any records that they produce or receive in connection with their functions for the TPA would, in my view, based on the definition quoted above, constitute County records that fall within the coverage of the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

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October 30, 2000

Ms. Susan V. Rice
[redacted]

The staff of the Committee on 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. Rice:

I have received your letter of September 13 in which you described a series of problems relating to the conduct of meetings and disclosure of records by the Potsdam Central School District Board of Education. You asked for suggestions concerning "recourse a citizen or group of citizens might take" and added that the "district could not possibly pay the court fees associated with taking action against them."

In this regard, aside from the issues associated with meetings and records, I believe that citizens expressing their views, collectively, in substantial numbers, can have a significant impact on the course of action taken by a government agency, and that by doing so, accountability is encouraged and enhanced.

With respect to the issues raised in relation to meetings and records, a review of the law and its judicial interpretation will be offered in the ensuing paragraphs. Although that commentary is not binding, it is our hope that an opinion rendered by this office is educational and persuasive, and that it serves to enable government officials to better understand and comply with law.

You referred to "the filing of a non-criminal claim" with the District's insurance company involving actions by District officials that allegedly resulted in "financial harm to [y]our district." In addition, a citizen has apparently initiated a suit concerning "the financial misrepresentations", and your request, a copy of which you enclosed, for a copy of the "insurance claim submitted 5/10/2000" was denied on the ground that it is "part of investigatory files."

It is noted at the outset that the phrase "part of investigatory files", which appears on the District's application for public access to records, was part of the Freedom of Information Law when that statute was initially enacted in 1974. However, it has not been in that statute since it was repealed and replaced with the current version, which became effective in 1978. The equivalent provision in the current law, §87(2)(e), pertains to the authority to withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

It is questionable in my view whether a claim filed with an insurance company could be characterized as having been "compiled for law enforcement purposes." It is also questionable whether any of the harmful effects described in subparagraphs (i) through (iv) of §87(2)(e) would arise via disclosure. If §87(2)(e) does not apply, I do not believe that the insurance claim could be withheld.

You also referred in your letter to requests for "the information supporting the claim." While I am unfamiliar with the specific contents of the records at issue, it is noted that, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

I would conjecture that records "supporting the claim" may include books of account, ledgers, contracts, checks and similar documentation dealing with financial transactions. To characterize those kinds of records as having been compiled for law enforcement purposes, even though they may be used in or pertinent to an investigation, would be inconsistent with both the language and the judicial interpretation of the Freedom of Information Law. The Court of Appeals, the state's highest court, has held on several occasions that the exceptions to rights of access appearing in §87(2) "are to be narrowly construed to provide maximum access, and the agency seeking to prevent disclosure carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption be articulating a particularized and specific justification for denying access" [Capital Newspapers v. Burns, 67 NY 2d 562, 566 (1986); see also, M. Farbman & Sons v. New York City Health and Hospitals Corp., 62 NY 2d 75, 80 (1984); Fink v. Lefkowitz, 47 NY 2d 567, 571 (1979)]. Based upon the thrust of those decisions, §87(2)(e) should be construed narrowly in order to foster access.

Further, there is case law that illustrates why §87(2)(e) should be construed narrowly, and why a broad construction of that provision would give rise to an anomalous result. Specifically, in King v. Dillon (Supreme Court, Nassau County, December 19, 1984), the District Attorney was engaged in an investigation of the petitioner, who had served as a village clerk. In conjunction with the investigation, the District Attorney obtained minutes of meetings of the village board of trustees. Those minutes, which were prepared by the petitioner, were requested from the District Attorney.

In granting access to the minutes, the decision indicated that "the party resisting disclosure has the burden of proof in establishing entitlement to the exemption," and the judge wrote that he:

> "must note in the first instance that the records sought were not compiled for law enforcement purposes (P.O.L. 87[2]e). Minutes of Village Board meetings serve a different function...These were public records, ostensibly prepared by the petitioner, so there can be little question of the disclosure of confidential material."

Often records prepared in the ordinary course of business, which might already have been disclosed under the Freedom of Information Law, become relevant to or used in a law enforcement investigation or perhaps in litigation. In my view, when that occurs, the records would not be transformed into records compiled for law enforcement purposes. If they would have been available prior to their use in a law enforcement or investigative context, I believe that they would remain available, notwithstanding their use in that context for a purpose inconsistent with the reason for which they were prepared.

The remaining issues to which you referred pertain to the Open Meetings Law. The first involves a "straw vote" relating to a vacancy on the Board. By way of background, the Open Meetings Law is based on a presumption of openness. Stated differently, meetings of public bodies must be conducted in public except to the extent that an executive session may appropriately be held. Paragraphs (a) through (h) of §105(1) of the Open Meetings Law specify and limit the subjects that may properly be considered during an executive session.

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

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

Under the language quoted above, it would appear that a discussion focusing on the individual candidates could validly be considered in an executive session, for it would involve a matter leading to the appointment of a particular person. Nevertheless, in the only decision of which I am aware that dealt directly with the propriety of holding an executive to discuss filling a vacancy in an elective office, the court found that there was no basis for entry into executive session. In determining that an executive session could not properly have been held, the court stated that:

> "...respondents' reliance on the portion of Section 105(1)(f) which states that a Board in executive session may discuss the 'appointment...of a particular person...' is misplaced. In this Court's opinion, given the liberality with which the law's requirements of openness are to be interpreted (Holden v. Board of Trustees of Cornell Univ., 80 AD2d 378) and given the obvious importance of

> protecting the voter's franchise this section should be interpreted as applying only to employees of the municipality and not to appointments to fill the unexpired terms of elected officials. Certainly, the matter of replacing elected officials, should be subject to public input and scrutiny" (Gordon v. Village of Monticello, Supreme Court, Sullivan County, January 7, 1994), modified on other grounds, 207 AD 2d 55 (1994)].

Based on the foregoing, notwithstanding its language, the court in Gordon held that §105(1)(f) could not be asserted to conduct an executive session.

With respect to the "straw vote", in Previdi v. Hirsch [524 NYS 2d 643 (1988)], which involved a board of education, 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).

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

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

Lastly, you referred to "a work session, which was to be a goal setting meeting and a seminar on public relations with a state representative, [which] turned into a business meeting." You added that action was taken to hire an individual, but that "it was a meeting that only the board was

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

Inherent in the definition and its judicial interpretation is the notion of intent. If there is an intent that a majority of a public body will convene for the purpose of conducting public business, such a gathering would, in my opinion, constitute a meeting subject to the requirements of the Open Meetings Law.

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

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

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

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

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

If the sole intent of a gathering of the Board involves training or getting to know one another better, or if, for example, a gathering is social in nature, I do not believe that the Open Meetings Law would apply, for there would be no intent to conduct public business. However, "goal setting", as I understand that phrase, would constitute a matter of public business. If my understanding is accurate, the gathering was a "meeting" that should have been preceded by notice given in accordance with §104 of the Open Meetings Law and conducted open to the public to the extent required by law. If there was no intent to conduct public business and the gathering was not a meeting subject to the requirements of the Open Meetings Law, I believe that the Board should have waited to take action until convening a meeting in manner consistent with that statute. Further, if action was taken at a meeting essentially held in secret, without notice to the public, a court would have the authority to invalidate the action in the event of a lawsuit.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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October 31, 2000

Mr. Arthur Norden
[redacted]

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

Dear Mr. Norden:

I have received your letter of September 20, as well as the materials relating to it. You expressed concern that officials of the Sullivan West School District may have "deliberately misrepresented the budget to the voters and may have violated New York's Freedom of Information Law and Open Meetings Law in the process."

By way of background, you indicated that last year the Delaware Valley, Jeffersonville-Youngsville and Narrowsburg Central School Districts merged into what is now the Sullivan West Central School District. Following its election, the Board of Education "held several executive sessions about the budget which resulted in their approval and presentation to the voters..." Among the materials is a memorandum sent to the Board by Mr. Martin Handler of the Education Department that cites a "work document that was used to build the proposed budget", which you also enclosed. The memorandum makes reference to "the budget presented at the workshop...in the 3-part public document format as required by law" and states further that:

> "To meet the legal requirements for the three-part document, some of the codes are split between the three components. In addition, we allocated the salary amounts across the appropriate salary codes and benefit codes. Our goal was to insure that the amount built into the budget for negotiation purposes was not readily available to the associations we will be bargaining with."

The memorandum states that "the additions representing adjustments to salaries [are] for the former Delaware Valley & Narrowsburg districts", specifies that the proposed figures are "for [the Board's] review and are open for discussion in executive session" and that "all this information is '**CONFIDENTIAL**' " (emphasis in the memorandum) You added that "no negotiation [had been]

scheduled as of the memo date." The "additions representing adjustments" total approximately $537,000.

The "work document" containing that information, which you obtained "from an anonymous source", was requested and the portions of that record at issue were withheld by the District pursuant to §87(2)(c) of the Freedom of Information Law. You wrote that the documentation provided to voters by the District indicated that "the total combined salaries [would be] only $8,657 more than the sum of the previous separate budgets" and that, therefore, the documentation presented to the voters included "deceptive information." It is your view that because "the salary additions were 'hidden' in the budget", those expenditures will diminish the District's ability to meet its operating costs in the future.

In consideration of the foregoing, you have sought an opinion concerning whether the Board "violated Open Meetings Laws by discussing and creating a budget in executive session, which accommodated $536,000 in potential salary increases and without ever publicly acknowledging such action" and whether the denial of access to records indicating that amount "constitutes a violation of the Freedom of Information Laws."

In this regard, the courts have consistently interpreted the Freedom of Information Law in manner that fosters maximum access to government records. As a general matter, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

The state's highest court, the Court of Appeals, has expressed its view of the intent of the Freedom of Information Law on several occasions, and 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).

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.).

In the context of your request, I believe that only one of the grounds for denial, that cited in response to your request, would be pertinent in analyzing rights of access. Specifically, §87(2)(c) permits an agency to withhold records or portions thereof the disclosure of which "would impair present or imminent contract awards or collective bargaining negotiations. From my perspective, it is doubtful that a court would sustain the District's denial of access to the records at issue. If my understanding of the matter is accurate, the information withheld consisted of gross figures indicating moneys essentially set aside for salary increases for teachers without being earmarked as such. The information did not describe collective bargaining strategy; it did not deal with the numerous collective bargaining issues other than wages; it included no detail regarding any breakdown of possible payments or increases. In short, disclosure of those figures, without more, would not in my view have "impaired present or imminent...collective bargaining negotiations."

If denials of access to the kind of information at issue were found to be proper and sustainable, a school district's budget-related records, many of which are required by law to be disclosed, would be unavailable to the public, and the public's capacity to reach reasoned decisions prior to consideration of a budget would be minimized. As you may be aware, boards of education are required to prepare and disclose to the public detailed information concerning their proposed budgets. Subdivision (1) of §1716 of the Education Law, entitled "Estimated expenses for ensuing year", states in relevant part that:

> "It shall be the duty of the board of education of each district to present at the annual budget hearing a detailed statement in writing of the amount of money which will be required for the ensuing year for school purposes, specifying the several purposes and the amount for each."

