STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3263

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

January 16, 2001

Ms. Helen M. Lafferty
[redacted]

Gary L. Steffanetta, Esq.
Guercio & Guercio
77 Conklin Street
Farmingdale, NY 11735

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

Dear Ms. Lafferty and Mr. Steffanetta:

I have received your letters dated November 25 and December 28 respectively, both of which deal with meetings of the Board of Education of the Hicksville Union Free School District. Ms. Lafferty questioned the propriety of "26 Special Meetings" held by the Board between January 5, 2000 and September 20 to consider a variety of subjects.

Ms. Lafferty wrote that it is her understanding that "Special Meetings were to be held only for special school board elections, resubmitting a budget and emergency matters...." Mr. Steffanetta suggested that there may be "confusion....as to the distinction between 'special district meetings' and special meetings of the Board...", and he added that "different rules apply to special district meetings, such as those convened for special school board elections or resubmitting a defeated budget." Further, he characterized the "special meetings" in question as "work sessions and planning meetings, which must be open to the public."

In conjunction with the foregoing, I offer the following comments.

First, district meetings and special district meetings are considered in the provisions of Article 41 of the Education Law, §2001 *et seq.* Those provisions, as I understand them, pertain to annual meetings, as well as meetings held to deal with limited subjects, such as those described in both of your letters. To be distinguished are the kinds of meetings to which Mr. Steffanetta referred, which, although characterized as "special meetings", are essentially unscheduled meetings, those that are not referenced on a school calendar, for example, but which are held due to a need to take action in a timely manner and without undue delay. It appears that the meetings in question are unscheduled, and that they are not special district meetings that fall within the scope of Article 41

of the Education Law. If that is so, the Board would appear to be in general compliance with the Open Meetings Law.

Since Ms. Lafferty referred to notice requirements, I point out that §104 of the Open Meetings Law provides that:

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

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

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

> "Whether abbreviated notice is 'practicable' or 'reasonable' in a given case depends on the necessity for same. Here, respondents virtually concede a lack of urgency: They deny petitioner's characterization of the session as an 'emergency' and maintain nothing of substance was transacted at the meeting except to discuss the status of litigation and to authorize, pro forma, their insurance carrier's involvement in negotiations. It is manifest then that the executive session could easily have been scheduled for another date with only minimum delay. In that event respondents could even have provided the more extensive notice required by POL §104(1). Only respondent's choice in scheduling prevented this result.

> "Moreover, given the short notice provided by respondents, it should have been apparent that the posting of a single notice in the School District offices would hardly serve to apprise the public that an executive session was being called...
>
> "In White v. Battaglia, 79 A.D. 2d 880, 881, 434 N.Y.S.ed 637, lv. to app. den. 53 N.Y.2d 603, 439 N.Y.S.2d 1027, 421 N.E.2d 854, the Court condemned an almost identical method of notice as one at bar:
>
> "Fay Powell, then president of the board, began contacting board members at 4:00 p.m. on June 27 to ask them to attend a meeting at 7:30 that evening at the central office, which was not the usual meeting date or place. The only notice given to the public was one typewritten announcement posted on the central office bulletin board...Special Term could find on this record that appellants violated the...Public Officers Law...in that notice was not given 'to the extent practicable, to the news media' nor was it 'conspicuously posted in one or more designated public locations' at a reasonable time 'prior thereto' (emphasis added)" [524 NYS 2d 643, 645 (1988)].

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

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-3264

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January 17, 2001

Hon. Joseph D'Ambrosio
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 Mr. D'Ambrosio:

I have received your letter of December 8. In your capacity as a member of the Town Board of the Town of Kent, you indicated that a fellow member of the Board "has a few of her relatives working for the Town", including her husband, who works for the Parks Department. You contend that "she should not take part in any of the executive sessions related to the Parks Dept." and that "she should not have imput (sic) into any action pertaining to budgets, or contracts..."

In this regard, first, it is emphasized that the advisory jurisdiction of the Committee on Open Government is limited to matters involving public access to government information, primarily under the Freedom of Information and Open Meetings Laws. The Committee is not empowered to advise with respect to issues involving ethics.

Second, §105(2) of the Open Meetings Law states that: "Attendance at an executive session shall be permitted to any member of the public body and any other persons authorized by the public body." Based on the foregoing, it is clear in my view that a member of a town board has the right to attend executive sessions conducted by that board. Whether his or her participation through voting or otherwise is consistent with provisions involving ethical conduct is, again, a question that this office cannot appropriately address.

I regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

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January 17, 2001

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:

As you are aware, I have received your letter of December 8 in which you sought an opinion "as to whether the provisions of the New York Open Meetings Law apply to meetings held by the school-based building planning committees that were created by the Board of Education...pursuant to regulations issued by the Commissioner of Education." As you indicated, school districts are required by the regulations to develop district plans for the participation of teachers and parents in shared decision-making.

You referred to the "district-wide committee" established in the Greenburgh Eleven Union Free School District, which conducts its meetings in accordance with the Open Meetings Law, for "it carries out functions necessary to the development of the shared decision making district plan that must under the Commissioner's regulations, ultimately be adopted by the full School Board after consideration of the district-wide committee's recommendations." Under the plan adopted by the Board, "school-based building committees are created to provide a forum for input on internal curricular and educational issues at each school building." You added that those committees "function essentially as internal advisory committees for the administrators within a particular school" and as a "sounding board" to help "obtain consensus among the constituent members to ensure that the district's goals set by the School Board are implemented and achieved at each school." You specified that the school-based committees "may offer advice on any educational issue to the appropriate administrators or other groups", but that "they are not obligated to do so, nor is the Board of Education obligated to obtain input from the school-based building committees with respect to any decisions made by the School Board." In contrast, you wrote that the Board "is obligated to consult with the district-wide committee" (emphasis yours).

While the "district-wide committee" established pursuant to regulation is, in my view, a "public body" required to comply with the Open Meetings Law, the "school-based committees", as you described them, would appear to fall beyond the requirements of that statute. In this regard, I offer the following comments.

First, by way of background, §100.11(b) of the regulations promulgated by the Commissioner of Education states in relevant part that:

> "By February 1, 1994, each public school district board of education and each board of cooperative educational services (BOCES) shall develop and adopt a district plan for the participation by teachers and parents with administrators and school board members in school-based planning and shared decisionmaking. Such district plan shall be developed in collaboration with a committee composed of the superintendent of schools, administrators selected by the district's administrative bargaining organization(s), teachers selected by the teachers' collective bargaining organization(s), and parents (not employed by the district or a collective bargaining organization representing teachers or administrators in the district) selected by their peers in the manner prescribed by the board of education or BOCES, provided that those portions of the district plan that provide for participation of teachers or administrators in school-based planning and shared decisionmaking may be developed through collective negotiations between the board of education or BOCES and local collective bargaining organizations representing administrators and teachers."

The committee to which reference is made in the provision quoted above is characterized frequently as the "shared decision-making committee" or, as in your letter, the "district-wide committee."

Section 100.11(d) provides in part that:

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

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

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

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

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

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

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

In this instance, however, although the district-wide committee may or may not have the ability to make determinations, according to the Commissioner's regulations, it performs a necessary and integral function in the development of shared decision making plans. As stated earlier, the regulations specify that a district plan "shall be developed in collaboration with a committee." As such, a committee must, by law, be involved in the development of a plan. The regulations also indicate that a plan may be adopted by a board of education or BOCES only "after consultation with and full participation by" a committee, and that the Commissioner may approve a plan only after having found that it "complies with the requirements of this section", i.e., when it is found that a committee was involved in the development of a plan. Further, an appeal may be made to the Commissioner if a board has failed to permit "full participation" of a committee.

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

Again, according to the Commissioner's regulations, which have the force and effect of law, a plan cannot be adopted absent "collaboration" and participation by a district-wide committee.

Since a district-wide committee carries out necessary functions in the development of shared decision making plans, 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 district-wide committee is an entity consisting of more than two members; it is required in my view to conduct its business subject to quorum requirements (see General Construction Law, §41); and, based upon the preceding commentary, a committee conducts public business and performs a governmental function for a public corporation, such as a school district or a BOCES.

While the Commissioner's regulations make reference to "school-based" committees, there is no statement concerning their specific role, function or authority. It is my understanding, based upon a discussion with a representative of the State Education Department, that school-based committees carry out their duties in accordance with the plans adopted individually by boards of education in each school district, and that those plans are intended to provide the committees in question varied roles in the decision-making process.

When, for example, a plan provides decision making authority to school-based committees within a district, those committees, in my opinion, would clearly constitute public bodies required to comply with the Open Meetings Law. Similarly, when a school-based committee performs a function analogous to that of the shared decision-making committee, i.e., where the school-based committee has the authority to recommend, and the decision maker or decision making body must consider its recommendations as a condition precedent to taking action, I believe that the committee would be a public body subject to the Open Meetings Law, even when the recommendations need not be followed. On the other hand, however, if a school-based committee has no decision-making authority, and if the Board of Education is not required to seek such a committee's input or otherwise consult with the committee prior to the Board's assertion of its authority, the committee, in my opinion, would not constitute a "public body" subject to the Open Meetings Law.

Since the attributes necessary to a finding a school-based committee is a public body do not appear to be present in the context of your inquiry, I do not believe that such committee would be required to comply with the Open Meetings Law. This is not to suggest that a school-based committee cannot hold open meetings, but rather merely that the requirements imposed by the Open Meetings Law are not applicable.

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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January 18, 2001

Lelia M. Wood-Smith, 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 Ms. Wood-Smith:

As you are aware, I have received your correspondence of December 20 in which you questioned the propriety of an executive session conducted by the Planning Board of the Town of Harrison. You focused in particular on "the appropriateness of the Planning Board's action in permitting the applicant to join them in executive session..."

According to your letter, "[t]he application of Purchase Corporate Park Associates was listed on the agenda as Item number (2)." However, rather than considering that issue when it was reached on the agenda, the Chairman, "without stating the purpose", indicated that the Board would enter into an executive session, and he invited the applicant's attorney to join the Board. The attorney deferred and stated that his client would attend the executive session. Following the closed session, the Chairman stated that the Board determined to retain a second traffic consultant, who was named, and that the Board would attempt to refund to the applicant monies that were advanced to the original traffic consultant. You wrote that you later learned that the first consultant resigned, citing a conflict, and that the applicant "was permitted to discuss possible replacements with the Board." The other issue considered during the executive session involved whether the applicant "could provide proof that the property owner had consented to the application."

From my perspective, the primary issue involves the extent to which the Board could validly have considered the issues that you described during an executive session. In this regard, I offer the following comments.

First, since you indicated that no reason was given prior to entry into executive session, I point out that the Open Meetings Law requires that a public body accomplish a procedure, in public, before conducting an executive session. One of the elements of the procedure involves providing a description of the subjects to be considered. Specifically, subdivision (1) of §105(1) states in relevant part that:

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

Based on the foregoing, it is clear that a motion must be made before entering into executive session, and that the motion must identify "the general area or areas of the subject or subjects to be considered..." Absent identification of the subject matter in a motion to conduct an executive session, neither members of the public in attendance nor perhaps other members of the public body can have the ability to ascertain whether the discussion may properly occur in executive session.

Second, in a related vein, the Open Meetings Law is based on a presumption of openness. Stated differently, a public body must conduct its business in public, except to the extent that an executive session may validly be held. As you are aware, a public body may not hold an executive session to discuss the subject of its choice. On the contrary, paragraphs (a) through (h) of §105(1) specify and limit the subjects that may properly be considered in executive session.

Of likely relevance with respect to the first issue discussed in executive session, the matter involving traffic consultants, would have been §105(1)(f), which permits a public body to enter into executive session to discuss:

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

Insofar as the Board considered the merits of specific traffic consultants, it appears that the executive session was properly held. A discussion of that nature would have involved consideration of the employment history of a particular person or corporation or perhaps a matter leading to the employment of a particular person or corporation. However, if other issues were considered, those that would not have focused on retaining a specific person or firm, I do not believe that the executive session would properly have been held. For instance, if before consideration of specific consultants, the discussion involved the need to retain a second consultant, it would not, in my opinion, have fallen within the grounds for entry into executive session. Similarly, I do not believe refunding or repaying monies to the applicant would have constituted a proper subject for discussion during the executive session. In short, only to the extent that the language of §105(1) clearly applied would the executive session have properly been held.

With respect to the other issue considered during the executive session, the matter involving proof that the property owner had consented to the application, based on information that you provided, the issue should have been discussed in public. A review of the grounds for entry into executive session suggests that none of the grounds would have been applicable or pertinent.

Lastly, with regard to the presence of the applicant during the executive session, again, it appears that much of the discussion should have occurred in full view of the public. Insofar as there was a proper basis for conducting an executive session, I point out that subdivision (2) of §105 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."

In my view, every law, including the Open Meetings Law, should be implemented in a manner that gives reasonable effect to its intent. Relative to your inquiry, it has been advised that a public body may not invite certain segments of the public to attend an executive session (i.e., those with a particular point of view) and exclude others. Further, notwithstanding the language of subdivision (2) of §105, it has been held that the presence of certain persons eliminates the ability of a public body to conduct an executive session. For instance, it has been determined judicially that the intent of the "litigation" exception for entry into executive session [see §105(1)(d)] is intended to enable a public body to discuss its litigation strategy in private, so as not to divulge its strategy to its adversary. Consequently, in a situation in which a town board invited its adversary in litigation to join the board in an executive session to discuss a settlement, the Appellate Division, Second Department, found that the Board relinquished its ability to conduct an executive session [Concerned Citizens to Review the Jefferson Mall v. Town Board of the Town of Yorktown, 84 AD2d 612, appeal dismissed, 54 NY2d 957 (1981)]. I am unaware of the relationship between the Board and the applicant in the context of your inquiry. However, if it is analogous to that described in relation to the litigation exception, it would appear that the Board would have lost its ability to conduct a closed session.

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

cc: Planning Board

STATE OF NEW YORK
DEPARTMENT OF STATE
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OML-AO-3307

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January 18, 2001

Mr. Rich Quaglietta
[redacted]

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. Quaglietta:

I have received your letter of December 11. You have questioned whether you are entitled to "a separate copy" of minutes of executive sessions held by a town board.

In this regard, I direct your attention to §106 of the Open Meetings Law which provides that:

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

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

Lastly, I point out that a public body must approve a motion, in public, before entry into an executive session, and that the motion must include reference to the "general area or areas of the subject or subjects to be considered..." [Open Meetings Law, §105(1)]. Since a motion to enter into executive session must be made during an open meeting, and since §106(1) requires that minutes include references to all motions, the minutes of an open meeting must always include an indication that an executive session was held, as well as the reason for the executive session.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board

OML-AO-3268

From: Robert Freeman
To: [redacted]
Date: 1/19/01 1:09PM
Subject: Dear Ms. LeFebvre:

Dear Ms. LeFebvre:

In response to your questions, in brief, any gathering of a majority of the Town Board for the purpose of conducting public business would constitute a "meeting" that falls within the coverage of the Open Meetings Law. Therefore, the gathering at issue would, in my view, be subject to the Open Meetings Law.

As you may be aware, that law permits the Board to enter into executive session to discuss "proposed, pending or current litigation." However, it has been held by the courts that the purpose of the exception is to enable a board to discuss its litigation strategy in private, so as not to divulge its strategy to its adversary. One case dealt with a situation similar to that which you described, where a town board met with its adversary in litigation to discuss a settlement. The court found that the board lost its authority to hold an executive session when the adversary was invited to join in the settlement discussion [Concerned Citizens to Review the Jefferson Mall v.Town Board of Town of Yorktown, 84 AD2d 612, appeal dismissed, 54 NY2d 957 (1981)]. Consequently, although the Board may discuss its litigation strategy in private, when the adversary joins them, the Board, according to case law, relinquishes its ability to hold an executive session.

If you need additional information, please feel free to contact me.

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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January 19, 2001

Mr. Thomas Sobczak, 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. Sobczak:

As you are aware, I have received your letter of December 26 and the materials attached to it. You have sought my views concerning your contention that the Carle Place Board of Education "seems to treat one group of citizens different from another group." You referred, for example, to a statement by the President of the Board indicating that the Board deals only with "known entities." However, when you requested records defining that phrase or specifying the Board's policy on the subject, you were informed that there are no such records and that the phrase "known entities" was "a figure of speech."

In this regard, I point out that the Committee on Open Government is authorized to advise with respect to the Freedom of Information and Open Meetings Laws. As such, the following comments will be limited to matters relating to those statutes.

With respect to the Freedom of Information Law, the identity of an applicant for records, his or her residence, and that person's interest in the records are factors largely irrelevant in consideration of rights of access. As a general matter, when records are accessible under the Freedom of Information Law, it has been held that they should be made equally available to any person, regardless of one's status, interest or the intended use of the records [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. Moreover, the Court of Appeals, the State's highest court, has held that:

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

person making the request" [Farbman v. New York City Health and Hospitals Corporation, 62 NY 2d 75, 80 (1984)].

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

Similarly, §103 of the Open Meetings Law states that meetings of public bodies "shall be open to the general public." While 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), I note that it 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.

Further, 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.

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-3270

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January 30, 2001

Mr. Lee Kirby
[redacted]

Dear Mr. Kirby:

As you are aware, the Office of the Attorney General recently forwarded your correspondence of December 15 to the Committee on Open Government. The Committee, a unit of the Department of State, is authorized to offer opinions and guidance concerning the state's Open Meetings Law.

The issue that you raised involves your right to speak at an open meeting of a public body. Specifically, you contend that the Town of Schuyler Falls Planning Board violated your constitutional rights by prohibiting you from speaking at its meetings.

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

In the case of the New York Open Meetings Law, in a statement of general principle and intent, that statute confers upon the public the right to attend meetings of public bodies, to listen to their deliberations and observe the performance of public officials. However, as you may be aware, that right is limited, for public bodies in appropriate circumstances may enter into closed or executive sessions. As such, it is reiterated that, in my opinion, there is no constitutional right to attend meetings.

Within the language of the Open Meetings Law, there is nothing that pertains to the right of those in attendance to speak or otherwise participate. Certainly a member of the public may speak or express opinions about meetings or about the conduct of public business before or after meetings to other persons. However, since neither the Open Meetings Law nor any other provision of which I am aware provides the public with the right to speak during meetings, I do not believe that a public body is required to permit the public to do so during meetings. A public body may permit the public to speak, and if it does so, it has been suggested that rules and procedures be developed that

regarding the privilege to speak that are reasonable and that treat members of the public equally. Further, I believe that a town board, as the governing body of a municipality, would have the authority to establish policies or directions regarding the conduct of meetings of a planning board or other bodies over which it has jurisdiction.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Harold Ormsby

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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January 31, 2001

Ms. Fran Hohenberger
[redacted]

Mr. Richard Miesemer
[redacted]

The staff of the Committee on 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. Hohenberger and Mr. Miesemer:

As you are aware, I have received your letters of November 28 and January 2, as well as related materials concerning the implementation of the Open Meetings and Freedom of Information Laws by the Connetquot Central School District Board of Education.

The matter pertains to a "Special Executive Session Meeting" held by the Board on October 30. Because notice of the meeting indicated that the meeting would be an executive session, you wrote that no member of the public attended and that you were informed that the purpose of the meeting was to interview candidates for the position of district clerk. However, having reviewed the notes relating to the meeting, you wrote that they indicated that a "budget workshop" was held prior to the executive session. You added, however, that upon questioning, the Superintendent stated that the Board had recently attended a conference held by the New York State School Boards Association and sessions dealing with budgets, reserves and fund balances, and that the Board asked to discuss those matters at the meeting in question. When you asked for reference materials used in consideration of those issues, you were initially told that there were no materials, and later that the Board discussed the documentation distributed at the conference. It is your belief that another document, a copy of which you enclosed, was reviewed at the meeting. That document involves the same subjects as those presented in the conference materials, but they focus specifically on the District.

In this regard, I offer the following comments.

First, the phrase "executive session" is defined in §102(3) of the Open Meetings Law to mean a portion of an open meeting during which the public may be excluded. As such, an executive

session is not separate and distinct from a meeting, but rather is a portion of an open meeting. The Law also contains a procedure that must be accomplished during an open meeting before an executive session may be held. Specifically, §105(1) states in relevant part that:

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

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

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

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

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

Second, while I believe that interviews of or discussions involving candidates for the position of district clerk could clearly have been conducted during an executive session, insofar as the executive session involved consideration of budgetary or fiscal matters, I believe that those issues should have been discussed in public at a meeting preceded by proper notice. Often a discussion

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

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

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

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

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

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

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

When a discussion concerns matters of policy, such as the manner in which public money is 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 materials that you described, I point out that the Freedom of Information Law pertains to all agency records, and that §86(4) of the Law defines the term "record" to mean:

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

Based on the foregoing, when information is maintained by an agency in some physical form (i.e., drafts, worksheets, computer disks, etc.), I believe that it would constitute a "record" subject to rights of access.

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.

Pertinent with regard to materials prepared by the District 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.

In a case involving "budget worksheets", it was held that numerical figures, including estimates and projections of proposed expenditures, are accessible, even though they may have been

advisory and subject to change. In that case, I believe that the records at issue contained three columns of numbers related to certain areas of expenditures. One column consisted of a breakdown of expenditures for the current fiscal year; the second consisted of a breakdown of proposed expenditures recommended by a state agency; the third consisted of a breakdown of proposed expenditures recommended by a budget examiner for the Division of the Budget. Although the latter two columns were merely estimates and subject to modification, they were found to be "statistical tabulations" accessible under the Freedom of Information Law as originally enacted [see Dunlea v. Goldmark, 380 NYS 2d 496, aff'd 54 AD 2d 446, aff'd 43 NY 2d 754 (1977)]. At that time, the Freedom of Information Law granted access to "statistical or factual tabulations" [see original Law, §88(1)(d)]. Currently, §87(2)(g)(i) requires the disclosure of "statistical or factual tabulations or data". As stated by the Appellate Division in Dunlea:

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

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

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

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

Further, another decision highlighted that the contents of materials falling within the scope of section 87(2)(g) represent the factors in determining the extent to which inter-agency or intra-agency materials must be disclosed or may be withheld. For example, in Ingram v. Axelrod, the Appellate Division held that:

> "Respondent, while admitting that the report contains factual data, contends that such data is so intertwined with subject analysis and

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

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

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

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

The materials obtained by the School Board Association would, in my view, be accessible for your review in their entirety, for none of the grounds for denial would apparently be pertinent. It is noted that §86(3) of the Freedom of Information Law defines the term "agency" to mean:

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

Based on the foregoing, the exception pertains to communications between or among state or local government officials at two or more agencies ("inter-agency materials"), or communications between or among officials at one agency ("intra-agency materials"). Since the Association is not an "agency", the materials that it prepared would not fall within the exception regarding inter-agency or intra-agency materials.

Lastly, when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search."