Subdivision (4) requires that the proposed budget "shall be presented in three components: a program component, a capital component and an administrative component which shall be separately delineated...." Relevant to the issue at hand, that provision states in part that:

> "The program component shall include, but need not be limited to, all program expenditures of the school district, including the salaries and benefits of teachers and any school administrators or supervisors who spend a majority of their time performing teaching duties, and all transportation operating expenses. The capital component shall include, but need not be limited to, all transportation capital, debt service, and lease expenditures; costs resulting from judgements in tax certiorari proceedings or the payment of awards from court

> judgments, administrative orders or settled or compromised claims; and all facilities costs of the school district, including facilities lease expenditures, the annual debt service and total debt for all facilities financed by bonds and notes of the school district, and the costs of construction, acquisition, reconstruction, rehabilitation or improvement of school buildings, provided that such budget shall include a rental, operations and maintenance section that includes base rent costs, total rent costs, operation and maintenance charges, cost per square foot for each facility leased by the school district, and any and all expenditures associated with custodial salaries and benefits, service contracts, supplies, utilities, and maintenance and repairs of school facilities."

Arguably, the detail in the proposed budget that must be made available to the public might, if disclosed "impair present or imminent contract awards" in any number of contexts (i.e., leasing, or the purchase of goods and services. Nevertheless, in enacting §1716, the Legislature apparently determined that there would be no such impairment and that the public has the right to know, in reasonable detail, how tax dollars will be allocated. The same conclusion should be reached in relation to the kind of information that was withheld, which, as I understand the provision quoted above, must be included in the "program component" of a proposed budget that must indicate "the salaries and benefits of teachers." Again, the figures that should appear would not detail a district's negotiation strategy or identify particular elements pertinent in the collective bargaining process. Therefore, in my view, §87(2)(c) would not serve as a justifiable basis for withholding the information at issue.

With respect to the propriety of executive sessions, the Open Meetings Law, like the Freedom of Information Law, is based on a presumption of openness. Meetings of public bodies, such as boards of education, must be conducted open to the public, unless there is a basis for entry into executive session. Section 105(1) specifies and limits the grounds for entry into executive session.

Pertinent to the matter is paragraph (e) of §105(1), which permits a public body to conduct an executive session regarding "collective negotiations pursuant to article fourteen of the civil service law." Article 14 is commonly known as the "Taylor Law", and it deals with the relationship between public employers and public employee unions. As such, it is clear that a public body may conduct an executive session to discuss collective bargaining negotiations. The question, therefore, involves whether or the extent to which the Board conducted executive session to discuss the budget, as opposed to what clearly would be collective bargaining negotiations. In my view, insofar as discussions focused on the former, there would have been no basis for entry into executive session.

In an effort to enhance compliance with and understanding of the statutes cited in the preceding commentary, copies of this opinion will be sent to District officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Education
Elizabeth McKean

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November 3, 2000

Mr. John D. Horst
[redacted]

The staff of the Committee 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. Horst:

I have received your letter of September 26 in which you raised the following questions:

> "Can the Board of Education meet in executive session to discuss a FOIL denial since it is not listed as one of the eight items given as reasons for convening an executive session.
>
> "When a board does meet in executive session and a quorum is present, does a simple majority vote on an issue before them, stand as if it were the entire board voting?
>
> "Is factual data or information gathered by a consultant (hired by the district) and then used to expend public monies, through the creation of a new administrative post, foilable?"

In this regard, first, the Open Meetings Law is based on a presumption of openness. Meetings of public bodies, such as boards of education, must be conducted in public, except to the extent that an executive session may properly be held. Paragraphs (a) though (h) of §105(1) of that statute specify and limit the topics that may be considered in executive session.

According to materials sent to this office by the Patchogue-Medford School District, the record at issue was a report prepared by a consultant for the District. From my perspective, in consideration of the grounds for entry into executive session, it is doubtful in my view that an executive session could validly have been held to discuss your request. There may be other instances, however, in which an executive session might justifiably be held. For instance, if the issue involves records relating to a disciplinary matter, an executive session might appropriately be held [see Open Meetings Law, §105(1)(f)].

Second, any action taken by a public body requires an affirmative vote of a majority of its total membership, not a majority of those present. A board of education, like other governmental bodies, is subject to §41 of the General Construction Law which is entitled "Quorum and majority." That statute states that:

> "Whenever three of more public officers are given any power or authority, or three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of the whole number of such persons or officers, gathered together in the presence of each other or through the use of videoconferencing, 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 foregoing, a quorum is a majority of the total membership of a public body, notwithstanding absences or vacancies, for example. Further, in order to carry a motion or take action, there must be an affirmative vote of a majority of the total membership of a public body. Therefore, if a public body consists of five members, three affirmative votes would be need to approve a motion, even if only three members are present.

Lastly, I believe that "factual data" prepared by a consultant retained by an agency is accessible under the Freedom of Information law. In brief, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Pertinent is §87(2)(g), the provision to which the District alluded in its denial of your request. That provision permits an agency to withhold records that:

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

> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

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

In a discussion of the issue of records prepared by consultants for agencies, the Court of Appeals, the state's highest court, 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:jm

cc: Board of Education
Barbara Kane

STATE OF NEW YORK
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November 3, 2000

Ms. Linda Pew
[redacted]

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

Dear Ms. Pew:

I have received your letter of September 25, as well as the materials attached to it. You referred to meetings of the Brookhaven Town Board and questioned whether it is "proper for the Board to close a meeting and move into Executive Session to discuss proposed personnel decisions such as the abolishment of positions and reach an informal decision." You added that the "meeting is then reopened, a resolution introduced without further discussion and voted upon."

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

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

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

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

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

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

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

When a discussion concerns matters of policy, such as the manner in which public money will be expended or allocated, the functions of a department or perhaps the creation or elimination of positions, I do not believe that §105(1)(f) could be asserted, even though the discussion may relate to "personnel". For example, if a discussion involves staff reductions or layoffs due to budgetary concerns, the issue in my view would involve matters of policy. Similarly, if a discussion of possible layoff relates to positions and whether those positions should be retained or abolished, the discussion would involve the means by which public monies would be allocated. In none of the instances described would the focus involve a "particular person" and how well or poorly an individual has performed his or her duties. To reiterate, in order to enter into an executive session pursuant to §105(1)(f), I believe that the discussion must focus on a particular person (or persons) in relation to

a topic listed in that provision. As stated judicially, "it would seem that under the statute matters related to personnel generally or to personnel policy should be discussed in public for such matters do not deal with any particular person" (Doolittle v. Board of Education, Supreme Court, Chemung County, October 20, 1981).

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

It is noted that the Appellate Division 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)].

Third, with respect to the "informal discussions" to which you referred, in Previdi v. Hirsch [524 NYS 2d 643 (1988)], the issue pertained to access to records, i.e., minutes of executive sessions held under the Open Meetings Law. Although it was assumed by the court that the executive sessions were properly held, it was found that "this was no basis for respondents to avoid publication of minutes pertaining to the 'final determination' of any action, and 'the date and vote thereon'" (id., 646). The court stated that:

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

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

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

Lastly, when action is taken by a public body, I believe that it must be memorialized in minutes, and §106 of the Open Meetings Law provides that:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.

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

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board
Hon. Stanley Allan

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November 3, 2000

Ms. F. Warren Kahn
Attorney at Law
M.P.O. Box 702
Niagara Falls, NY 14302-0702

The staff of the Committee on 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. Kahn:

I have received your letter of September 20, as well as a portion of a transcript of an open meeting held by the Board of Education of the Lewiston-Porter Central School District.

In brief, you wrote that the District is involved in negotiations with the administrators' bargaining unit, and that the District's negotiator and the Superintendent reported on the negotiations in executive session. In an effort to avoid problems concerning the Board's involvement in the process, the Board was not given specific details regarding the negotiations. As I understand the situation, a member of the Board independently developed a questionnaire to the Superintendent concerning the negotiations. Based on the responses, that member considered the Superintendent's answers different from the answers to the same questions that he raised with the Board President.

"The issue", according to your letter, "is whether [the members] comments were appropriate in the setting just described." Having reviewed the comments as reflected in the transcript, I believe that the entirety of the discussion could have occurred during an executive session.

While the Freedom of Information and Open Meetings Laws are related and were likely enacted in an effort to achieve similar goals, their application in some instances may give rise to inconsistent results. 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. Similarly, the Open Meetings Law is based on a presumption of openness; meetings of public bodies must be conducted open to the public, except to the extent that they consider matters that may properly be discussed in executive session. As you are aware, paragraphs (a) through (h) of §105(1) of that statute specify and limit the grounds for entry into executive session.

As the Freedom of Information Law relates to the matter, the pertinent provision in my view is §87(2)(c), which authorizes an agency to withhold records to the extent that disclosure "would impair present or imminent contract awards or collective bargaining negotiations." The key word is "impair", and the question, therefore, under the Freedom of Information Law in the context of your inquiry involves whether or the extent to which the disclosure of records would adversely affect collective bargaining negotiations.

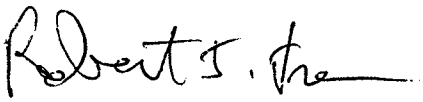
You and others during the discussion referred to records, such as the current contract and the budget, that are accessible to the public. Even though those records may be used in or relevant to a negotiation process, they must be disclosed, for disclosure of those records may be required by law (i.e., Education Law, §1716) and would not "impair" the collective bargaining process.

The analogous provision in the Open Meetings Law does not include language concerning the effects of disclosure or the harm that could potentially result through public discussion of an issue. Specifically, under §105(1)(e), the Board may discuss collective bargaining negotiations in executive session, irrespective of the impact of openness. That being so, I believe that the entirety of the discussion could have been conducted during an executive session.

With respect to your specific question, whether the member's comments "were appropriate" the answer may not be derived from the Open Meetings Law. That statute is permissive; a public body *may* conduct an executive session in accordance with one or more of the grounds for private discussion appearing in §105(1). Nevertheless, there is no obligation imposed by that statute to do so. While I am not an expert on the subject, it appears that the propriety of public discussion of the matter would involve the interpretation of the Taylor Law. Consequently, it is suggested that the Public Employment Relations Board may be better able to offer guidance concerning whether the member's comments were "appropriate."

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

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November 3, 2000

Ms. Regina Pellegrino
[redacted]

The staff of the Committee on 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. Pellegrino:

I have received your letter of September 25 in which you sought an opinion concerning the status of a "Special Education Review" that is being conducted in the Mt. Pleasant Central School District in private.

According to your letter:

> "The Regional Special Education Associate informed [you] that this review is to be done in four parts. There is only one part in which actual Individual Education Plans are reviewed and that is the section done with district personnel and the State Review Office. [You] understandably acknowledged that due to confidentiality this portion must be closed to the general public. However, the other three parts of the review process are done by a committee, appointed by the superintendent, consisting of a cross section representation of the schools. This is to include district personnel, two parent members and two State Education representatives."

The statute that generally confers a right to attend meetings is the Open Meetings Law. That statute 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 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 of Education consisting solely of its own members would have the same obligations regarding notice and openness, for example, as well as the same authority to conduct executive sessions as the governing body [see Glens Falls Newspapers, Inc. v. Solid Waste and Recycling Committee of the Warren County Board of Supervisors, 195 AD2d 898 (1993)].