I point out that in Key v. Hynes [613 NYS 2d 926, 205 AD 2d 779 (1994)], it was found that a court could not validly accept conclusory allegations as a substitute for proof that an agency could not locate a record after having made a "diligent search". However, in another decision, such an allegation was found to be sufficient when "the employee who conducted the actual search for the documents in question submitted an affidavit which provided an adequate basis upon which to conclude that a 'diligent search' for the documents had been made" [Thomas v. Records Access Officer, 613 NYS 2d 929, 205 AD 2d 786 (1994)].

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Joseph A. Laria

STATE OF NEW YORK
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February 12, 2001

Ms. Delores Z. Caruso, Director
Millenium Project
MVCC Academic Building
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1101 Sherman Drive
Albany, 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 Ms. Caruso:

I have received your correspondence in which you questioned the status of the "Millennium Project" under the Open Meetings Law.

The materials that you forwarded indicate that the Millennium Project was created pursuant to an agreement between the City of Utica School District and Mohawk Valley Community College "to form a cooperative educational partnership program to increase the quality and range of educational experience for the students at Thomas R. Proctor High School and Mohawk Valley Community College..." The functions of the Project are carried out, according to the Project's by-laws, "by an eight - person Coordinating Policy Board that serves as an advisory and recommending Board to the Utica City School Board and the Mohawk Valley Board of Trustees respectively." The by-laws indicate further that the members include three each from the School District and the Board of Trustees, the District Superintendent and the President of the Community College.

In addition to the statement in the by-laws indicating that the authority of the Coordinating Policy Board is advisory, the Declaration of Intent describing the initial agreement to form the partnership to be known as the Millennium Project refers to the Board as "advisory in capacity." Since that entity has the ability only to advise and recommend, based on judicial decisions, its meetings would not, in my view, be subject to the requirements of the Open Meetings Law.

In this regard, 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, in my opinion, 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 solely 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 Coordinating Board consists of members of two public bodies, and the chief executive officers of two agencies, it does not include a majority of any particular public body. Further, based on the materials that you supplied, it has no authority to take any final and binding action for or on behalf the District or the Community College. If that is so, and if the District Board of Education and the Community College Board of Trustees have the authority to accept, reject or modify the advice and recommendations offered by the Coordinating Policy Board, according to judicial decisions, the Policy Board would not carry out a "governmental function" and, therefore, would not constitute a public body subject to the requirements of the Open Meetings Law.

This is not to suggest that the Board could not choose to conduct its meetings open to the public in whole or in part; certainly it may do so. Nevertheless, unlike a meeting of a public body during which any member has the right to be present, the ability of the public to attend a meeting of the Board would involve a privilege conferred by the Board.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

OML-AO-3273

From: Robert Freeman
To: [redacted]
Date: 2/15/01 7:53AM
Subject: Re: Open Meetings Law

Dear Ms. Wood:

You are indeed correct. In short, the phrase "work session" appears nowhere in law, and there is no distinction between a "work session" and a "meeting."

As you may be aware, a case decided more than twenty years ago [Orange County Publications v. City of Newburgh, 60 AD2d 409, aff'd 45 NY2d 947 (1978)] dealt with work sessions held solely for the purpose of discussion and with no intent to take action. Although it was contended that those gatherings fell outside the coverage of the Open Meetings Law, it was determined, in essence, that any gathering of a majority of a public body for the purpose of conducting or discussing public business constitutes a "meeting" subject to the Open Meetings Law.

From my perspective, a public body can do anything at a work session that it can do at a "formal" meeting, unless it has established its own rule or policy to the contrary.

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

I hope that I have been of assistance.

[redacted]

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February 26, 2001

Mr. William W. Watson
[redacted]

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

Dear Mr. Watson:

I have received your letter in which you referred to the language of §105(1)(f) of the Open Meetings Law that permits a public body to enter into executive session to consider the "employment history of a particular person." You asked whether " a non paid Board of Education member [is] considered to be an employee of the school district."

From my perspective, since a board of education is the governing body of a school district, and since a member of a board of education is not paid, he or she could not be characterized as "an employee of the district." I note, however, that the terms of §105(1)(f) are not restricted to matters relating only to employees. Specifically, that provision authorizes a public body to conduct an executive session to discuss:

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

Based on the foregoing, an executive session may be held to discuss the subject matter described in §105(1)(f) in relation to a "particular person or corporation."

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3275

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 26, 2001

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 facts presented in your correspondence.

Dear Mr. Brixner:

I have received your letter of January 11 in which you raised the following question:

> "If a Chili designated Committee, in particular the 'Year 2000 Master Plan Update Committee' fails to provide any Public Notice of its full Committee or of its Subcommittee Meetings, then is this Violation of the Open Meetings Law?"

In this regard, if my understanding of the matter is accurate, the Open Meetings Law would not apply to the entity that is the subject of your inquiry.

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 been long 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 opinionn, 135 AD 2d 1149, motion for leave to appeal denied, 71 NY 2d 964 (1988)].

Assuming, that the Year 2000 Master Plan Update Committee does not consist solely of members of a public body (i.e., members of the Town Board) and has no authority to take final and binding action, it would not constitute a "public body." If that is so, it would not be subject to or required to comply with the Open Meetings law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board
Hon. Richard Brongo

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3276

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 27, 2001

Mr. Robert Morrow
ZBA Board Member
Town of Schroeppel
Town Hall
Phoenix, NY 13135

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

Dear Mr. Morrow:

I have received your letter of January 28. According to your letter, and the news article attached to it, you serve as a member of the Zoning Board of Appeals of the Town of Schroeppel, and you excused yourself from consideration of a matter before the Board due to the possibility of a conflict of interest. You were directed, however, by the Town Attorney to leave the meeting room while the matter was being discussed. Although you indicated that you sought to attend "as a taxpayer and a citizen", the Town Attorney told you that you "had to leave the room."

From my perspective, you have the right to attend any meeting of the Zoning Board of Appeals or any public body subject to the Open Meetings Law. Section 103(a) of that statute states that meetings of public bodies are open to the general public. As a member of the public, I do not believe that the Town Attorney or any other person or entity would have the authority to preclude you from attending an open meeting of the Board.

In the only case of which I am aware in which an attempt was made to exclude a certain individual from attending an open meeting, the matter involved a school district employee who was the subject of a disciplinary proceeding, and the Board sought to prohibit his attendance at Board meetings as parts of a disciplinary sanction. While the Court found that disciplinary measures could be imposed in relation to the individual's employment, it determined that the Board could not prohibit him, as a member of the public, from attending the open meeting [Goetschuis v. Board of Education, Supreme Court, Westchester County, NYLJ, August 8, 1996; aff'd 244 AD2d 552 (1997)]. The principle in my view is the same in the context of your inquiry. While you may be precluded from participating as a Board member due to a possible conflict of interest, I do not believe that, in your capacity as a member of the public, you may be excluded from an open meeting.

Even if the matter involving your interest could properly be considered in an executive session, as a member of the Board, I believe that you would have the right to be present. Section 105(2) of the Open Meetings Law 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, a member of a public body has the right to attend an executive session of that body.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Zoning Board of Appeals
Scott Chatfield

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3277

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

February 27, 2001

Trustee Gary Rainbow
Village of North Syracuse
600 South Bay Road
North Syracuse, NY 13212

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

Dear Trustee Rainbow:

I have received your letter in which you raised a series of questions concerning certain persons' presence at or exclusion from executive sessions held by the Board of Trustees of the Village of North Syracuse. You also asked whether the Board may appoint a "pro-tem" clerk to attend an executive session to discuss a personnel matter.

In this regard, I offer the following comments.

First, pertinent to several of your questions is §105(2) of the Open Meetings Law, which provides that: "Attendance at an executive session shall be permitted to any member of the public body and any other persons authorized by the public body." Therefore, the only people who have the right to attend executive sessions are the members of the public body, i.e., a village board of trustees, conducting the executive session. Stated differently, I do not believe that a member of a public body may be compelled to leave an 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 Village 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.

With respect to issues involving the village clerk, I point out that §4-402 (b) of the Village Law states in relevant part that the clerk shall "act as clerk of the board of trustees...and shall keep a record of their proceedings." As suggested above, although the Village Board could choose to enable the clerk or others to attend an executive session, only the members of the Board have the right to attend an executive session. However, in my opinion, 4-402 of the Village Law is intended to require the presence of the clerk to take minutes in situations in which motions and resolutions are made and in which votes are taken.

To give effect to both the Open Meetings Law and §4-402 of the Village Law, which imposes certain responsibilities upon a village clerk, it is suggested that there may be three options. First, the Board could permit the clerk to attend an executive session in its entirety. Second, the 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 Village Law. And third, the 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:tt

cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12550
OML-AO-3278

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

February 27, 2001

Mr. Lee H. Kirby
[redacted]

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. Kirby:

I have received your letter of January 14 in which you raised a series of issues relating to requests for records made to the Town of Schuyler Falls. In addition, you expressed the view that you have the right to speak at meetings of the Planning Board

In this regard, I offer the following comments.

First, it is emphasized that the Freedom of Information Law is applicable to all records maintained by or for an agency, such as the Town. Section 86 (4) of that statute defines the term "record" expansively to mean:

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

Based on the foregoing, a tape recording of an open meeting constitutes a "record" subject to rights of access. Similarly plans and other documentary materials submitted to the Town by a contractor or developer would in my view constitute Town records, irrespective of whether or the extent to which they have been reviewed by the Planning Board.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, the kinds of records to which you referred would be accessible, for none of the grounds for denial would be pertinent. I point out that it was held more than twenty years ago that 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 a tape.

Third, when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." If you consider it worthwhile to do so, you could seek such a certification.

I point out that in Key v. Hynes [613 NYS 2d 926, 205 AD 2d 779 (1994)], it was found that a court could not validly accept conclusory allegations as a substitute for proof that an agency could not locate a record after having made a "diligent search". However, in another decision, such an allegation was found to be sufficient when "the employee who conducted the actual search for the documents in question submitted an affidavit which provided an adequate basis upon which to conclude that a 'diligent search' for the documents had been made" [Thomas v. Records Access Officer, 613 NYS 2d 929, 205 AD 2d 786 (1994)].

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

In the case of the New York Open Meetings Law, in a statement of general principle and intent, that statute confers upon the public the right to attend meetings of public bodies, to listen to their deliberations and observe the performance of public officials. However, as you are aware, that right is limited, for public bodies in appropriate circumstances may enter into closed or executive sessions. As such, it is reiterated that, in my opinion, there is no constitutional right to attend meetings.

Within the language of the Open Meetings Law, there is nothing that pertains to the right of those in attendance to speak or otherwise participate. Certainly a member of the public may speak or express opinions about meetings or about the conduct of public business before or after meetings to other persons. However, since neither the Open Meetings Law nor any other provision of which I am aware provides the public with the right to speak during meetings, I do not believe that a public body is required to permit the public to do so during meetings. A public body may permit the public to speak, and if it does so, it has been suggested that rules and procedures be developed that regarding the privilege to speak that are reasonable and that treat members of the public equally.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board
Hon. Harold Ormsby
Edward Yandow

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3279

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

February 27, 2001

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 facts presented in your correspondence.

Dear Ms. Lane:

As you are aware, I have received your letter of February 13 in which you raised a series of questions. As indicated during our conversation of February 15, the advisory jurisdiction of the Committee on Open Government is limited to matters relating to open government statutes. Therefore, the following commentary will be limited to the issue concerning the site of meetings held by a village board of trustees.