However, if an entity is advisory in nature and does not consist wholly of members of a public body, it has been held it would not constitute a public body. Judicial decisions indicate generally that ad hoc entities that include persons other than members of public bodies that have no power to take final action fall outside the scope of the Open Meetings Law. As stated in those decisions: "it has long been held that the mere giving of advice, even about governmental matters is not itself a governmental function" [Goodson-Todman Enterprises, Ltd. v. Town Board of Milan, 542 NYS 2d 373, 374, 151 AD 2d 642 (1989); Poughkeepsie Newspapers v. Mayor's Intergovernmental Task Force, 145 AD 2d 65, 67 (1989); see also New York Public Interest Research Group v. Governor's Advisory Commission, 507 NYS 2d 798, aff'd with no opinion, 135 AD 2d 1149, motion for leave to appeal denied, 71 NY 2d 964 (1988)]. Therefore, an entity designated by the Superintendent that consists of the members that you described would not constitute a "public body" subject to the Open Meetings Law. Similarly, the other aspects of the review process would not involve a public body, and the Open Meetings Law, in my view, would not be applicable.

In sum, as I understand the matter, the Open Meetings Law would not be applicable and, therefore, there would be no right to attend the meetings on the part of the public.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3227

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

November 6, 2000

Mr. Robert F. Reninger
[redacted]

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

Dear Mr. Reninger:

I have received your letter of October 1 and the materials attached to it. As I understand the matter, the Town of Greenburgh Planning Board usually meets in "the regular large public meeting room", but its meeting of August 29 was moved to a small conference room. You wrote that several people "had to stand or listen at a distance to the deliberations from outside the conference room" and that conditions were "uncomfortable." If the Open Meetings Law was violated, you asked whether the actions taken by the Board are invalid.

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

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

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

From my perspective, every provision of law, including the Open Meetings Law, should be implemented in a manner that gives reasonable effect to its intent. In my opinion, if it is known in advance of a meeting that a larger crowd is likely to attend than the usual meeting location will accommodate, and if a larger facility is available, it would be reasonable and consistent with the intent of the Law to hold the meeting in the larger facility. Conversely, assuming the same facts, I believe that it would be unreasonable to hold a meeting in a facility that would not accommodate those interested in attending.

The preceding paragraph appeared in an advisory opinion rendered in 1993 and was relied upon in Crain v. Reynolds (Supreme Court, New York County, NYLJ, August 12, 1998). In that decision, the Board of Trustees of the City University of New York conducted a meeting in a room that could not accommodate those interested in attending, even though other facilities were available that would have accommodated those persons. The court in Crain granted the petitioners' motion for an order precluding the Board of Trustees from implementing a resolution adopted at the meeting at issue until certain conditions were met. In my view, based on that decision and the provisions dealing with the enforcement of the Open Meetings Law (see §107), the actions of the Planning Board remain valid until a court renders a determination to the contrary.

It is also 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 the foregoing, there is no obligation upon a public body to construct a new facility or to renovate an existing facility to permit barrier-free access to physically handicapped persons. However, I believe that the Law does impose a responsibility upon a public body to make "all reasonable efforts" to ensure that meetings are held in facilities that permit barrier-free access to physically handicapped persons. Therefore, if, for example, the Board has the capacity to hold its meetings in a room that is accessible to handicapped persons, I believe that the meetings should be held in the room that is most likely to accommodate the needs of those people.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Planning Board
Hon. Paul Feiner
Susan A. Mancuso

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3228

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November 6, 2000

E-Mail

TO: Robert Swayze [redacted]

FROM: Robert J. Freeman, Executive Director

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

Dear Mr. Swayze:

I have received your recent letter in which you added whether a public body "may regularly schedule its meetings in small rooms to limit the number of citizens who wish to attend the public meeting."

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

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

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

From my perspective, every provision of law, including the Open Meetings Law, should be implemented in a manner that gives reasonable effect to its intent. In my opinion, if it is known in advance of a meeting that a larger crowd is likely to attend than the usual meeting location will accommodate, and if a larger facility is available, it would be reasonable and consistent with the intent of the Law to hold the meeting in the larger facility. Conversely, assuming the same facts, I believe that it would be unreasonable to hold a meeting in a facility that would not accommodate those interested in attending.

It is also 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 the foregoing, there is no obligation upon a public body to construct a new facility or to renovate an existing facility to permit barrier-free access to physically handicapped persons. However, I believe that the Law does impose a responsibility upon a public body to make "all reasonable efforts" to ensure that meetings are held in facilities that permit barrier-free access to physically handicapped persons. Therefore, if, for example, a public body has the capacity to hold its meetings in a room that is accessible to handicapped persons, I believe that the meetings should be held in the room that is most likely to accommodate the needs of those people.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3229

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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

November 6, 2000

E-Mail

TO: Robert Struble <[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. Stuble:

I have received your letter of September 22. You wrote that the Board of Fire Commissioners of the Horseheads Fire District, which you serve as chairperson, was "evicted" from its usual meeting place. You referred to an article indicating that I stated that notice must be given at least seventy-two hours prior to a meeting, but added that you "don't know where [y]our meetings will be held usually until the day before or the day of the meeting."

You have sought guidance in an effort to comply with the Open Meetings Law. Your concern is much appreciated, and in this regard, I offer the following comments.

As you may be aware, the Open Meetings Law requires that notice be given to the news media and posted prior to every meeting. Specifically, §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.

Under the circumstances that you described, it is suggested that notice be given to the news media and posted at Town or Village Hall, for example, indicating that the Board has scheduled a meeting on a certain date and that the news media will be contacted by phone or fax as soon as the location of the meeting is known. Similarly, it might be indicated where notice is posted that additional information will appear on the posting when it is known where the meeting will be held.

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

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12379
OML-AO-3230

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November 7, 2000

Mr. Donald Riviella
[redacted]

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

Dear Mr. Riviella:

I have received your letter in which you asked that this office "intervene" on your behalf in relation to your efforts in obtaining minutes of meetings of committees of community boards in the Bronx.

In this regard, it is noted at the outset that the Committee on Open Government is authorized to provide opinions concerning the Open Meetings and Freedom of Information Laws; it is not empowered to enforce those statutes. Nevertheless, in an effort to assist you, I offer the following comments.

First, 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 community 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 a community 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)].

Second, I believe that a committee of a community board would also have an obligation to prepare minutes in accordance with §106 of the Open Meetings Law. 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 upon the foregoing, it is clear that minutes must be prepared and made available within two weeks.

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

Third, viewing the matter from a different perspective, minutes of meetings are subject to rights conferred by the Freedom of Information Law. In brief, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Minutes of open meetings must in my view be disclosed, for none of the grounds for denial would be applicable.

In an effort to enhance compliance with and understanding of the matter, copies of this opinion will be forwarded to the boards to which you referred. I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Community Board 9
Community Board 10
Community Board 11

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12380
OML-AO-3231

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November 7, 2000

Mr. Lee G. Austin
[redacted]

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

Dear Mr. Austin:

I have received your letter of September 15 and apologize for the delay in response. You have sought clarification concerning your right to look at minutes of meetings of the Town Board of the Town of Halcott. You wrote that the Town Clerk initially indicated that "to look at the minutes [you] would have purchase a copy for twenty-five cents." In addition, you questioned the propriety of an executive session held by the Town Board.

In this regard, first, the Freedom of Information Law, §87(2) states in relevant part that records must be made available for "inspection" and copying. Further, under §87(1)(b)(iii) of that statute and the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), an agency, such as a town, may charge only for copies. If a photocopy of an accessible record is requested, an agency may charge up to twenty-five cents. However, accessible records must be made available for inspection at no charge.

With respect to the executive session, the minutes attached to your letter indicate that the purpose "was to procure contractor or contractors" for a building project. Here I point out that 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. Paragraphs (a) through (h) of §105(1) specify and limit the topics that may be considered during an executive session.

It appears that one of the grounds for entry into executive session would have been pertinent. Paragraph (f) of §105(1) 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 or a particular person or corporation..."

If the discussion involved a review of the strengths, weaknesses, experience, or financial status of a particular contractor or contractors, I believe that an executive session could properly have been held, for the matter would have focused on a "particular person or corporation." On the other hand, if, for instance, the discussion did not focus on any particular contractor, but perhaps when a legal notice should be given or the scope of the project generally, it is unlikely in my view that an executive session could properly have been held.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board
Hon. Ruth Kelder

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3232

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November 9, 2000

Ms. JoAnn Mincemoyer
[redacted]

The staff of the Committee on 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. Mincemoyer:

I have received your letter of October 3 in which you raised questions relating to the implementation of the Open Meetings Law by the Board of Education of the Newark Central School District.

The first involves whether a board of education may conduct an executive session "to discuss the actions" of one of its members. In this regard, as you may be aware, paragraphs (a) through (h) of §105(1) of the Open Meetings Law specify and limit the subjects that may properly be considered in executive session. Pertinent to the issue is paragraph (f), which permits a public body to enter into executive session to discuss:

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

You referred to an opinion prepared by this office in which it was advised that a town board could not validly conduct an executive session discuss the performance of one of its members, for the board had no authority to remove, dismiss or discipline its members. My understanding is that a board of education may petition the Commissioner of Education to seek the removal of a board member. If that is the nature of the discussion, a matter "leading to the ...removal of a particular person", I believe that an executive session could validly be held. If the discussion concerning the actions of the member do not involve his or her removal, it is unlikely in my view that there would be a basis for entry into executive session.

The second issue relates to the ability to discuss "a grievance filed by a collective bargaining unit in executive session." Whether there is a basis for conducting an executive session, or whether the Open Meetings Law applies, would in my opinion be dependent on the nature of the proceeding.

If the board is discussing a grievance, it appears that the only ground for entry into executive session would be the same as that cited earlier, §105(1)(f). Again, if the matter pertains to a particular person in relation to a subject described in that provision, an executive session would appear to be appropriate. For instance, if a teacher has complained that the air in her classroom is making her ill, the matter may involve his or her medical history. If, however, the grievance involves the policy concerning lunchroom duty applicable to all faculty, I do not believe that there would be any basis for conducting an executive session.

The other scenario involves the possibility that the board is determining an appeal and conducting a proceeding in which there is a right to be heard and consideration of due process. If, for example, the board conducts a hearing on appeal rendered pursuant to §3214 of the Education Law, relevant would be §108(1) of the Open Meetings Law, which exempts "judicial or quasi-judicial proceedings" from the coverage of that statute. From my perspective, it is often difficult to determine exactly when public bodies are involved in a quasi-judicial proceeding, or where a line of demarcation may be drawn between what may be characterized as quasi-judicial, quasi-legislative or administrative functions. The holding of hearings and providing an opportunity to be heard does not in my opinion render a proceeding quasi-judicial in every instance. Those requirements may be present in a variety of contexts, many of which precede legislative action.