In this regard, there is nothing in the Open Meetings Law or any other provision of law of which I am aware that specifies that meetings of boards of trustees must be conducted within the boundaries of a village. Nevertheless, in my view, every provision of law, including the Open Meetings Law, must be carried out in a manner that gives reasonable effect to its intent. Section 100 of that statute, the legislative declaration, states in part that: "It is essential...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." In my opinion, a meeting of a board of trustees, or any municipal body, must be held at a location where members of the public who might want to attend could reasonably do so. While I do not believe that a specific distance can be determined to be too far from or within reasonable distance of the boundaries of a village for the purpose of holding a meeting. I note that it has been held that meetings held by a board of education twenty miles away from the district it serves was found to be unreasonable and inconsistent with law (see Goetschius v. Board of Education, Supreme Court, Westchester County, March 8, 1999).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

OML-AO-3280

From: Robert Freeman
To: [redacted]

I have received your inquiry concerning the propriety of holding an executive session. As indicated in a phone message, it appears that an executive session could properly be held. However, since I am unaware of the details regarding the matter, I cannot offer specific guidance.

Of likely relevance is §105(1)(f) of the Open Meetings Law, 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."

I would conjecture that the matter may involve the consultant's employment history. If that is so, or if other elements of the language quoted above are applicable, the Board could conduct an executive session.

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

I hope that I have been of assistance.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3281

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

March 1, 2001

E-MAIL

TO: [redacted]

FROM: Robert J. Freeman RJF

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

Dear Councilwoman Mullen:

First, I hope that you are recovering and feeling well.

You wrote that you serve as chair of a recreation committee that plans events and "take[s] the information to the town board." Your question is whether the Open Meetings Law applies to the committee.

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(i.e., a town board, a city council or county legislature) creates or designates two or more of 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 public bodies consisting solely of their own members would have the same obligations regarding notice and openness, for example, as well as the same authority to conduct executive sessions as the governing body [see Glens Falls Newspapers, Inc. v. Solid Waste and Recycling Committee of the Warren County Board of Supervisors, 195 AD2d 898 (1993)].

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

Therefore, if the committee to which you referred does not consist solely of Town Board members and has no authority to take final and binding action, it would not in my view be subject to the Open Meetings Law.

I hope that I have been of assistance. Again, I hope that you are well.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12558
OML-AO-3282

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

March 5, 2001

Mr. Mike Kilian
The Observer-Dispatch
221 Oriskany Plaza
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 facts presented in your correspondence.

Dear Mr. Kilian:

I have received your letter of February 1 and the materials attached to it. You referred to certain actions recently taken in the City of Rome and have sought an advisory opinion concerning their propriety.

The first, an "Official Statement of Executive Policy" ("the Policy") issued by the Mayor, prohibits members of the City's senior staff or department heads from disclosing information discussed at meetings with the Mayor and other City officials. The information that cannot be disclosed involves "statutorily confidential information" and includes a variety of considerations based on a combination of provisions found in the grounds for withholding records listed in §87(2) of the Freedom of Information Law and the grounds for entry into executive session appearing in §105(1) of the Open Meetings Law. Additionally, the policy prohibits the disclosure of:

> "Any sensitive matter or information that if disclosed would disrupt the efficient and effective operations of the City government or would impair the public officer's close working relationship with the Mayor."

A violation of the policy is "considered misconduct and will be cause for discipline."

The second is an ordinance that prohibits City officers or employees from disclosing "by any means" certain information "discussed or deliberated during a properly convened executive session." As in the case of the Policy, this prohibition appears to be based on a combination of exceptions to rights of access in the Freedom of Information Law and the Open Meeting Law's grounds for entry into executive session. Further, a violation " shall be punishable pursuant to the general penalty provision of the Code of Ordinances."

From my perspective, the actions are of questionable legality. I believe, too, that many routine disclosures would constitute violations of the Policy or the Ordinance, and a careful analysis of the matter indicates, in my view, that it is based on an erroneous presumption.

In this regard, I offer the following comments.

First, it appears that the prohibitions adopted by the City of Rome were precipitated by request for an opinion sought by the City's Corporation Counsel from the Attorney General. Corporation Counsel asked "whether a municipality has statutory authority, by local law or in its code of ethics to prohibit members of the city council from disclosing matters discussed in executive session." In an informal opinion (Informal Opinion No. 2000-2) prepared by James D. Cole, Assistant Solicitor General, it was advised that "[a]lthough nothing in the Public Officers Law directly prohibits such disclosure, such a prohibition is entirely consistent with the provisions of the Freedom of Information Law and the Open Meetings Law." The opinion was careful to point out, however, that "[a]ny such restriction on speech would, of course, be subject to state and federal constitutional requirements." It was advised that:

> "Disclosure of matters discussed in executive session would defeat the purpose of the apparent legislative intent of authorizing local legislative bodies to discuss these limited matters in private. Disclosure would be contrary to the public welfare. A locally enacted provision prohibiting disclosure would thus further the statutory purpose of executive sessions and promote the public interest."

The opinion then cited and appears to have relied heavily on a decision rendered by the Appellate Division, Third Department, Kline v. County of Hamilton [235 AD2d 44, 663 NYS 2d 339 (1997)].

Kline involved a request made under the Freedom of Information Law for tape recordings and transcripts of executive sessions, and the Court referred to the first ground for denial, §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute", and concluded that:

> "While the purpose of FOIL is to lift 'the cloak of secrecy or confidentiality' (Public Officers Law, §84) from governmental records which are part of the governmental process, where, as here, confidentiality has been specifically sanctioned by Public Officers Law §§105 and 106, the records at issue fall within the exemption of Public Officers Law § 87(2)(a) and are to be shielded from public disclosure" (id., 341).

Following its reference to Kline, the Attorney General concluded that:

> "...it seems clear seems clear that under the Public Officers Law a governing body of a municipality may withhold any records of discussions properly taking place in executive session. Section 806(1)(a) of the General Municipal Law, authorizing municipal codes

> of ethics that prohibit, inter alia, disclosure of information, is consistent with and reinforces this fact. Accordingly, we conclude that a local legislative body, by local law or in its code of ethics, has statutory authority to prohibit a legislator from disclosing matters discussed in executive session. We emphasize that the decision to go into executive session is discretionary, and that any such prohibition on speech would be subject to state and federal constitutional requirements."

With due respect to the Appellate Division and the Attorney General, the conclusion reached with regard to the notion of "confidentiality" and the scope of §87(2)(a) is inconsistent with more detailed analyses found in judicial decisions rendered in New York and by federal courts in construing the federal Freedom of Information Act (5 USC §552). To be confidential under the Freedom of Information Law, I believe that records must "specifically exempted from disclosure by state or federal statute" in accordance with §87(2)(a). Similarly, §108(3) of the Open Meetings Law refers to matters made confidential by state or federal law as "exempt" from the provisions of that statute.

Both the Court of Appeals and federal courts in construing access statutes have determined that the characterization of records as "confidential" or "exempted from disclosure by statute" must be based on statutory language that specifically confers or requires confidentiality. As stated by the Court of Appeals:

> "Although we have never held that a State statute must expressly state it is intended to establish a FOIL exemption, we have required a showing of clear legislative intent to establish and preserve that confidentiality which one resisting disclosure claims as protection" [Capital Newspapers v. Burns, 67 NY2d 562, 567 (1986)].

In like manner, in construing the equivalent exception to rights of access in the federal Act, it has been found that:

> "Exemption 3 excludes from its coverage only matters that are:
>
> > *specifically* exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) **requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue**, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.
>
> "5 U.S.C. § 552(b)(3) (1982) (emphasis added). Records sought to be withheld under authority of another statute thus escape the release requirements of FOIA if – and only if – that statute meets the requirements of Exemption 3, including the threshold requirement

> that it specifically exempt matters from disclosure. The Supreme Court has equated 'specifically' with 'explicitly.' *Baldridge v. Shapiro*, 455 U.S. 345, 355, 102 S. Ct. 1103, 1109, 71 L.Ed.2d 199 (1982). '[O]nly *explicitly* non-disclosure statutes that evidence a congressional determination that certain materials ought to be kept in confidence will be sufficient to qualify under the exemption.' *Irons & Sears v. Dann*, 606 F.2d 1215, 1220 (D.C.Cir.1979) (emphasis added). In other words, a statute that is claimed to qualify as an Exemption 3 withholding statute must, on its face, exempt matters from disclosure"[Reporters Committee for Freedom of the Press v. U.S. Department of Justice, 816 F.2d 730, 735 (1987); modified on other grounds,831 F.2d 1184 (1987); reversed on other grounds, 489 U.S. 789 (1989); see also British Airports Authority v. C.A.B., D.C.D.C.1982, 531 F.Supp. 408; Inglesias v. Central Intelligence Agency, D.C.D.C.1981, 525 F.Supp, 547; Hunt v. Commodity Futures Trading Commission, D.C.D.C.1979, 484 F.Supp. 47; Florida Medical Ass'n, Inc. v. Department of Health, Ed. & Welfare, D.C.Fla.1979, 479 F.Supp. 1291].

In short, to be "exempted from disclosure by statute", both state and federal courts have determined that a statute must leave no discretion to an agency: it must withhold such records.

In contrast, when records are not exempted from disclosure by a separate statute, both the Freedom of Information Law and its federal counterpart are permissive. Although an agency *may* withhold records in accordance with the grounds for denial appearing in §87(2), the Court of Appeals in a decision cited earlier held that the agency is not obliged to do so and may choose to disclose, 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...if it so chooses" (Capital Newspapers, supra, 567).

The only situations in which an agency cannot disclose would involve those instances in which a statute other than the Freedom of Information Law prohibits disclosure. The same is so under the federal Act. While a federal agency *may* withhold records in accordance with the grounds for denial, it has discretionary authority to disclose. Stated differently, there is nothing inherently confidential about records that an agency may choose to withhold or disclose; only when an agency has no discretion and must deny access would records be confidential or "specifically exempted from disclosure by statute" in accordance with §87(2)(a).

The same analysis is applicable in the context of the Open Meetings Law. While that statute authorizes public bodies to conduct executive sessions in circumstances described in paragraphs (a) through (h) of §105(1), there is no requirement that an executive session be held even though a public body has the right to do so. 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.

Since a public body may choose to conduct an executive session or discuss an issue in public, information expressed during an executive session is not "confidential." To be confidential, again, a statute must prohibit disclosure and leave no discretion to an agency or official regarding the ability to disclose.

By means of 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.

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 the context of most of the duties of most municipal boards, councils or similar bodies, there is no statute that *forbids* disclosure or requires confidentiality. Again, the Freedom of Information Law states that an agency *may* withhold records in certain circumstances; it has discretion to grant or deny access. The only instances in which records may be characterized as "confidential" would, based on judicial interpretations, involve those situations in which a statute prohibits disclosure and leaves no discretion to a person or body.

In short, I believe that the presumption that records that *may* be withheld or that information that *may* be discussed in executive session are confidential and, therefore, exempted from disclosure by statute is inaccurate.

In the Mayor's Statement of Executive Policy, the prohibition against disclosure refers to "statutorily confidential information" and then lists a variety of "matters" which if disclosed would violate the Policy. In my opinion, those matters represent areas that, by law *need not* be disclosed; they are not matters that *cannot* be disclosed. The same would be so under the Ordinance, for it refers to matters that *may* but are not required to be considered in executive session.

Second, viewing the issue from a different vantage point, based on a decision rendered by the U.S. Court of Appeals for the Second Circuit [Harman v. City of New York, 140 F.3d 111 (2nd Cir. 1998)], it appears that the Executive Policy and the Ordinance may be unconstitutional. In Harman, the New York City Human Resources Administration (HRA) adopted an executive order that forbade its employees:

> "...from speaking with the media regarding any policies or activities of the agency without first obtaining permission from the agency's media relations department. The City contends that these policies are necessary to meet the agencies' obligations under federal and state law to protect the confidentiality of reports and information relating to children, families and other individuals served by the agencies" (id., 115).