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

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

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

It is my opinion that the final determination of a controversy is a condition precedent that must be present before one can reach a finding that a proceeding is quasi-judicial. Reliance upon

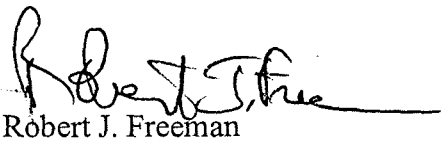
this notion is based in part upon the definition of "quasi-judicial" appearing in Black's Law Dictionary (revised fourth edition). Black's defines "quasi-judicial" as:

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

Insofar as a grievance proceeding could be characterized as quasi-judicial, the Open Meetings Law, in my view, would not apply.

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-3233

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November 10, 2000

Mr. Frank D. Petramale
Town of Saugerties Democratic Committee
2905-1 Route 9W
Saugerties, NY 12477

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. Petramale:

I have received your letter of October 2 in which you wrote that three members of the Saugerties Town Board "held a pre-arranged, secret meeting in the back room of a local bar in Saugerties to discuss town business." You added that you learned that they "discussed the feasibility of purchasing a large tract of land for town purposes."

In this regard, as you are aware, the Open Meetings Law pertains to meetings of public bodies, such as town boards. 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, the State's highest court, 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 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.

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

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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OML-AO-3234

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November 17, 2000

Mr. Theodore A. Trespasz, Jr.
Trespasz & Marquardt, LLP
251 West Fayette Street
Syracuse, NY 13202

The staff of the Committee 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. Trespasz:

I have received your letter of October 2, as well as related materials. You indicated that you represent the Canandaigua Recreation Development Corporation ("the Corporation"), which was the subject of an advisory opinion prepared on August 8 at the request of Mr. Harold Oliver. In brief, based on the information provided by Mr. Oliver, it was advised that the Corporation is subject to both the Freedom of Information and Open Meetings Laws. At that time, the information that I had indicated that the Board of the Directors consisted of *ex officio* City of Canandaigua officials and others designated by the City Council that would comprise a majority of the Board. For that reason, it was advised that the City had substantial control over the Corporation.

Since then, I have learned that the composition of the Board of Directors has been changed. As you aware, in its original certificate of incorporation, Article V stated that the Board of Directors must consist initially of eleven members, six of whom would be the City officials to whom reference was made above. I note that Article 7 entitled "Amendments" states that certain articles, including Article V, "shall not be subject to amendment." Notwithstanding the foregoing, less than a year after the approval of the certificate of incorporation, Article 5 was amended to provide that five members of the Board would be City officials. As such, it would appear that less than a majority of Board consists of City officials. I point out that City officials, based on the certificate of incorporation, could become a majority on the Board, for Article V provides that the Board's initial membership shall be eleven, but that it may be reduced to nine. In that event, five of the nine members would be City officials.

Not being an expert in the Not-for-Profit Corporation Law, I cannot gauge the legality or propriety of amending the terms of Article V in view of its original prohibition regarding a change in the composition of the Board. I would conjecture, however, that such an amendment would be

unusual, and that it is equally unusual to create a corporation whose board of directors may shift from being somewhat independent of government to being under substantial governmental control. Despite the amendment to the certificate and the reduction of City officials on its Board, I believe that many of the Corporation's records would remain subject to the Freedom of Information Law even if the Corporation is not itself subject to that statute. Further, meetings of the Board arguably are subject to the Open Meetings Law.

Specific reference is found in §1411 of the Not-for-Profit Corporation Law to local development corporations, such as the entity in question. 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."

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

With respect to its status under the Open Meetings Law, that statute applies 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."

By breaking the definition into its components, I believe that each condition necessary to a finding that the board of a local development corporation 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, I believe that it conducts public business and performs a governmental function for a public corporation, in this instance, the City of Canandaigua.

With respect to access to records under the Freedom of Information Law, even if it may be contended that the Corporation is not an "agency" subject to that statute, it is clear that several of the members of its Board serve due to their status as City officials, and I believe that any records that they prepare or receive in conjunction with their activities involving the Corporation would fall within the coverage of the Freedom of Information Law. That statute pertains to agency records, and §86(4) defines the term "record expansively to 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, documentation prepared or received by City officials in conjunction with the performance of their duties with the Corporation would by kept or produced by or for an agency, the City of Canandaigua. Therefore, again, even if the Corporation is not directly subject to the Freedom of Information Law, and I am not suggesting that it is not subject to that statute, due to the participation of City officials and designees, many, if not all of its records would in my view fall within the coverage of the statute.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Harold Oliver
City Council

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3235

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November 27, 2000

TO: Nunez, Richard <Rnunez@law.pace.edu>

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. Nunez:

I have received your letter of October 10 and apologize for the delay in response. You referred to the Board of Directors of a county cooperative extension agency and indicated that its executive director serves as "a voting member of the Board..." Your questions involve the right of the executive director to attend executive sessions of the Board when he or she is the subject of the discussion and whether that person may attend meetings of committees on which he or she does not serve.

In this regard, first, as you are aware, §105(2) of the Open Meetings Law states that: "Attendance at an executive session shall be permitted any member of the public body and any other persons authorized by the public body." Based on the foregoing, I believe that the executive director has the right to attend any executive session of any public body upon which he or she serves as a member. For instance, because that person is a member of the Board of Directors, the Board, in my view, could not preclude him or her from attending any executive session that it conducts.

Secondly, the Open Meetings Law pertains to meetings of governing bodies, such as the Board of Directors, and committees and similar bodies consisting of members of governing bodies. Section 102(2) of that statute defines the phrase "public body" to include:

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

Although the original definition of "public body" enacted in 1976 made reference to entities that "transact" public business, the current definition as amended in 1979 makes reference to entities that "conduct" public business and added specific reference to "committees, subcommittees and similar bodies" of a public body.

In view of the definition of "public body", I believe that any entity consisting of two or more members of a public body would fall within the requirements of the Open Meetings Law [see Glens Falls Newspapers, Inc. v. Solid Waste and Recycling Committee of the Warren County Board of Supervisors, 195 AD2d 898 (1993); also Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984 (1981)]. Therefore, a standing committee of members of the Board of Directors members in my view constitutes a public body subject to the Open Meetings Law that is separate and distinct from the Board itself. Further, as a general matter, I believe that a quorum consists of a majority of the total membership of a body (see General Construction Law, §41).

Again, as a member of the Board of Directors, I believe that the executive director would have the right to attend its executive sessions pursuant to §105(2) of the Open Meetings Law. If the executive director is not a member of a committee, I do not believe that he or she would have the right to attend an executive session of that public body, unless there is some independent authority to do so based on a rule, policy or other privilege conferred by the Board of Directors upon its members.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
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November 27, 2000

E-Mail

TO: Hon. Joseph Kushner<jkushner@gvmail.edutech.org

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 Councilman Kushner:

As you are aware, I have received a variety of correspondence from you concerning your ability to obtain minutes of meetings in a timely manner.

From my perspective, the law is clear. 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."

Based on the foregoing, minutes of meetings must be prepared and made available to any person for inspection and copying within two weeks of the meetings to which they pertain. I note that the Town Law, §30(1), specifies that the Town Clerk has the duty to prepare the minutes. In consideration of the direction provided in the Open Meetings Law and the Town Law, the clerk must, in my view, make the records available within the statutory time at Town Hall, if there is such a facility, or where the records are generally kept.

I point out, too, that there is nothing in the Open Meetings Law or any other statute of which I am aware that requires that minutes be approved. Nevertheless, as a matter of practice or policy, many public bodies approve minutes of their meetings. In the event that minutes have not been

approved, to comply with the Open Meetings Law, it has consistently been advised that minutes be prepared and made available within two weeks, and that 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 Town Clerk and the Town Board.

I hope that I have been of assistance.

RJF:jm

cc: Hon. Nancy Flynn
Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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November 27, 2000

Mr. Mark Spacone
[redacted]

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

Dear Mr. Spacone:

I have received your letter of October 5 and apologize for the delay in response. You described difficulty in obtaining minutes of meetings of the Board of Directors of the Empire State Development Corporation. In this regard, I offer the following comments.

First, it is my understanding that entity whose minutes you are seeking is the Board of Directors of the Urban Development Corporation, which is doing business as the Empire State Development Corporation (ESDC). The Corporation was created by §4 of Chapter 252 of the Unconsolidated Laws as a "corporate governmental agency of the state" and a "public benefit corporation." That provision also states that "[i]ts membership shall consist of nine directors", seven of whom are designated by the Governor.

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

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

I believe that each of the conditions necessary to determine that the Board of Directors of the ESDC constitutes a public body can be met. The Board consists of more than two members; a quorum is needed for the Board to conduct public business pursuant to §41 of the General Construction Law; based on the provisions of Chapter 252, the Board clearly performs a governmental function for the state. Further, §66 of the General Construction Law indicates that a public benefit corporation is a kind of public corporation.

Third, because it is a public body, I believe that ESDC's Board of Directors is required to prepare and disclose minutes in accordance with §106 of the Open Meetings Law. That provision states that:

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

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

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

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, when a public body makes a final determination during an executive session, that determination will, in most instances, be public. For instance, §105(1)(h) authorizes a public body to enter into executive session to discuss the proposed acquisition, sale or lease of real property when publicity would substantially affect the value of the property. However, if a decision is made and the transaction has been consummated, minutes reflective of the action taken would, in my view, be accessible to the public.

In an effort to enhance their understanding of the requirements imposed by the Open Meetings Law, copies of this opinion will be forwarded to ESDC officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Carol Berens
Lawrence Gerson

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3238

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November 28, 2000

Mr. Jerry Brixner
[redacted]

Dear Mr. Brixner:

I have received your letter of October 6 and the materials attached to it. You have raised a question concerning the sufficiency of the notice relating to a public hearing.

In this regard, the statute within the advisory jurisdiction of this office, the Open Meetings Law, pertains to meetings of public bodies. Meetings generally involve the gathering of a majority of a public body for the purpose of discussion, deliberation and perhaps taking action. A hearing typically involves a situation in which the public is given the right to speak concerning a particular issue. The functions of meetings and hearings are different, and the requirements concerning notices of hearings and meetings differ. Frequently, there is a statutory requirement that notices of a hearing be published as a legal notice in a newspaper. Section 104 of the Open Meetings Law, however, specifies that notice of a meeting held under that statute does not require the publication of a legal notice. Rather, the Open Meetings Law requires that notice of the time and place of a meeting be given to the news media and posted prior to every meeting. Once in receipt of notice of a meeting, a news media organization may choose to publish a notice or report on a meeting, but there is no obligation to do so. Further, the requirements relating to hearings differ, depending on the subject matter and the nature of the subject matter. For instance, there are different statutes that deal with public hearings concerning the proposed budgets of counties, towns, villages and school districts.

In short, issues relating to hearings are generally beyond the jurisdiction or expertise of this office.

I regret that I cannot be 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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November 28, 2000

Ms. Lenore Wilson
[redacted]

The staff of the Committee on 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. Wilson:

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

According to your letter:

> "On June 30, 2000 the West Seneca School Board conducted a meeting at which time they negotiated a termination agreement with Superintendent Dr. Richard Sagar, and in open session authorized then Board President James Asztalos to execute this agreement on behalf of the board. On June 20, 2000 the Board had similarly met to attempt to negotiate a termination agreement. It was determined on June 29th that the Board would meet on June 30th at 5:00 p.m. to complete the negotiations."

You added that it is your contention that:

> "...the Board violated the Open Meetings Law by not advertising the meeting of June 30, although they had every opportunity to do so. The only notice was an 8 ½" x 11" note placed on the front door of the West Elementary School. School was not in session and the chances that any member of the public or media would see this notice were minimal. The District Clerk admits that she intentionally failed to notify any of the media outlets, although she had both the time and opportunity to communicate with print and broadcast media, in order to hid the fact that this meeting was scheduled. This is reinforced by later attempts by the Board and District to conceal the existence of that meeting."

In addition, you indicated that "[t]he meeting of June 29th was similarly not advertised to the media, although the date was known several days in advance."

You have sought my views concerning "the legality of the June 30, 2000 meeting." In this regard, I offer the following comments.

First, the Open Meetings Law specifies that every meeting must be preceded by notice given to the news and by means of posting. 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."

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

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

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

> extensive notice required by POL §104(1). Only respondent's choice in scheduling prevented this result.
>
> "Moreover, given the short notice provided by respondents, it should have been apparent that the posting of a single notice in the School District offices would hardly serve to apprise the public that an executive session was being called...
>
> "In White v. Battaglia, 79 A.D. 2d 880, 881, 434 N.Y.S.ed 637, lv. to app. den. 53 N.Y.2d 603, 439 N.Y.S.2d 1027, 421 N.E.2d 854, the Court condemned an almost identical method of notice as one at bar:
>
> "Fay Powell, then president of the board, began contacting board members at 4:00 p.m. on June 27 to ask them to attend a meeting at 7:30 that evening at the central office, which was not the usual meeting date or place. The only notice given to the public was one typewritten announcement posted on the central office bulletin board...Special Term could find on this record that appellants violated the...Public Officers Law...in that notice was not given 'to the extent practicable, to the news media' nor was it 'conspicuously posted in one or more designated public locations' at a reasonable time 'prior thereto' (emphasis added)" [524 NYS 2d 643, 645 (1988)].

In short, 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, 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, if your contention is accurate, that the failure to fully to comply with the notice requirements imposed by the Open Meetings Law was intentional, I believe that a court would have the authority to invalidate action taken.

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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November 28, 2000

Mr. Robert Fullem
[redacted]

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

Dear Mr. Fullem:

I have received your letter of October 17 in which you have sought an advisory opinion concerning "the applicability of the Open Meetings Law to committees or subcommittees of a larger board, particularly to a school board." You added that the issue pertains to "a committee of four members, all of whom are members of the full nine person school board" and whether the committee is required to comply with the Open Meetings Law.

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

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

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

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

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

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

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

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

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

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

In sum, assuming that the committees in question consist of two or more members of the board, those committees would constitute public bodies subject to the Open Meetings Law and a quorum of those bodies would be a majority of the membership of the committees.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
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November 29, 2000

E-Mail

TO: Jim Sofranko <[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. Sofranko:

I have received your letter of October 17 in which you indicated that your board of education appointed a committee consisting of three of its members to investigate allegations made against an administrator and oversee the costs of outside counsel retained to assist in the matter. You have asked whether the committee must meet in public.

From my perspective, although the committee is subject to the Open Meetings Law, its meetings may likely be conducted in private in great measure, if not in their entirety.

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

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

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

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

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

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

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

In view of the amendments to the definition of "public body", I believe that any entity consisting of two or more members of a public body, such as a committee or subcommittee consisting of members of 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, if, for example, the board consists of seven, its quorum would be four; in the case of a committee consisting of three, a quorum would be two.

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

In sum, assuming that the committees in question consist of two or more members of the Agency, those committees would constitute public bodies subject to the Open Meetings Law and a quorum of those bodies would be a majority of the membership of the committees.

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

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

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

Relevant under the circumstances is paragraph (f) of §105(1), which permits a public body to enter into executive session to consider:

> "...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, it appears that the substance of the committee's activities may be conducted in executive session.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OMC-AO-3042

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November 30, 2000

Ms. Vivian Burke
[redacted]

Dear Ms. Burke:

I have received your letter of October 17 and regret that you found fault with a comment that I offered during a presentation at the convention of the New York Planning Federation. The issue, according to your letter, involved the status of a masterplan committee under the Open Meetings Law, and based on the facts provided, it was advised that the committee was not subject to that statute.

In this regard, the Open Meetings Law pertains to public bodies, and §102(2) defines the phrase "public body" to mean:

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

If an entity is advisory in nature and does not consist wholly of members of a public body, it has been held it would not constitute a public body. Judicial decisions indicate generally that ad hoc entities that include persons other than members of public bodies that have no power to take final action fall outside the scope of the Open Meetings Law. As stated in those decisions: "it has long been held that the mere giving of advice, even about governmental matters is not itself a governmental function" [Goodson-Todman Enterprises, Ltd. v. Town Board of Milan, 542 NYS 2d 373, 374, 151 AD 2d 642 (1989); Poughkeepsie Newspapers v. Mayor's Intergovernmental Task Force, 145 AD 2d 65, 67 (1989); see also New York Public Interest Research Group v. Governor's Advisory Commission, 507 NYS 2d 798, aff'd with no opinion, 135 AD 2d 1149, motion for leave to appeal denied, 71 NY 2d 964 (1988)]. Therefore, an advisory body designated by a municipal board or member thereof would not in my opinion be subject to the Open Meetings Law, even if a member of a public body participates. I note, too, that the first decision cited above dealt with a zoning revision committee designated by a town board. The committee, in terms of its composition and functions, would likely be analogous to the committee to which you referred.

It is emphasized that my function involves offering what I consider to be the correct answer under the law, irrespective of whether I feel personally that the provision of law or a judicial decision represents poor public policy. In the context of the question that was raised during the presentation, I felt that I had no choice but to provide the response that was given. I note, too, that the Committee on Open Government recommended for several years that the law be amended to include advisory bodies designated by municipal boards within the coverage of the Open Meetings Law, but that its efforts were unsuccessful.

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

STATE OF NEW YORK
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OMC-AO-3243

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December 1, 2000

Ms. Christine M. DiNatale
Concerned Citizens of MFD
[redacted]

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

Dear Ms. DiNatale:

I have received your letter of October 16. You have sought an advisory opinion concerning the Morton Fire District's "practice of holding closed workshop sessions and conducting business in these sessions (actually passing motions)."

Based on judicial decisions rendered more than twenty years ago, "workshop sessions" are subject to the Open Meetings Law and must be held open to the public in accordance with the requirements of that statute. In this regard, I offer the following comments.

First, the Open Meetings Law pertains to meetings of public bodies, such as boards of fire commissioners, 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 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. Further, there is no distinction between a meeting and a work session; when a work session is held, a public body has the same obligations in terms of notice, openness and the ability to conduct executive sessions as in the case of regular meetings. Since the Open Meetings Law applies equally to "work shops" and regular meetings, confusion might be eliminated by referring to each as "meetings", rather than distinguishing them in a manner that is artificial.

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

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

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

may appropriately be considered during an executive session. Therefore, a public body may not conduct an executive session to discuss the subject of its choice.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Chairman Glenn Wilson
Co-Chairman Caroline Sill
Commissioner Douglas Fagan
Commissioner Ruth Rayburn
Commissioner Audra Keirn
Atty. Ray DiRaddo

STATE OF NEW YORK
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December 7, 2000

Ms. Dione Goldin
[redacted]

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

Dear Ms. Goldin:

I have received your letter of October 19 in which you sought an advisory opinion concerning the propriety of a "retreat" held by the Wappingers Central School District Board of Education. According to your letter, the retreat was held to discuss "interpersonal relationships."

In this regard, the Open Meetings applies to meetings of public bodies, and §102(1) of the Law defines the term "meeting" to mean "the official convening of a public body for the purpose of conducting public business". Inherent in the definition is the notion of intent. A chance gathering or a social function, for example, would not in my view constitute a meeting, for there would be no intent on the part of those present to conduct public business, collectively, as a body. Similarly, in situations in which members of a public body are part of a large audience and are present as members of the audience, and not to conduct business as a body, I do not believe that the Open Meetings Law would apply, even though a majority of a public body may be present.

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

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

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

In short, based upon the direction given by the courts, if a majority of the Board gathers to conduct the business of the body, in their capacities as Board members, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law.

In the context of the situation that you described, if the gathering was held to discuss interpersonal relationships and similar matters, and if the business of the Board was not intended to arise and did not arise, I do not believe that that kind of gatherings would be subject to the Open Meetings Law. Likewise, if a session is to be held solely for the purpose of educating and training Board members, and if the members do not conduct Board business collectively as a body, the session would not in my view constitute a meeting of a public body subject to the Open Meetings Law.

On the other hand, however, if or insofar as the Board discussed matters within its power, authority or duty, the gathering in my view would have constituted a "meeting" that should have been held in accordance with the Open Meetings Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Education
Wayne F. Gersen
Raymond G. Kuntz

STATE OF NEW YORK
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December 7, 2000

Mr. William W. Scriber
Parish Planning Board Member
[redacted]

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

Dear Mr. Scriber:

I have received your letter of November 6. You wrote that you serve as a member of the Town of Parish Planning Board and that five of its seven members met without informing you. You asked whether "members of the planning board [may] get together and discuss town business, questionably act on items without notice of all members and without notice to the public."

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

I point out that the decision rendered by the Court of Appeals 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.

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

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

In view of the language quoted above, a planning board cannot carry out its powers or duties except by means of an affirmative vote of a majority of its total membership taken at a meeting duly held upon reasonable notice to all of the members. Therefore, if a member of the Board is not given reasonable notice of a meeting, the Board in my view cannot take action, conduct a valid meeting or otherwise carry out its powers and duties, even if a majority of the Board is present.

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

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

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

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

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December 7, 2000

Ms. Sue Ellen Gerchman
Biology Department Bldg. 463
Brookhaven National Laboratory
Upton, NY 11973

The staff of the Committee 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. Gerchman:

As you are aware, I have received your letters of October 27 and November 15.

Several areas of your inquiry involve your ability as a member of the Board of Education of the Shoreham Wading River Central School District Board of Education to disclose information or express your views. For instance, during an open meeting in which the Board discussed its policy concerning videotaping of meetings, you "revealed what [you] felt were the feelings that had been expressed by [y]our attorney." You also asked whether "all discussions which occur in executive session [are] privileged" and questioned the "confidentiality of material received by the Board of Education in [y]our weekly packets." Similarly, you asked whether "a board member [is] allowed to discuss class sizes or fund balances, [or] any information which could be gotten through a FOIL request." A Board member also questioned the propriety of your transmission of an e-mail communication to a number of people relating to certain programs that are carried out in the District.

From my perspective, unless a statute, an act of the Congress or the State Legislature, forbids a member of the Board or others from disclosing specific information or records, the Board member may choose to disclose.

In this regard, it is emphasized that the two statutes of primary significance in relation to your questions, the Freedom of Information Law and the Open Meetings 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)].

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

For example, if a discussion by a board of education concerns a record pertaining to a particular student (i.e., in the case of consideration of disciplinary action, an educational program, an award, etc.), the discussion would have to occur in private and the record would have to be withheld insofar as public discussion or disclosure would identify the student. As you may be aware, the Family Educational Rights and Privacy Act (20 USC §1232g) generally prohibits an 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).