I note that §136 of the Social Services Law prohibits a social services agency from disclosing records identifiable to an applicant for or recipient of public assistance. Additionally, §372 of the Social Services Law prohibits the disclosure of records identifiable to "abandoned, delinquent, destitute, neglected or dependent children..." As such, there is no question that many of HRA's records are exempted from disclosure by statute and are, therefore, confidential. Nevertheless, the proceeding in Harman was precipitated by commentary that was not identifiable to any particular child or family; rather it involved the operation of the agency. As specified by the Court:

> "...neither the Plaintiffs nor the public has any protected interest in releasing **statutorily confidential information**. Given the network of laws **forbidding** the dissemination of such information, Plaintiffs wisely concede this point. Therefore, we evaluate the interests of employees and of the public only in commenting on **non-confidential** agency policies and activities" (emphasis mine) (id., 119).

The Court in that passage highlighted the critical aspect of the point made earlier: that records may be characterized and exempted from disclosure by statute only when a statute forbids disclosure.

In finding that the order prohibiting speech that did not involve information that is exempted from disclosure by statute, the Court stated initially that:

> "Individuals do not relinquish their First Amendment rights by accepting employment with the government. See *Pickering v. Board of Educ.*, 391 U.S. 563, 568, 88 S. Ct. 1731, 1734, 20 L. Ed. 2d 811 (1968). However, the Supreme Court has recognized that the government 'may impose restraints on the job-related speech of public employees that would be plainly unconstitutional if applied to the public at large.' *United States v. National Treasury Employees Union*, 513 U.S. 454, 465, 115 S. Ct. 1003, 1012, 130 L. Ed2d 964 (1995) (NTEU). In evaluating the validity of a restraint on government employee speech, courts must 'arrive at a balance

> between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting efficiency of the public services it performs through its employees. *Pickering*, 391 U.S. at 568, 88 S.Ct. at 1734-35"(id., 117).

In considering the "balancing test", it was held that "where the employee speaks on matters of public concern, the government bears the burden of justifying any adverse employment action" and that:

> "This burden is particularly heavy where, as here, the issue is not an isolated disciplinary action taken in response to one employee's speech, but is, instead, a blanket policy designed to restrict expression by a large number of potential speakers. To justify this kind of prospective regulation, '[t]he Government must show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's 'necessary impact on the actual operation' of the Government." *NTEU*, 513 U.S. at 468, 115 S. Ct. at 1014 (quoting *Pickering*, 391 U.S. at 571, 88 S.Ct. at 1736)...
>
> > "'[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.') While the government has special authority to proscribe the speech of its employees , '[v]igilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees' speech.' *Rankin*, 483 U.S. at 384, 107 S. Ct. at 2896.
>
> "A restraint on government employee expression 'also imposes a significant burden on the public's right to read and hear what the employees would otherwise have written and said.' *NTEU*, 513 U.S. at 470, 115 S.Ct. at 1015. The Supreme Court has noted that '[g]overnment employees are often in the best position to know what ails the agencies for which they work; public debate may gain much from their informed opinions.' *Waters v. Churchill*, 511 U.S. 661, 674, 114 S.Ct. 1878, 1887, 128 L.Ed.2d 686 (1994)..." (id., 118-119).

The Court found that the Order, by requiring advance approval before an employee could comment, "is generally disfavored under First Amendment law because it 'chills potential speech before it happens', stating that:

> "The press policies allow the agencies to determine in advance what kind of speech will harm agency operations instead of punishing disruptive remarks after their effect has been felt. For this reason, the regulations ran afoul of the general presumption against prior restraints on speech" (id., 119).

It also viewed the matter from the perspective of the reality of the relationship between employers and employees, finding that:

> "Employees who are critical of the agency will naturally hesitate to voice their concerns if they must first ask permission from the very people whose judgments they call into question. Only those who adhere to the party line would view such a requirement without trepidation" (id., 120).

In generally rejecting the possibility that speech may be disruptive, it was stated that:

> "The City contends that employee speech will be permitted as long as it will not interfere with the efficient and effective operations of the agencies. We do not find this standard to be sufficiently definite to limit the possibility for content or viewpoint censorship. Because the press policies allow suppression of speech before it takes place, administrators may prevent speech that would not actually have had a disruptive effect. See e.g., *NTEU*, 513 U.S. at 475 n.21, 115 S.Ct. at 1017 n.21 ('Deferring to the Government's speculation about the pernicious effects of thousands of articles and speeches yet to be written or delivered would encroach unacceptably on the First Amendment's protections.'). Furthermore, the standard inherently disfavors speech that is critical of agency operations, because such comments will necessarily seem more potentially disruptive than comments that 'toe[] the agency line.' *Sanjour*, 56 F3d at 96-97 (striking down regulation that permitted reimbursement for only those speaking engagements consistent with the 'mission of the agency' as a restriction on anti-government speech).
>
> "The challenged regulations thus implicate all of the above concerns. By mandating approval from an employee's superiors, they will discourage speakers with dissenting views from coming forward. They provide no time limit for review to ensure that commentary is not rendered moot by delay. Finally, they lack objective standards to limit the discretion of the agency decision-maker. For these reasons we agree with the district court that 'ACS 101 and HRA 641 clearly restrict the First Amendment rights of City employees..."(id., 121).

It was emphasized by the court that the harm sought to be avoided must be real, and not merely conjectural:

> "...where the government singles out expressive activity for special regulation to address anticipated harms, the government must 'demonstrate that the recited harms are real, not merely conjectural, and that the regulations will in fact alleviate these harms in a direct and material way.' *NTEU* 513 U.S. at 475, 115 S.Ct. at 1017 (quoting *Turner Broad Sys. Inc. v. Federal Communications Comm'n*, 512 U.S. 622, 624, 114 S.Ct. 2445, 2450, 129 L.Ed.2d 497 (1994) (plurality opinion)). Although government predictions of harm are entitled to greater deference when used to justify restrictions on employee speech as opposed to speech by the public, such difference is generally accorded only when the government takes action in response to speech which has already taken place. *NTEU*, 513 U.S. at 475 n.21, 115 S.Ct. at 1017 n.21. Where the predictions of harm are proscriptive, the government cannot rely on assertions, but must show a basis in fact for its concerns" (id., 122).

In a key statement that essentially summarizes its decision, the Court found that:

> "The executive orders reach more broadly to cover all information regarding any agency policy or activity. They thus have the potential to chill substantially more speech than is reasonably necessary to protect the confidential information" (id., 123) (i.e., information that is exempted from disclosure and which, pursuant to statute, cannot be disclosed).

With regard to the Mayor's Official Statement of Executive Policy, little in paragraphs (a) through (g) of subdivision (1) could, based on the preceding analysis, be considered to be "statutorily confidential information." In my opinion, in the context of city business, matters would be "confidential" only on rare occasions. Those situations might involve information that is derived from personnel records used to evaluate continuing employment or promotion of police officers or professional firefighters pursuant to §50-a of the Civil Rights Law; they might involve attorney work product or records subject to the attorney-client privilege. In most instances, however, there would be no prohibition against disclosure based on a statute that forbids release of records or their contents.

Under subdivision (2), again, certain City employees could not discuss or divulge "any sensitive matter or information that if disclosed would disrupt the efficient and effective operation of the City government or would impair the public officer's close working relationship with the Mayor." That aspect of the Policy is in my view contrary to the holding rendered in Harman. It is vague, or in the words of Harman, not "sufficiently definite"; it is prospective and "chills speech before it happens", for it does not focus on any harm that has actually occurred. In short, it stifles free speech in a manner that has been found to be unconstitutional. Further, although a policy can be readily altered or revoked, an ordinance remains in effect until legislative action is taken. Consequently, the Ordinance potentially affects numerous individuals yet to serve as City employees or members of the Common Council.

In the course of the duties carried out by public officers and employees, any number of subjects prohibited from being disclosed under the Executive Policy and the Ordinance are routinely disclosed. For instance, both refer to "[m]atters or information regarding proposed, pending or current litigation." Matters relating to litigation are frequently disclosed, and any person may ordinarily obtain records concerning litigation from a court and in many cases from an agency. "Matters or information regarding the preparation, grading or administration of examinations" are also disclosed. Nevertheless, a disclosure that a new exam for plumbers' licenses is being developed or a disclosure of an eligible list would appear to run afoul of the policy.

What if there is honest disagreement between the Mayor and a department head on an issue of policy and the latter expresses his opinion to the news media or to a friend - would that run afoul of the Policy, particularly if the Mayor believes that the comment impairs his relationship with the Department head? Should the department head face the possibility of a fine or imprisonment, or both?

What if, after an executive session, a member of the City Council believes that the session or a portion of the session was improperly held? Would his or her disclosure of that opinion or the substance of the matter discussed result in a violation of the Ordinance? I note, too, that the Ordinance refers to a "properly convened executive session." Frequently executive sessions are convened for "proper" reasons, but the public body drifts into a new subject. My hope is there will be a member or other person present who is sufficiently knowledgeable regarding the permissible parameters of executive session and sufficiently vigilant to suggest that the executive session should end and that the body should return to an open meeting. But what if that does not happen? What if the public body rejects that person's efforts to return to the open meeting? What if there is simply an oversight and a realization after the executive session that the body should have engaged in a discussion in public? Would disclosure of a matter that should have been discussed in public but which was considered during a "properly convened" executive session constitute a violation of law?

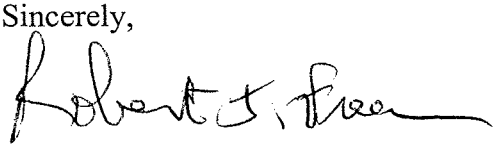
I recognize that many of the questions are rhetorical. Nevertheless, in consideration of the possibility that violation of the Policy or the Ordinance could result in the imposition of a fine and/or imprisonment, as well as the Harman decision and the analysis that preceded my discussion of that holding, it is my view that those enactments are inconsistent with law and would likely be found, as in Harman, to be unconstitutional.

Lastly, while there may be no prohibition against disclosure of most of the information that is the subject of the Policy and the Ordinance, the foregoing is not intended to suggest that 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 in 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 those bodies 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. 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. Disclosures made contrary to or in the absence of consent by the majority could result in unwarranted invasions of personal privacy, impairment of collective bargaining negotiations or even interference with criminal or other investigations. In those kinds of situations, even though there may be no statute that prohibits disclosure, release of information could be damaging to individuals and the functioning of government, and disclosures should in my view be cautious, thoughtful and based on an exercise of reasonable discretion.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Joseph Griffo
Common Council
James D. Cole
Andrew Brick

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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March 8, 2001

Ms. Barbara A. Nephew
[redacted]

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. Nephew:

I have received your letter of January 31. You wrote that you have served as a member of the Board of Trustees of the Village of Gowanda for one term and have attempted to enhance compliance with open government requirements by "discouraging the Board from holding meetings or 'workshops' that are closed to the public, holding of meetings without notice; not giving reasonable notice to all Board members of meetings; use of telephone polls; and inappropriate use of the Executive sessions."

Despite your efforts, you indicated that you have found a majority of the Board discussing Village business during closed meetings that are preceded by notice given neither to you nor the public.

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

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

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

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

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

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

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

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

> vacancies and were one of the persons or officers disqualified from acting."

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

Third, every meeting must be preceded by notice given to the news media and the public by means of posting. Specifically, §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 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.

Lastly, with respect to "telephone polls", as suggested earlier, §102(1) of the Open Meetings Law defines the term "meeting" to mean "the official convening of a public body for the purpose of conducting public business". Based upon an ordinary dictionary definition of "convene", that term means:

> "1. to summon before a tribunal;

> 2. to cause to assemble syn see 'SUMMON'" (Webster's Seventh New Collegiate Dictionary, Copyright 1965).

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

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

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

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

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

> "...there is a question as to whether the series of telephone calls among the individual members constitutes a meeting which would be subject to the Open Meetings Law. A meeting is defined as 'the official convening of a public body for the purpose of conducting public business' (Public Officers Law §102 [1]). Although 'not every assembling of the members of a public body was intended to fall within the scope of the Open Meetings Law [such as casual encounters by members], ***informal conferences, agenda sessions and work sessions do invoke the provisions of the statute when a quorum is present and when the topics for discussion and decision are such as would otherwise arise at a regular meeting' (Matter of Goodson Todman Enter. v. City of Kingston Common Council, 153 AD2d 103, 105). Peripheral discussions concerning an item of public business are subject to the provisions of the statute in the same manner as formal votes (see, Matter of Orange County Publs. v. Council of City of Newburgh, 60 AD2d 309, 415 affd 45 NY2d 947).

> The issue was the Town's policy concerning tax assessment reductions, clearly a matter of public business. There was no physical gathering, but four members of the five-member board discussed the issue in a series of telephone calls. As a result, a quorum of members of the Board were 'present' and determined to publish the Dear Resident article. The failure to actually meet in person or have a telephone conference in order to avoid a 'meeting' circumvents the intent of the Open Meetings Law (see e.g., 1998 Advisory Opns Committee on Open Government 2877). This court finds that telephonic conferences among the individual members constituted a meeting in violation of the Open Meetings Law..."

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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March 19, 2001

E-MAIL

TO: Susan Harrington [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 Ms. Harrington:

I have received your letter in which you sought an advisory opinion relating to the Open Meetings Law.

You referred to a Town Board meeting during which a heated discussion arose, and the Supervisor called for a recess. According to your letter, three Board members remained at the table and asked if the tape recorder was still running. You then turned off the tape recorder, but the three at the table continued their discussion. Because you prepare verbatim minutes of meetings, you asked whether their discussion should have been taped or included in the minutes.

In this regard, there is nothing in the Open Meetings Law that requires that a meeting be tape recorded. However, that statute provides what might be characterized as minimum requirements concerning the contents of minutes. Specifically, §106 states that:

> "1. Minutes shall be taken at all open meetings of a public body which shall consists 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 consists of a verbatim account of every comment that was made.

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.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
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March 27, 2001

Hon. Steven Otis
Mayor
City of Rye
City hall
Rye, NY 10580

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 Mayor Otis:

As you are aware, I have received a variety of material concerning access to "draft unapproved minutes" of meetings of the Rye City Council, and you have sought an advisory opinion on the matter.

From my perspective, the draft minutes should be disclosed, on request, as soon as they exist. In this regard, I offer the following comments.

First, that a document is characterized as a draft is not determinative of rights of access, for the Freedom of Information Law is applicable to all agency records. Section 86(4) of that statute 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, computer1 tapes or discs, rules, regulations or codes."

Based on the foregoing, once information exists in some physical form, i.e., a draft, it constitutes a "record" subject to rights conferred by the Freedom of Information Law.

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

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

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

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

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, again, I believe that those unapproved minutes would be available as soon as they exist, and that they may be marked in the manner described above.

Third, returning to the Freedom of Information Law, as you 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. In my view, minutes of open meetings are clearly available; any person could have been present at the meetings to which the minutes relate, and none of the grounds for denial would apply.

Although draft minutes might be characterized as "intra-agency materials" that fall within the scope of §87(2)(g), an analysis of that provision and its judicial interpretation indicates that they must be disclosed. Section 87(2)(g) permits an agency to withhold records that:

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

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

I point out that one of the contentions offered by the New York City Police Department in a case decided by the Court of Appeals was that certain reports could be withheld because they are not final and because they relate to incidents for which no final determination had been made. The Court rejected that finding and stated that:

> "...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers Law §87[2][g][iii)]. However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (see, Matter of Farbman & Sons v. New York City Health & Hosp. Corp., 62 NY2d 75, 83, supra; Matter of MacRae v. Dolce, 130 AD2d 577)..." [Gould et al. v. New York City Police Department, 87 NY2d 267, 276 (1996)].

In short, that a record is in "draft" or is "non-final" would not represent an end of an analysis of rights of access or an agency's obligation to review the entirety of its contents.

The Court also 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)" (id., 276-277).

Minutes of a meeting open to the public do not involve "internal government consultations or deliberations"; on the contrary, information contained in those records has effectively been disclosed to the public already.

Lastly, in consideration of the preceding commentary, I do not believe that there would be any valid reason for delaying disclosure of the records in question. In my view, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible.*" Therefore,

if records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a lengthy delay in disclosure. As the Court of Appeals has asserted:

> "...the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objectives cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" [Westchester News v. Kimball, 50 NY 2d 575, 579 (1980)].

If a request is voluminous and a significant amount of time is needed to locate records and review them to determine rights of access, a delay in disclosure might be reasonable. On the other hand, if a record or report is clearly public and can be found easily, there would appear to be no rational basis for a delay.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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OML-AO - 3285

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March 29, 2001

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 February 23. You referred to a meeting held by the Town of Greenburgh Planning Board "in a small conference room adjacent to the larger Town Meeting room" and wrote that "[n]umerous interested parties could not get access to the conference room, stood outside and were unable to hear the proceedings." Additionally, you alleged that the Town "has refused" to make available "approved minutes" of the meeting, "draft minutes" of the meeting, and notes taken by the Board's secretary that serve "as the basis of preparing the minutes of the meeting."

In this regard, I offer the following comments.

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

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

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

From my perspective, and based on a judicial decision involving a similar issue, 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 a larger crowd attends 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 (see Crain v. Reynolds, Supreme Court, New York County, August 12, 1998).

Second, with respect to minutes, it is noted at the outset that the characterization of a document as a draft is not determinative of rights of access, for the Freedom of Information Law is applicable to all agency records. Section 86(4) of that statute defines the term "record" to include:

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

Based on the foregoing, once information exists in some physical form, i.e., a draft, it constitutes a "record" subject to rights conferred by the Freedom of Information Law.

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

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

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."

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effectively notified that the minutes are subject to change. If minutes have been prepared within less than two weeks, again, 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.

Returning to the Freedom of Information Law, as you 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. In my view, minutes of open meetings are clearly available; any person could have been present at the meetings to which the minutes relate, and none of the grounds for denial would apply.

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> "are inter-agency or intra-agency materials which are not:
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It is emphasized that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

I point out that one of the contentions offered by the New York City Police Department in a case decided by the Court of Appeals was that certain reports could be withheld because they are not final and because they relate to incidents for which no final determination had been made. The Court rejected that finding and stated that:

> "...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers Law §87[2][g][iii)]. However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (see, Matter of Farbman & Sons v. New York City Health & Hosp. Corp., 62 NY2d 75, 83, supra; Matter of MacRae v. Dolce, 130 AD2d 577)..." [Gould et al. v. New York City Police Department, 87 NY2d 267, 276 (1996)].

In short, that a record is in "draft" or is "non-final" would not represent an end of an analysis of rights of access or an agency's obligation to review the entirety of its contents.

The Court also 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)" (id., 276-277).

Minutes of a meeting open to the public do not involve "internal government consultations or deliberations"; on the contrary, information contained in those records has effectively been disclosed to the public already.

Lastly, it was held more than twenty years ago that notes of a meeting consisting of factual information were required to be disclosed [Warder v. Board of Regents, 410 NYS2d 742 (1978)]. I point out that if, for example, notes are taken in shorthand, there may be an obligation to disclose them, but there would be no obligation, in my view, to decipher or interpret them.

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.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Planning Board

OML-AO-3286

From: Robert Freeman
To: [redacted]
Date: 3/28/01 9:20AM
Subject: Dear Mr. DeBartolo:

Dear Mr. DeBartolo:

I have received your letter in which you sought guidance concerning the number of members of a board of education that must be present to adopt a motion, and among them, the number of votes necessary to approve such a motion.

In this regard, the Open Meetings Meetings Law provides a framework regarding meetings of public bodies, such as boards of education. That statute is Article 7 of the Public Officers Law, and the full text of that law is available on our website under "Publications".

Also pertinent is section 41 of the General Construction Law, entitled "Quorum and majority." In brief, a quorum of a public body is a majority of its total membership, notwithstanding absences or vacancies. Therefore, if a board consists of five members, and two are absent from a meeting, the quorum is three, despite the absences. Further, action may be taken only by means of an affirmative vote of a public body's total membership (not a majority of those present). Consequently, again, if a board consists of five members and three are present, all three would have to cast affirmative votes to carry a motion or take action. A vote of two to one on a board consisting of five would not be valid.

To obtain more information on the subject, you can go to the Open Meetings Law advisory opinions on our website, click on to "Q" and scroll down to "Quorum." The higher the number, the more recent is the opinion.

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
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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March 30, 2001

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 facts presented in your correspondence.

Dear Ms. Pellegrino:

I have received your letter of February 18 in which you raised questions and sought an opinion concerning certain actions of the Mt. Pleasant Central School District Board of Education in relation to the Open Meetings Law.

You referred to an "emergency" meeting held without notice to the public or the news media and asked "what notification should, if any, take place" in the event that such a meeting must be held. Immediately after the meeting began, the Board entered into an executive session to discuss "personnel" issues. According to your letter, a candidate for the position of superintendent withdrew his name from consideration, and you were told that the discussion "included whether they should go forward with the last two candidates, hire an interim or possibly reopen the search", as well as "whether or not they would contact the consulting firm the district paid for and ask to re-interview other candidates on the list submitted by the consultants." You questioned the propriety of an executive session held to consider those matters.

In this regard, first, there is nothing in the Open Meetings Law that refers specifically to an "emergency" meeting.

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

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

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

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

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

> "Whether abbreviated notice is 'practicable' or 'reasonable' in a given case depends on the necessity for same. Here, respondents virtually concede a lack of urgency: They deny petitioner's characterization of the session as an 'emergency' and maintain nothing of substance was transacted at the meeting except to discuss the status of litigation and to authorize, pro forma, their insurance carrier's involvement in negotiations. It is manifest then that the executive session could easily have been scheduled for another date with only minimum delay. In that event respondents could even have provided the more extensive notice required by POL §104(1). Only respondent's choice in scheduling prevented this result.
>
> "Moreover, given the short notice provided by respondents, it should have been apparent that the posting of a single notice in the School District offices would hardly serve to apprise the public that an executive session was being called...
>
> "In White v. Battaglia, 79 A.D. 2d 880, 881, 434 N.Y.S.ed 637, lv. to app. den. 53 N.Y.2d 603, 439 N.Y.S.2d 1027, 421 N.E.2d 854, the Court condemned an almost identical method of notice as one at bar:
>
> "Fay Powell, then president of the board, began contacting board members at 4:00 p.m. on June 27 to ask them to attend a meeting at

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

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

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

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

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

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

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

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

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

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

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

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

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

In the context of the situation that you described, while each aspect of the discussion might have involved so-called personnel issues, with one possible exception, none in my opinion could validly have been discussed during an executive session. Consideration of the options, i.e., whether to choose from the existing candidates, hire an interim superintendent, or reopen the search would not apparently have involved matters pertaining to a "particular person or corporation" in conjunction with the topics listed in §105(1)(f). If that is so, to that extent, the meeting should have been conducted open to the public. It is unclear whether contacting the consulting would involve the need to engage in a new agreement or contract with the firm. If it did not, I do not believe that there would have been a basis for conducting an executive session. On the other hand, to the extent that the discussion involved a "matter leading to the employment of...a particular person or corporation", i.e., the consulting firm, that aspect of the discussion might validly have been conducted behind closed doors.