Since you referred to disclosure of information obtained from the District's attorney, although I returned the videotape containing the exchange in question, my recollection is that several Board members made reference to the attorney's advice and that his opinion was part of the discussion. That being so, I believe that the Board, the client, effectively waived the ability to claim that your comments were made in contravention of the attorney-client privilege.

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.

In the context of the situations that you described, I do not believe that your disclosure of comments were in any way inappropriate. On the contrary, you and the others on the Board were elected to express points of view and represent your community. 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; rather, in my view, they should represent disparate points of view which, when conveyed as members of the community and part of a deliberative process, lead to fair and representative decision making.

With specific reference to the propriety of your discussion of class sizes or fund balances, I believe that you were elected to discuss those issues and that a failure to do so would deprive the public of the ability to communicate with an elected official and to know of that official's views on matters within the scope of his or her official duties. With respect to e-mail, I ask how you, as a Board member, could have a lesser right to communicate or offer an opinion than any other member of the public. In short, I disagree with the suggestion that your e-mail communication was in some way improper; on the contrary, you were elected to be an opinion leader and communicate on issues of public concern within your community, and doing so is in my opinion not only proper but precisely what you were elected to do.

Next, with respect to the materials distributed to Board members, I point out that an assertion or claim of confidentiality, unless it is based upon a statute, is likely meaningless. As suggested earlier, when confidentiality is conferred by a statute, records fall outside the scope of rights of access pursuant to §87(2)(a) of the Freedom of Information Law, which, again, states that an agency may withhold records that "are specifically exempted from disclosure by state or federal statute". If there is no statute upon which an agency can rely to characterize records as "confidential" or "exempted from disclosure", the records are subject to whatever rights of access exist under the Freedom of Information Law [see Doolan v.BOCES, 48 NY 2d 341 (1979); Washington Post v. Insurance Department, 61 NY 2d 557 (1984); Gannett News Service, Inc. v. State Office of Alcoholism and Substance Abuse, 415 NYS 2d 780 (1979)]. As such, an assertion of confidentiality without more, would not in my view serve to enable an agency to withhold a record.

The contents of the records in question serve as the factors relevant to an analysis of the extent to which they may be withheld or must be disclosed. In my view, several of the grounds for denial may be pertinent to such an analysis.

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

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

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

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

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

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

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

Section 87(2)(c) of the Freedom of Information Law permits an agency to withhold records to the extent that disclosure "would impair present or imminent contract awards or collective bargaining negotiations". When the District is engaged in collective bargaining negotiations, information provided to the Board might in some instances fall within that exception.

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

In sum, a blanket denial of access to the records in question would likely be inconsistent with the Freedom of Information Law. However, it is also likely that one or more grounds for denial could appropriately be cited withhold portions of those records.

It is noted, too, that the grounds for withholding records appearing in the Freedom of Information Law and the grounds for entry into executive session appearing in §105(1) of the Open Meetings Law are not necessarily consistent. For instance, a recommendation to modify policy or to change the date of a board meeting would constitute intra-agency material that could be withheld pursuant to §87(2)(g) of the Freedom of Information Law. However, when those issues are raised at a Board meeting, there would be no valid basis for conducting an executive session. Therefore, even though records might be withheld in accordance with law, it does not necessarily follow that a meeting pertaining to those records may properly be closed or that it is reasonable to withhold them.

Lastly, with regard to the confidentiality of meetings of subcommittees of the Board, when a committee or subcommittee consists solely of members of a public body, such as the Board, 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 Agency, would fall within the requirements of the Open Meetings Law, assuming that a committee discusses or conducts public business collectively as a body [see Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984 (1981)]. Further, as a general matter, I believe that a quorum consists of a majority of the total membership of a body (see e.g., General Construction Law, §41). Therefore, if, for example, the Board consists of seven, its quorum would be four; in the case of a committee consisting of three, a quorum would be two.

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

In sum, assuming that committees or subcommittees consist of two or more members of the Board, I believe that they would constitute public bodies subject to the Open Meetings Law, and that a quorum of those bodies would be a majority of their membership.

Further, as you are aware, a copy of an opinion was sent to the Board recently in which it was advised that any person may tape or video record an open meeting of a public body, so long as the use of the recording device is not disruptive or obtrusive.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OMC. AO3246

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December 7, 2000

Ms. Martha L. Weale
[redacted]

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

Dear Ms. Weale:

I have received your letter of October 11, which reached this office on October 20. Since you raised a variety of questions, I note that the advisory jurisdiction of the Committee on Open Government is limited to matters relating to the Freedom of Information and Open Meetings Laws. As such, the following comments will pertain to the questions involving matters within the jurisdiction of this office.

Specifically, you indicated that minutes of meetings of the Board of Trustees of the Village of Addison have not been available in a timely manner. 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, as well as the time within which they must be prepared and made available. Section 106 of that statute states that:

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

Based upon the foregoing, minutes must be prepared and made available within two weeks. I point out that, however, minutes need not consist of a verbatim account of every comment that was made.

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Trustees
Village Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3247

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December 7, 2000

Ms. Marie Clancy Ginnane
[redacted]

The staff of the Committee on 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 October 27, as well as the materials relating to it. In your capacity as a member of the Board of Education of the Carmel School District, you questioned the propriety of a "retreat" held "behind closed doors" by the Board. Among the areas considered by the Board were its current and "potential" operational guidelines and "Administration Goals."

From my perspective, the retreat, as it is described in the materials that you sent, fell within the coverage of the Open Meetings Law, and most aspects of the gathering should have been conducted in public. In this regard, I offer the following comments.

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

Inherent in the definition and its judicial interpretation is the notion of intent. If there is an intent that a majority of a public body will convene for the purpose of conducting public business, such a gathering would, in my opinion, constitute a meeting subject to the requirements of the Open Meetings Law.

I point out that the decision rendered by the Court of Appeals was precipitated by contentions made by public bodies that so-called "work sessions" and similar gatherings held for the purpose of

discussion, but without an intent to take action, fell outside the scope of the Open Meetings Law. In discussing the issue, the Appellate Division, Second Department, which includes Westchester County and whose determination was unanimously affirmed by the Court of Appeals, stated that:

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

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

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

Based upon the direction given by the courts, when a majority of a public body gathers to discuss public business, in their capacities as members of the body, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law. In my view, with respect to the gathering described in the correspondence, the issues under consideration involved matters of public business. Consequently, despite its characterization as a "retreat", I believe that it constituted a "meeting" that should have been held in accordance with the requirements of the Open Meetings Law.

I note that retreats in some circumstances are conducted solely for the purpose of training or the improvement of interpersonal relations. In those instances, a public body would not be involved in conducting business reflective of the performance of its duties collectively as a body. Those kinds of gatherings are, in my opinion and based on judicial decisions, distinguishable from meetings and would not be subject to the Open Meetings Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Marilyn Terranova

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AC-3248

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December 7, 2000

Hon. Samuel Catholdi
Village of Lyons Trustee
[redacted]

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

Dear Trustee Catholdi:

I have received your letter of October 31 in which you sought clarification and guidance concerning the notice requirements imposed by the Open Meetings Law.

In this regard, §104 of the Open Meetings Law states that:

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

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

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

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

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

Based upon the foregoing, merely posting a single notice would fail to comply with the Open Meetings Law, for the Law requires that notice be given to the news media and posted prior to meetings. Further, absent an emergency or urgency, the Court in Previdi suggested that it would be unreasonable to conduct meetings on short notice, unless there is some necessity to do so.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3949

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December 7, 2000

E-MAIL

TO: Bruce Sherwin [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. Sherwin:

As you are aware, I have received your letter of November 3. In your capacity as a member of the Board of Trustees of the Guilderland Public Library, you have raised a series of questions, most of which involve the Open Meetings Law.

The first question is whether Trustees are public officers. This issue concerns a matter beyond the jurisdiction of this office. It is suggested that you seek guidance from your attorney or representative of the State Education Department. With respect to your remaining questions, 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, such as the board of trustees of a public library, must be conducted in public, except to the extent that there is a basis for entry into executive session. Section 102(3) of the Open Meeting Law defines the phrase "executive session" 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 before a public body may conduct an executive session. Specifically, the cited provision states in relevant part that:

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

Paragraphs (a) through (h) of §105(1) specify and limit the grounds for entry into executive session. Therefore, the Board of Trustees cannot conduct an executive session to discuss the subject of its choice.

The most common ground for entry into executive session by library boards of trustees is §105(1)(f), the so-called "personnel" exception. I note, however, that the language of that provision is limited and precise. It states that a public body may 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 or a particular person or corporation;"

Based on the language quoted above, it is clear that many personnel-related issues would not qualify for consideration in executive session. Only when the subject matter pertains to a "particular person or corporation" in conjunction with a subject appearing in §105(1)(f) would an executive session be proper under that provision. Therefore, by means of example, even though extending or diminishing the hours during which a library is open may relate to "personnel", that subject would not focus on any "particular person" and there would be no basis for holding an executive session.

Next, with respect to minutes of meetings, §106 of the Open Meetings Law states that:

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

In view of the foregoing, it is clear in my opinion that minutes of open meetings must be prepared and made available on request "within two weeks of the date of such meeting."

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

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

Lastly, minutes of executive sessions need not include information that may be withheld under the Freedom of Information Law. From my perspective, 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)].

As indicated to you by phone, I would be pleased to conduct a workshop concerning the Open Meetings and Freedom of Information Laws.

I hope that I have been of assistance.

RJF:tt

OML-AO-3950

From: Robert Freeman
To: [redacted]
Date: 12/8/00 3:51PM
Subject: Dear Ms. Gilbert:

Dear Ms. Gilbert:

It has been held that the "litigation" exception for entry into executive session is applicable when a public body, such as a planning board or a zoning board of appeals, discusses its litigation strategy. The principle is that a government body may discuss its litigation strategy in private so as not to divulge its strategy to its adversary, who may be in attendance at a meeting. It has also been held that the mere threat, the possibility or fear of litigation would would not alone constitute valid grounds for conducting an executive session.

As a general matter, if a public body enters into executive session and discusses an issue but takes no action, there is no requirement that minutes of the executive session be prepared.

If you need additional information, please feel free to contact me.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
Albany, NY 12231
(518) 474-2518 - Phone
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Website - www.dos.state.ny.us/coog/coogwww.html

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3251

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Website Address:http://www.dos.state.ny.us/coog/coogwww.html

December 11, 2000

Mr. Frank Vescera
Common Cents Property Owners
Association, Inc.
1155 Mohawk Street
Utica, NY 13501

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

Dear Mr. Vescera:

I have received your note of November 8 in which you questioned the propriety of a "condition" imposed by the Utica City School District Board of Education concerning the use of videotapes of its open meetings. According to a news article, the Board adopted a resolution allowing anyone to broadcast a videotape of its meeting, so long as the tape is shown in its entirety.

From my perspective, the condition is unenforceable and unreasonable. For reasons described in the opinion sent to you pertaining to the District's claim of copyright, once a copy of the videotape is made available to you, I believe that the tape is your property, and that you may do with it as you see fit. To reiterate a point offered by the Appellate Division in Mitchell v. Board of Education, that "recordings can be edited, altered, or used out of context" is of no significance; what is captured on tape was expressed during a "public forum", and the only valid means of precluding the use of a recording device at an open meeting would involve a finding that the use of the recording equipment is physically obtrusive or disruptive [113 AD2d 924, 925 (1985)].