Lastly, it has been advised and confirmed judicially 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.

In considering the nature of a motion to conduct an executive session under §105(1)(f) it has been held that:

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

In sum, again, the Open Meetings Law requires that every meeting, including an emergency meeting, be preceded by notice given to the news media and to the public by means of posting. Additionally, the discussion by the Board, based on the information that you provided, should , in my opinion, have occurred in public in public in great measure, if not in its entirety.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Education

From: Robert Freeman
To: [redacted]

Dear Councilwoman Harrington:

I have received your inquiry concerning the coverage of the Open Meetings Law and "what constitutes an illegal meeting." You indicated that a resident has suggested that any situation in which more than two members of the Town Board attend the same function, such as a wedding or birthday party, there is a requirement that notice be given because the gathering would be a meeting subject to the Open Meetings Law.

In this regard, the term "meeting" is defined in section 102(1) of the Open Meetings Law to mean a gathering of a majority of a public body (such as a town board) for the purpose of conducting public business. Therefore, when there is an intent that a majority of the Town Board convene for the purpose of considering Town business, collectively, as a body. Conversely, if there is no intent to conduct public business, but rather to attend a social function, the Open Meetings Law would not apply, for the gathering would not constitute a meeting of a public body.

If you would like more detailed information, numerous opinions are available on our website. The website address appears below, and it is suggested that you review advisory opinions relating to the Open Meetings Law. Click on to "M" and scroll down to "Meeting, Chance" and "Meeting, Social Gathering." The higher the number of an opinion, the more recent it is, and the opinions prepared within approximately eight years are available in full text.

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

I hope that I have been of assistance.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3289

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

April 2, 2001

Hon. Donald Backman
Councilman
Town of New Hartford
48 Genesee Street
New Hartford, NY 13413-2397

The staff of the Committee on 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 Backman:

I have received your letter of March 1. In your capacity as a member of the New Hartford Town Board, you wrote that:

> "At a regularly scheduled meeting of the Town Board, the supervisor alleged a violation of the Open-Meetings Law because items brought up for action failed to appear on the Agenda under the title 'Matters Submitted By Town Board Members'."

You asked whether I "find a violation of the Open Meetings Law by a Town Board member failing to put matters on the Agenda prior to the meeting."

In this regard, the Open Meetings Law makes no reference to agendas. Further, there is no law of which I am aware that requires that agendas be prepared or that they must be followed. Whether the Town Board's Rules of Procedure may address the issue involves a matter beyond the jurisdiction of this office.

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-3290

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

April 2, 2001

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 facts presented in your correspondence.

Dear Mr. Stempien:

As you are aware, I have received your letter of February 19. In your capacity as a member of the Ava Town Board, you sought guidance concerning the ability of the Board to deal with "inflammatory statements" or "verbal attacks" made by persons who attend Board meetings. You also asked whether Board members must respond to comments made by the public.

In this regard, by way of background, 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, such as a Town Board, 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.

From my perspective, 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 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.), 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 you choose to adopt the kinds of rules described above, it is suggested that they be read or distributed to those in attendance at meeting. If the rules are not heeded, it is suggested that you 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 be abusive or interrupt, I believe that you could ask the officer to remove the person or persons from the meeting.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12617
OML-AO-3291

41 State Street, Albany, New York 12231
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April 2, 2001

Mr. James C. Bugenhagen
[redacted]

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

Dear Mr. Bugenhagen:

I have received your letter of February 20 in which you sought assistance relative to requests for records of the Town of Royalton.

In this regard, first, since you referred to minutes of Town Board meetings, I note that §106 of the Open Meetings Law deals with the contents of minutes and the time within which they must be prepared. 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."

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

I note that there is nothing in the Open Meetings Law or any other statute of which I am aware that requires that minutes be approved. Nevertheless, as a matter of practice or policy, many public bodies approve minutes of their meetings. In the event that minutes have 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, with respect to requests for records generally, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

While an agency must grant access to records, deny access or acknowledge the receipt of a request within five business days, when such acknowledgement is given, there is no precise time period within which an agency must grant or deny access to records. The time needed to do so may be dependent upon the volume of a request, the possibility that other requests have been made, the necessity to conduct legal research, the search and retrieval techniques used to locate the records and the like. In short, when an agency acknowledges the receipt of a request because more than five business days may be needed to grant or deny a request, so long as it provides an approximate date indicating when the request will be granted or denied, and that date is reasonable in view of the attendant circumstances, I believe that the agency would be acting in compliance with law.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Carol Genet, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3292

41 State Street, Albany, New York 12231
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April 2, 2001

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 Mr./Ms. Woods:

As you are aware, I have received your letter of February 22 in which you raised several questions relating to the conduct of meetings by a board of education.

You asked initially whether there is any requirement that there be "a public address system so that the public is able to hear the meeting and those speaking." 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, while there is no specific obligation to provide a public address system, 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 short, a board of education must in my view situate itself and conduct its

meetings in a manner in which those in attendance can observe and hear the proceedings. To do otherwise would in my opinion be unreasonable and fail to comply with a basis requirement of the Open Meetings Law.

Second, you questioned whether it is "illegal if a board goes into executive session under the guise of 'personnel matters' and comes back out and makes a major decision without further public input." In this regard, as a general matter, the Open Meetings Law is based upon a presumption of openness. Stated differently, meetings of public bodies must be conducted open to the public, unless there is a basis for entry into executive session. Moreover, the Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, §105(1) states in relevant part that:

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

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

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

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

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

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

To attempt to clarify the Law, the Committee recommended a series of amendments to the Open Meetings Law, several of which became effective on October 1, 1979. The recommendation

made by the Committee regarding §105(1)(f) was enacted and states that a public body may enter into an executive session to discuss:

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

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

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

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

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

> respect to personnel matters, that the discussion involve the 'employment history of a particular person" (id. [emphasis supplied]). Although this does not mandate that the individual in question be identified by name, it does require that any motion to enter into executive session describe with some detail the nature of the proposed discussion (see, State Comm on Open Govt Adv Opn dated Apr. 6, 1993), and we reject respondents' assertion that the Board's reference to a 'personnel issue' is the functional equivalent of identifying 'a particular person'" [Gordon v. Village of Monticello, 620 NY 2d 573, 575; 207AD 2d 55, 58 (1994)]

Next, you asked whether a board must have "a policy that limits public discussion (i.e., 3 minutes per person) or can the public speak until the discussion is finished." 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.

Lastly, you asked whether "legal counsel [can] advise BOE members NOT to speak at an open meeting" (emphasis yours). There is nothing that would prohibit counsel from offering advice to board members. Nevertheless, members of boards of education are, in my view, elected to express points of view, to exchange ideas and to engage in a deliberative process. To avoid speaking at open meetings would, from my perspective, conflict with basic duties of board members.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3293

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

April 10, 2001

Mr. Richard B. Lewis
[redacted]

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. Lewis:

I have received your letter of March 1 and the correspondence attached to it. You asked in an earlier letter to the Department of Law that the Department "investigate several complaints that [you] have regarding Ms. M.. Lynne Mahoney in her capacity as Chairperson of the Troy Housing Authority."

You referred initially to a gathering in which "Commissioner Mahoney along with three other commissioners met as the Evaluation Committee" to discuss an evaluation. Since four of the seven members of the Board of Directors of the Authority constituted a quorum and no notice was given to the public prior to the meeting, you questioned whether proper effect was given to the Open Meetings Law. From my perspective, the gathering in question might not have been a meeting of the Board; however, as I understand the matter, the Evaluation Committee is required to comply with 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 the Board of Directors of a Housing Authority, 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 Open Meetings Law. Therefore, committees of the Board consisting solely of its own

members would have the same obligations regarding notice and openness, for example, as well as the same authority to conduct executive sessions as the governing body [see Glens Falls Newspapers, Inc. v. Solid Waste and Recycling Committee of the Warren County Board of Supervisors, 195 AD2d 898 (1993)].

You also wrote that Ms. Mahoney indicated that no vote to enter into executive session is needed "as long as the Executive Session was an item on the agenda..." Based on the clear language of the law, I would disagree with that contention. The Open Meetings Law contains a procedure that must be accomplished during an open meeting before an executive session may be held. Specifically §105(1) states in relevant part that:

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

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

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 110[1] provides that a public body cannot schedule an executive session in advance or 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; not: the Open Meetings Law has been renumbered and §100 is not §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.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: M. Lynne Mahoney, Chair

From: Robert Freeman
To: [redacted]
Date: 4/13/01 4:03PM
Subject: Dear Madtraub:

Dear Madtraub:

I have received your letter in which you asked whether a board may vote on a resolution that was not referenced on an agenda.

In this regard, there is nothing in the Open Meetings Law that pertains to agendas or that requires that agendas be prepared or followed. The only instance in which a board would be precluded from voting on an item that is not referenced in its agenda would involve the rare situation in which the board, on its own initiative, adopted a rule or policy limiting its ability to act to those items appearing on an agenda.

With respect to the other issue involving the necessity of conducting a public hearing, I do not have the expertise to respond. I note that the functions of the Committee on Open Government relate to meetings and compliance with the Open Meetings Law. Matters pertaining to hearings are governed by different statutes.

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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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3295

41 State Street, Albany, New York 12231
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April 16, 2001

Hon. Tracy Jong
Administrator/Clerk-Treasurer
Village of Bergen
11 Buffalo Street
P.O. Box 100
Bergen, NY 14416

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. Jong:

I have received your letter of March 6 and the materials attached to it. You referred to a letter of March 1 addressed to the Bergen Village Board of Trustees in which [redacted] criticized the Board relating to their ability to speak at meetings of the Board.

In this regard, by way of background, 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.

From my perspective, 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 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.). 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 you choose to adopt the kinds of rules described above, it is suggested that they be read or distributed to those in attendance at meeting. If the rules are not heeded, it is suggested that you 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 you could ask the officer to remove the person or persons from the meeting.

Second, while public bodies have the right to adopt rules to govern their own proceedings [see e.g., Education Law, §1709(1)], the courts have found in a variety of contexts that such rules must be reasonable. For example, although a board of education may "adopt by laws and rules for its government and operations", in a case in which a board's rules prohibited the use of tape recorders at its meetings, the Appellate Division found that the rule was unreasonable, stating that the authority to adopt rules "is not unbridled" and that "unreasonable rules will not be sanctioned" [see Mitchell v. Garden City Union Free School District, 113 AD 2d 924, 925 (1985)]. Similarly, if by rule, a public body chose to permit certain citizens to address it for ten minutes while permitting others to address it for three, or not at all, such a rule, in my view, would be unreasonable.

I note that §103 of the Open Meetings Law provides that meetings of public bodies are open to the "general public." As such, any member of the public, whether a resident of the District or of another jurisdiction, would have the same right to attend. That being so, I do not believe that a member of the public can be required to identify himself or herself by name or by residence in order to attend a meeting of a public body. Further, since any person can attend, I do not believe that a public body could by rule limit the ability to speak to residents only. There are many instances in which people other than residents, such as those who may own commercial property or conduct business and who pay taxes within a given community, attend meetings and have a significant interest in the operation of a municipality or school district.