If the Board's resolution were valid, a local television station might not have the authority to air a brief but significant portion of a meeting during its news broadcast; it would be required to air the entirety of the meeting. Similarly, it might be contended that a local newspaper could not print a statement made during an open meeting, for the entirety of the meeting would have to be transcribed and reproduced.

In short, in my view, the condition to which you referred has no basis in law.

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-3952

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December 18, 2000

Hon. Robert S. Thompson
Massapequa Zoning Board of Appeals
[redacted]

The staff of the Committee on Open 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 November 7. In your capacity as a member of the Village of Massapequa Zoning Board of Appeals, you raised issues relating to the contents of minutes of the Board's meetings and the status of its deliberations under the Open Meetings Law.

First, you expressed the belief that all comments made by the members and others who attend meetings of the Board should be included in 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, although minutes must be prepared and made available within two weeks, it is clear that minutes need not consist of a verbatim account of every comment that was made, whether they relate to the "inside" or "outside" meetings that you described. As you suggested, however, public bodies frequently tape record their meetings in order to have an accurate record of all that was said at a meeting. Further, any person may record an open meeting, so long as the use of the recording device is not disruptive or obtrusive.

Second, I agree with your view that "the inside and outside meetings are one meeting" and that the latter should be treated in the same manner as the former in terms of openness, notice and the ability of the public to attend.

I point out 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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

OML-3253

From: Robert Freeman
To: [redacted]
Date: 12/21/00 12:10PM
Subject: Dear Ms. Philips:

Dear Ms. Philips:

I have received your letter. In my view, as a member of the Board of Education, you have a statutory right to attend executive sessions of the Board. Section 105(2) of the Open Meetings Law states that: "Attendance at an executive session shall be permitted to any member of the public body and any other persons authorized by the public body." Since a board of education is a "public body", again, I believe that you have the right to attend any executive session. Whether you refrain from voting on an issue is, in my opinion, a separate matter.

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

Robert J. Freeman
Executive Director
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December 27, 2000

Hon. Frank Maurizio
Councilman
City of Schenectady
Office of the City Council
City Hall - Jay Street
Schenectady, NY 12305

The staff of the Committee on 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 Maurizio:

I have received your letter of November 24 in which you requested a "ruling" from this office concerning the Open Meetings Law. You indicated that the Schenectady City Council consists of seven members, all of whom are from the same political party, and added that:

> "In an effort to comply with the Open Meetings Law, all current Council sessions – bimonthly meetings as well as committee meetings – are open to the public. The question of public access arises when we consider political caucuses. There are times the Council needs to convene to discuss political implications of legislation, or to discuss its internal 'housekeeping' matters (leadership designation, committee assignments, etc.)."

You have asked whether the caucuses as you described them may be conducted in private and if four or more Council members can ever meet "without it being a public session."

In this regard, it is emphasized that the Committee on Open Government is authorized to offer advisory opinions concerning the Open Meetings Law; it is not empowered to render a ruling or otherwise compel a public body to comply with law. In an effort to advise and offer clarification, 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 Council is present to discuss 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. I note that if a majority is present during a social gathering or attends a conference, for example, in which those in attendance are part of a large audience, the majority would not have gathered for the purpose of conducting the business of the City collectively, as a body, and in my view, in those situations, the presence of a majority would not constitute a "meeting" for purposes of the Open Meetings 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).

I point out that 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). Since all the members of the Council are from a single political party, based on the decision cited above, I do not believe that the Council may validly conduct a closed political caucus to discuss matters of public business. However, when the members are discussing political party business (i.e., fund raising, party leadership, etc.), a closed political caucus may in my view be appropriately held.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
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December 27, 2000

Mr. Robert F. Reninger
[redacted]

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

Dear Mr. Reninger:

I have received your letter of November 19 and the materials attached to it. You have again criticized the Greenburgh Town Supervisor for conducting meetings in a small conference room or on a "road show" in various locations in the Town, and you asked that I "outline the options available to Greenburgh residents."

In this regard, as indicated in the opinion addressed to you on November 6, it has been held that when it can be known in advance of a meeting that the location of the meeting will not likely accommodate those interested in attending, and if a site is available that will accommodate those persons, it would be unreasonable to refrain from holding the meeting at the alternative site (Crain v. Reynolds, Supreme Court, New York County, NYLJ, August 12, 1998).

With respect to the enforcement of the Open Meetings Law, subdivision (1) of §107 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 taking in violation of this article void in whole or in part."

Lastly, separate from the Open Meetings Law, I note that subdivision (2) of §62 of the Town Law states in part that: "All meetings of the town board shall be held within the town at such place as the town board shall determine by resolution..." It is my understanding that most town boards, soon after the enactment of the provision quoted above, designated their town halls as the location for conducting their meetings.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Paul Feiner

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December 27, 2000

Mr. Roy Mallette
[redacted]

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. Mallette:

I have received your letter of November 16 in which you raised a variety of questions and concerns relating to the operation of the government of the Town of Cicero.

The first area of inquiry involves the legality of a notice given prior to a hearing on the budget. In this regard, I note that the advisory jurisdiction of the Committee on Open Government involves offering opinions and guidance pertaining to the Open Meetings and Freedom of Information Laws. Neither of those statutes deals with hearings or notices that precede hearings; I believe that the basis of a response would involve provisions of the Town Law, and it is suggested that you might review sections of the Town Law dealing with the budget and the designation of an official newspaper.

The second involves a situation in which you found the main entrance to the Town Hall locked, entered through a different door, and came upon the entire Town Board, at which time you were informed, in your words, that "this was a budget meeting." In my view, if indeed the Board gathered to discuss the budget, the gathering would have constituted a "meeting" that should have been held in accordance with the Open Meetings Law.

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

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

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

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

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

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

Further, 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 that the private discussion involved consideration of the budget, I believe it 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. Further, certain matters that have nothing to do with personnel may be discussed in private under the provision that is ordinarily cited to discuss personnel.

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

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

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

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

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

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

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

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 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).

The remaining issue upon you focused relates to the Cicero Local Development Corporation, which was the subject of an opinion addressed to you on December 7. Having reviewed that opinion, I do not believe that I can add anything of substance to it.

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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December 27, 2000

Mr. Frank 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 in which you sought an opinion concerning the propriety of a vote conducted by the Hudson City School District Board of Education by means of e-mail for the purpose of giving certain employees a day off at full pay without charging any leave time.

In this regard, there is nothing in the Open Meetings Law that would preclude members of a public body from conferring individually, by telephone, via mail or e-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 or e-mail would in my opinion be inconsistent with law.

From my perspective, voting and action by a public body may be carried out only at a meeting during which a quorum has physically convened, or during a meeting held by videoconference. 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."

Further, §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, including the use of videoconferencing for attendance and participation by the members of the public body." 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 such a body, i.e., the Board of Education, or a convening that occurs through videoconferencing. I point out, too, that §103(c) of the Open Meetings Law states that "A public body that uses videoconferencing to conduct its meetings shall provide an opportunity to attend, listen and observe at any site at which a member participates."

The provisions in the Open Meetings Law concerning videoconferencing are newly enacted (Chapter 289 of the Laws of 2000), and in my view, those amendments clearly indicate that there are only two ways in which a public body may validly conduct a meeting. Any other means of conducting a meeting, i.e., by telephone conference, by mail, or by e-mail, would be inconsistent with law.

As indicated earlier, the definition of the phrase "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, which was also amended to include language concerning videoconferencing, 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, gathered together in the presence of each other or through the use of videoconferencing, 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 on the foregoing, again, a valid meeting may occur only when a majority of the total membership of a public body, a quorum, has "gathered together in the presence of each other or through the use of videoconferencing." Moreover, only when a quorum has convened in the manner described in §41 of the General Construction Law would a public body have the authority to carry out its powers and duties. Consequently, it is my opinion that a public body may not take action or vote by means of e-mail.

Conducting a vote or taking action via e-mail would, in my view, be equivalent to voting by means of a series of telephone calls, and in the only decision dealing with a vote taken by phone, the

court found the vote to be a nullity. In Cheevers v. Town of Union (Supreme Court, Broome County, September 3, 1998), which cited and relied upon an opinion rendered by this office, 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..."

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

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

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

In an effort to enhance compliance with and understanding of the Open Meetings Law, a copy of this response 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
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December 27, 2000

Ms. RaeAnn Fitch
[redacted]

The staff of the Committee on 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 November 27 in which you asked whether "fire department commissioners...are required to follow FOIL and open meetings laws." In my view, which is based on the language of the law and its judicial interpretation, both boards of fire commissioners and volunteer fire companies are required to comply with both statutes.

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

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

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

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

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

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

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

With respect to volunteer fire companies, it is my understanding that most are not-for-profit corporations. Although those kinds of entities are generally private and separate from government, the Court of Appeals, the state's highest court, held some twenty years ago that volunteer fire companies are "agencies" subject to the Freedom of Information Law, despite their corporate status [Westchester-Rockland Newspapers v. Kimball, 50 NY2d 575 (1980)]. In so holding, the Court stated that:

> "We begin by rejecting respondent's contention that, in applying the Freedom of Information Law, a distinction is to be made between a volunteer organization on which a local government relies for performance of an essential public service, as is true of the fire department here, and on the other hand, an organic arm of government, when that is the channel through which such services are delivered. Key is the Legislature's own unmistakably broad declaration that, '[a]s state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (emphasis added; Public Officers Law, §84).
>
> "True, the Legislature, in separately delineating the powers and duties of volunteer fire departments, for example, has nowhere included an obligation comparable to that spelled out in the Freedom of Information statute (see Village Law, art 10; see, also, 39 NY Jur, Municipal Corporations, §§560-588). But, absent a provision exempting volunteer fire departments from the reach of article 6-and there is none-we attach no significance to the fact that these or other particular agencies, regular or volunteer, are not expressly included. For the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objections cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely

> punctuates with explicitness what in any event is implicit" (id. at 579].

Moreover, although it was contended that documents concerning the lottery were not subject to the Freedom of Information Law because they did not pertain to the performance of the company's fire fighting duties, the Court held that the documents constituted "records" subject to the Freedom of Information Law [see §86(4)].

More recently, another decision confirmed in an expansive manner that volunteer fire companies are required to comply with the Freedom of Information Law. That decision, S.W. Pitts Hose Company et al. v. Capital Newspapers (Supreme Court, Albany County, January 25, 1988), dealt with the issue in terms of government control over volunteer fire companies. In its analysis, the Court states that:

> "Section 1402 of the Not-for-Profit Corporation Law is directly applicable to the plaintiffs and pertains to how volunteer fire companies are organized. Section 1402(e) provides:
>
> > '...a fire corporation, hereafter incorporated under this section shall be under the control of the city, village, fire district or town authorities having by law, control over the prevention or extinguishment of fires therein. Such authorities may adopt rules and regulations for the government and control of such corporations.'
>
> "These fire companies are formed by consent of the Colonie Town Board. The Town has control over the membership of the companies, as well as many other aspects of their structure, organization and operation (section 1402). The plaintiffs' contention that their relationship with the Town of Colonie is solely contractual is a mischaracterization. The municipality clearly has, by law, control over these volunteer organizations which reprovide a public function.
>
> "It should be further noted that the Legislature, in enacting FOIL, intended that it apply in the broadest possible terms. '...[I]t is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (Public Officers Law, section 84).
>
> "This court recognizes the long, distinguished history of volunteer fire companies in New York State, and the vital services they provide to many municipalities. But not to be ignored is that their existence is inextricably linked to, dependent on, and under the control of the municipalities for which they provide an essential public service."

Based upon the foregoing, it is clear that volunteer fire companies are subject to the Freedom of Information Law.

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.

When records are available under the Freedom of Information Law, it has been held that they must be made equally available to any person, without regard to status or interest [see M. Farbman & Sons v. New York City Health & Hosps. Corp., 62 NY 2d 75 (1984); Burke v. Yudelson, 51 AD 2d 673 (1976)]. The Law does not generally distinguish among applicants, and the reason for which a request is made or the residence of an applicant would be largely irrelevant to rights of access.

Lastly, in view of the decisions indicating that volunteer fire companies are subject to the Freedom of Information Law, I believe that the same result can be reached with regard to the inclusion of meetings of those entities under the Open Meetings Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3259

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December 27, 2000

Mr. Bennett Weiss
[redacted]

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

Dear Mr. Weiss:

I have received your letter in which you sought clarification concerning the Open Meetings Law and the propriety of an executive session held by the Board of Education of the Newburgh Board of Education.

Specifically, you were informed that the executive session was permissible due to a "threat of litigation" relating to an issue. You added that you were "especially troubled by the fact that a member of the group from which the Board feared legal action was included in the executive session." In relation to the foregoing, you asked whether "select members of the public" can be allowed to attend executive sessions while the majority of those present may be excluded.

Based on the facts as you presented them, in my opinion, there would have been no basis for entry into 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 Yorktown, 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" [Weatherwax 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. The mere possibility, fear or threat of litigation would not justify holding an executive session. 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 adversary or potential adversary was invited to join the Board, the Board, in my view, would have lost its authority to conduct an executive session.

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." As such, members of a public body always have the right to attend an executive session, and a public body may choose to permit others to attend. In my view, every law, including the Open Meetings Law, should be implemented in a manner that is reasonable and consistent with its intent. If, for example, a person has special knowledge or expertise, or if an employee, administrator or attorney can contribute to a public body's consideration of an issue, the body would clearly be acting appropriately by authorizing that person to attend. On the other hand, if a public body chooses to permit those having one point of view to attend, while excluding those with a different point of view, its action, in my opinion would be unreasonable and unsupportable.

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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

FOIL-AO-3260

From: Robert Freeman
To: [redacted]
Date: 12/27/00 4:12PM
Subject: Dear Mr. Vescovi:

Dear Mr. Vescovi:

I have received your communication in which you referred to a notice indicating that a meeting would be held in a certain location, but that the location could not accommodate those who sought to attend. In that situation, you asked whether a board could move the meeting to a different location that would accommodate those interested in attending, or whether the board must "adjourn...readvertise and reschedule the meeting."

In this regard, I do not believe that there is any provision of law or judicial decision that deals squarely with the issue. From my perspective, the matter involves reasonableness. If, for instance, it is recognized by a board that its usual meeting room is not sufficiently large, and there is an alternative site available, it might be contended that it would be unreasonable not to attempt to move the meeting to that second location. In that event, assuming that notices indicating the new location are posted, that an announcement is made, and that the news media are informed, I believe that the board would be acting reasonably, and that there would likely be no necessity of rescheduling the meeting.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
Albany, NY 12231
(518) 474-2518 - Phone
(518) 474-1927 - Fax
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STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

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December 28, 2000

Mr. Norman J. Goldman
[redacted]

Hon. Thomas A. Paolucci
Councilman
Town of Clifton Park
One Town Hall Plaza
Clifton Park, NY 12065

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

Dear Mr. Goldman and Councilman Paolucci:

I have received your letters, which are respectively dated November 30 and December 13. Both deal with the status of an *ad hoc* committee designated by the Clifton Park Town Board. The entity in question, the "Adult Uses Study Committee", consists of citizens and, in Councilman Paolucci's words, "some town employees with specific knowledge that could be helpful in generating solutions", and they have worked with a paid consultant. Although Mr. Goldman indicated that the Town Attorney advised that the Committee is not subject to the Open Meetings Law, the Councilman, who chaired the Committee, wrote that "no one was ever refused access to any....meetings" of the Committee.

Both of you have sought clarification concerning the status of the Committee under the Open Meetings Law.

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

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

Based on the foregoing, a public body is, in my view, an entity required to conduct public business by means of a quorum that performs a governmental function and carries out its duties collectively, as a body. In order to constitute a meeting subject to the Open Meetings Law, a majority of the total membership of a public body, a quorum, must be present for the purpose of conducting public business. I note, too, that the definition refers to committees, subcommittees and similar bodies of a public body. Based on judicial interpretations, if a committee, for example, consists solely of members of a particular public body, it, too, would constitute a public body. For instance, in the case of a legislative body consisting of seven members, four would constitute a quorum, and a gathering of that number or more for the purpose of conducting public business would be a meeting that falls within the scope of the Law. If that body designates a committee consisting of three of its 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.

With specific respect to your area of concern, several judicial decisions indicate generally that advisory bodies, other than those consisting of members of a governing body, that have no power to take final action fall outside the scope of the Open Meetings Law. As stated in those decisions: "it has long been held that the mere giving of advice, even about governmental matters is not itself a governmental function" [Goodson-Todman Enterprises, Ltd. v. Town Board of Milan, 542 NYS 2d 373, 374, 151 AD 2d 642 (1989); Poughkeepsie Newspaper v. Mayor's Intergovernmental Task Force, 145 AD 2d 65, 67 (1989); see also New York Public Interest Research Group v. Governor's Advisory Commission, 507 NYS 2d 798, aff'd with no opinion, 135 AD 2d 1149, motion for leave to appeal denied, 71 NY 2d 964 (1988)]. In one of the decisions, Poughkeepsie Newspaper, supra, a task force was designated by then Mayor Koch consisting of representatives of New York City agencies, as well as federal and state agencies and the Westchester County Executive, to review plans and make recommendations concerning the City's long range water supply needs. The Court specified that the Mayor was "free to accept or reject the recommendations" of the Task Force and that "[i]t is clear that the Task Force, which was created by invitation rather than by statute or executive order, has no power, on its own, to implement any of its recommendations" (id., 67). Referring to the other cases cited above, the Court found that "[t]he unifying principle running through these decisions is that groups or entities that do not, in fact, exercise the power of the sovereign are not performing a governmental function, hence they are not 'public bod[ies] subject to the Open Meetings Law..."(id.).

In the context of your inquiry, the Committee has no authority to take any final and binding action for or on behalf of the Town. If that is so, the Committee, in my view, would not constitute a public body and, therefore, would not be obliged to comply with the Open Meetings Law. This is not to suggest that the Committee could not hold open meetings, but rather that it is not obliged to give effect to the requirements of the Open Meetings Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

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OML-AO-3262

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December 28, 2000

Mr. Stan Wertheimer
[redacted]

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

Dear Mr. Wertheimer:

As you are aware, I have received your letter of December 3 in which you sought an advisory opinion involving a request for minutes of meetings of the Centerport Fire Department that has been denied.

In consideration of the requirements imposed by the Open Meetings and Freedom of Information Laws, I believe that the records in question must be disclosed. In this regard, I offer the following comments.

By way of background, the Open Meetings Law pertains to meetings of public bodies, and §102(2) of the Law defines the phrase "public body" to mean:

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

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

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

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

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

With respect to volunteer fire companies, it is my understanding that most are not-for-profit corporations. Although those kinds of entities are generally private and separate from government, the Court of Appeals, the state's highest court, held some twenty years ago that volunteer fire companies are "agencies" subject to the Freedom of Information Law, despite their corporate status [Westchester-Rockland Newspapers v. Kimball, 50 NY2d 575 (1980)]. In so holding, the Court stated that:

> "We begin by rejecting respondent's contention that, in applying the Freedom of Information Law, a distinction is to be made between a volunteer organization on which a local government relies for performance of an essential public service, as is true of the fire department here, and on the other hand, an organic arm of government, when that is the channel through which such services are delivered. Key is the Legislature's own unmistakably broad declaration that, '[a]s state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (emphasis added; Public Officers Law, §84).
>
> "True, the Legislature, in separately delineating the powers and duties of volunteer fire departments, for example, has nowhere included an obligation comparable to that spelled out in the Freedom of Information statute (see Village Law, art 10; see, also, 39 NY Jur, Municipal Corporations, §§560-588). But, absent a provision exempting volunteer fire departments from the reach of article 6-and there is none-we attach no significance to the fact that these or other particular agencies, regular or volunteer, are not expressly included. For the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objections cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely

> punctuates with explicitness what in any event is implicit" (id. at 579].

Moreover, although it was contended that documents concerning the lottery were not subject to the Freedom of Information Law because they did not pertain to the performance of the company's fire fighting duties, the Court held that the documents constituted "records" subject to the Freedom of Information Law [see §86(4)].

More recently, another decision confirmed in an expansive manner that volunteer fire companies are required to comply with the Freedom of Information Law. That decision, S.W. Pitts Hose Company et al. v. Capital Newspapers (Supreme Court, Albany County, January 25, 1988), dealt with the issue in terms of government control over volunteer fire companies. In its analysis, the Court states that:

> "Section 1402 of the Not-for-Profit Corporation Law is directly applicable to the plaintiffs and pertains to how volunteer fire companies are organized. Section 1402(e) provides:
>
> > '...a fire corporation, hereafter incorporated under this section shall be under the control of the city, village, fire district or town authorities having by law, control over the prevention or extinguishment of fires therein. Such authorities may adopt rules and regulations for the government and control of such corporations.'
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> "These fire companies are formed by consent of the Colonie Town Board. The Town has control over the membership of the companies, as well as many other aspects of their structure, organization and operation (section 1402). The plaintiffs' contention that their relationship with the Town of Colonie is solely contractual is a mischaracterization. The municipality clearly has, by law, control over these volunteer organizations which reprovide a public function.
>
> "It should be further noted that the Legislature, in enacting FOIL, intended that it apply in the broadest possible terms. '...[I]t is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (Public Officers Law, section 84).
>
> "This court recognizes the long, distinguished history of volunteer fire companies in New York State, and the vital services they provide to many municipalities. But not to be ignored is that their existence is inextricably linked to, dependent on, and under the control of the municipalities for which they provide an essential public service."

Based upon the foregoing, it is clear that they are subject to the Freedom of Information Law, and in view of the decisions indicating that volunteer fire companies are subject to the Freedom of Information Law, I believe that the same result can be reached with regard to the inclusion of meetings of those entities under the Open Meetings Law.

Lastly, the Open Meetings Law includes provisions regarding minutes of meetings. 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."

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

In an effort to enhance compliance with and understanding of open government laws, a copy of this opinion will be forwarded to Mr. Geffken, the President of the Centerport Fire Department.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Mr. Geffken