In sum, based on the foregoing, I believe that the Board may establish rules concerning the conduct of those who attend its meetings, including the privilege of those in attendance to speak or participate to certain times, topics and duration.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Patricia and Thomas Pawlaczyk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3296

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April 25, 2001

Ms. Barbara Gref
The Times Herald-Record
5 Bank Street
Monticello, NY 12701

Mr. Ira J. Cohen
County Attorney
Sullivan County Department of Law
P.O. Box 5012
Monticello, NY 12701

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

Dear Ms. Gref and Mr. Cohen:

I have received letters from both of you involving the same issue, the propriety of an executive session held by the Sullivan County Legislative Executive Committee to discuss "contract negotiations" relating to a potential development. The Executive Committee consists of all nine members of the County Legislature.

From my perspective, the issue and, therefore, the problem involves the extent to which a motion for entry into executive session adequately describes the matter to be considered. Absent sufficient detail, the public has no way of ascertaining whether or the extent to which an executive session may properly be held.

As you are aware, §105(1) requires that a motion for entry into executive session include reference to the subject or subjects to be considered. Paragraphs (a) through (h) of §105(1) specify and limit the grounds for entry into executive session. The only reference in §105(1) to "negotiations" or "contract negotiations" appears in paragraph (e). The provision pertains only to collective bargaining negotiations involving a public employee union and would clearly be inapplicable in the context of the instant situation.

The provision that might have justified an executive session in the circumstance described does not refer directly to negotiations. Paragraph (f) of §105(1) states that a public body may 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..."

Frequently negotiations or a discussion of negotiations include consideration of the "financial, credit or employment history" of a "particular person or corporation." To the extent that is so, I believe that an executive session may properly be held. Nevertheless, unless the basis for entry into executive session is expressed in that manner (i.e., "I move to enter into executive session to discuss the financial or credit history of a particular corporation"), the public cannot know whether there is indeed a proper basis for conducting an executive session. A description of the matter as "contract negotiations" would not, for reasons discussed earlier, describe the matter in a way that offers justification for holding an executive session.

In short, a more precise or artful motion for entry into executive session would, in my view, likely resolve some of the difficulties encountered.

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

OMLO-3297

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

April 25, 2001

Mr. Gustave DeTraglia, Jr.
Attorney and Counselor at Law
1425 Genesee 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 facts presented in your correspondence.

Dear Mr. DeTraglia:

I have received your letter of March 14 in which you raised a variety of issues relating to the use of an agenda by the New Hartford Town Board. You questioned "what the procedure would be in regard to agendas and whether or not something could or should be discussed if it is not on the agenda.

Based upon a review of the Open Meetings Law, there is nothing in that statute pertaining to agendas. Further, I know of no statute that specifies that an agenda must be prepared or that a public body is required to follow an agenda.

From my perspective, whether or the extent to which the Board chooses to develop or be bound by an agenda involves a matter within its authority. I note that §63 of the Town Law states in relevant part that "The board may determine the rules of its procedure."

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3298

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

April 25, 2001

Hon. Mark Irish
[redacted]

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 Councilman Irish:

As you are aware, I have received your letter of March 13 and the materials attached to it. You have sought an opinion concerning what you characterized as " an illegal meeting" convened by the Kinderhook Town Supervisor, Doug McGivney.

A review of the correspondence relating to the matter indicates that the Supervisor called a meeting to discuss the possibility of widening State Farm Road. Notice of the gathering was posted, a member of the news media was present, and four of the five members of the Town Board attended. Nevertheless, you wrote that only three were given prior notice. Based on several conversations, including a description of the gathering offered by the Supervisor, it is my understanding that Board members sat in the audience among others who attended and that the four members who were present did not function collectively as a Board. If that is so, it does not appear that the Open Meetings Law would have been applicable.

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, collectively as a body and 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.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Hon. Doug McGivney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12649
OML-AO-3329

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

April 30, 2001

Mr. Edward M. Gomez
Publisher and Editor
The Hudson River Herald
P.O. Box 18
Hudson, NY 12231

The staff of the Committee 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. Gomez:

As you are aware, I have received a variety of correspondence from you relating to what you characterized as "the appearance of impropriety and actual abuses of power on the part of...agencies linked to government." You added that those entities have engaged in "the routine ignoring of...open-government laws..." You referred specifically to the Columbia Economic Development Corporation and the Columbia-Hudson Partnership. Based on the materials that you forwarded, both are headed by Ms. Bernardina Torrey.

I spoke at length with Ms. Torrey to learn more of the nature of the two entities. Although she indicated that all of the records that you have requested, insofar as they exist, have been disclosed, it appears that neither entity is required to comply with the Freedom of Information Law or the Open Meetings Law.

In this regard, both the Freedom of Information and Open Meetings Laws generally apply to governmental entities. The former is applicable to agencies, and section 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."

The latter pertains to meetings of public bodies, and section 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."

My understanding is that neither the Columbia Economic Development Corporation nor the Columbia-Hudson Partnership is part of any governmental entity or subject to any significant government control. While they may have relationships with one or more units of government and receive government funding, those factors alone do not, in my view, bring them within the coverage of open government statutes.

As you may be aware, there are judicial decisions that indicate that not-for-profit corporations may in some instances be subject to those statutes. For instance, it has been held that volunteer fire companies are "agencies" that fall within the scope of the Freedom of Information Law, for they perform what traditionally has been deemed an essential governmental function and would not exist but for their contractual relationship with one or more entities of local government [see Westchester-Rockland Newspapers v. Kimball, 50 NY2d 575 (1980)]. It has been held that a not-for-profit foundation associated with, created by and operating within the confines of a branch of a public university is subject to the Freedom of Information Law (see Eisenberg v. Goldstein, Supreme Court, Kings County, February 26, 1988). It has been advised and held that a local development corporation, a majority of whose board of directors is designated by government and which functions as an extension of government is subject to the Freedom of Information Law [see Buffalo News, Inc. v. Buffalo Enterprise Development Corporation, 84 NY2d 488 (1994)]. In each of those instances, the not-for-profit entities owed their existence to government and were under substantial government control.

Again, as I understand the nature of the entities at issue, neither is under substantial government control. Although one or more government officials may sit on their corporate boards of directors, they constitute a small minority on those boards. If that is so, those entities, in my opinion, are neither agencies subject to the Freedom of Information Law nor public bodies required to comply with the Open Meetings Law. This is not to suggest that they may not disclose records or conduct meetings open to the public, but rather that they are not required to do so pursuant to those statutes.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Bernardina Torrey

OML-AO-3300

From: Robert Freeman
To: Internet:bfox@gwl.ouboces.org
Date: 5/2/01 8:32AM
Subject: Dear Mr. Fox:

Dear Mr. Fox:

I have received your letter in which you raised questions relating to the duties of a school board in relation to the Open Meetings Law.

First, you asked whether a board must return to an open meeting after an executive session "in order to close the general meeting officially." In my view, the board may do so, but it is not required to do so. I note, too, that if a majority of the board leaves a meeting (i.e., near the end of a meeting, when one or more members, for whatever the reason, excuse themselves), the meeting has ended, for a quorum would no longer be present. In that kind of situation, the meeting is over, notwithstanding the absence of any motion to adjourn or otherwise official end the meeting.

The next issue involves the board's ability to vote during an executive session. In general, a public body subject to the Open Meetings Law may vote during a properly held executive session, unless the vote is to appropriate public monies. However, based on judicial decisions dating to the 1950's, boards of education cannot vote in executive session, except in rare circumstances. One of those circumstances would include a vote to initiate charges against a tenured person under section 3020-a of the Education Law, for that statute specifies that a vote to do so must be taken during an executive session. In other instances relating to so-called personel matters, even if the subject can validly be considered in executive session, the board must return to the open meeting in order to vote.

Lastly, the Open Meetings Law is silent with respect to the public's right to speak at meetings. Therefore, a board is not required to permit public participation. Nevertheless, many boards do so, and it has been suggested that the public's opportunity to speak be governed via the adoption of reasonable rules that treat members of the public equally.

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

OML-AO-3301

From: Robert Freeman
To: [redacted]
Date: 5/2/01 8:09AM
Subject: Dear Councilman Tobin:

Dear Councilman Tobin:

I have received your letter concerning the propriety of an executive session held to discuss "a salary increase for a city employee who is not covered by a collective bargaining agreement and who received a pay increase three months ago."

In this regard, from my perspective, the answer is dependent on the nature of the discussion. If it involved an allocation in the budget or an increase accorded to the position, irrespective of who holds the position, I do not believe that an executive session could properly have been conducted. On the other hand, insofar as the discussion related to a "particular person" and his or her performance, an executive session would likely have been validly held.

The key provision is section 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...."

Based on the foregoing, again, to the extent that the discussion focused on a "particular person" in relation to one or more of the topics listed in section 105(1)(f), an executive session would be proper; otherwise, there would have been no basis for entry into executive session.

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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OML-AO-3302

From: Robert Freeman
To: "bfox@gwl.ouboces.org".GWIA.DOS1
Date: 5/4/01 8:27AM
Subject: Re:

Dear Mr. Fox:

I have received your second series of questions. With respect to two of the three, there is no law that deals with them; rather, they would involve matters of policy, or perhaps the absence of policy.

First, you asked whether the precedent of permitting public comment at certain times during meetings compels a board of education to do so at all future meetings. As suggested earlier, the Open Meetings Law is silent with respect to the public's ability to speak at meetings. A public body may choose to permit the public to speak, but it is not required to do so. If a public body at some point adopted a rule of procedure, a policy or a resolution authorizing public participation, I believe that it has essentially compelled itself to follow its own directive, unless and until the directive is revoked or amended. However, it could act at any time to alter a rule of procedure, a policy or a resolution formerly adopted.

Technically, in the absence of any formal rule or policy, I do not believe that a board would be required to permit the public to speak. However, the argument might be made that a longstanding precedent has resulted in a de facto rule that remains in effect until it is revoked or altered.

Second, in a similar vein, there is nothing in the Open Meetings Law that addresses matters involving an agenda or its function. In short, if a public body does not want to have an agenda (although most do), there is no requirement that it must. Further, there is no law of which I am aware that gives a member of the public the right to place an item on an agenda. Unless the Board has adopted a rule or policy that gives a member of the public such a right or privilege, in my view, there is none.

Lastly, based on case law, I do not believe that a board of education may "vote on a superintendent's recommendation for termination of a PROBATIONARY administrator in an executive session" (emphasis yours). While that kind of issue may be discussed during an executive session under section 105(1)(f) of the Open Meetings Law, judicial decisions indicate that the vote must occur in public. Further, since there is nothing secret about the name or the action of the board, I believe that the name should be included in a motion. Again, the privilege of speaking would be a matter left up to the board. Optimally, it would be the subject of some rule of procedure or policy.

I hope that I have been of assistance.

[redacted]

Robert J. Freeman
Executive Director
NYS Committee on Open Government

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12658
OMC-AO-3323

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

May 9, 2001

Ms. Vivian Burke
[redacted]

The staff of the Committee on 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. Burke:

Your letter of April 20 addressed to the Secretary of State has been forwarded to the Committee on Open Government. The Committee, a unit of the Department of State on which the Secretary of State serves, is authorized to offer opinions and guidance pertaining to the Freedom of Information and Open Meetings Laws. Although your questions do not deal directly with those laws, I offer the following comments.

First, in my view, minutes of town board meetings should not be prepared "in pencil." Provisions contained in Article 57-A of the Arts and Cultural Affairs Law deal with the retention and preservation of records, and local governments must retain records for particular periods of time before the records can be disposed of or destroyed. Minutes of meetings, according to the retention schedule, must be kept permanently. If a document prepared in pencil cannot be permanently preserved, it would be unreasonable in my view and inconsistent with law to prepare the record in pencil.

Second, with respect to changes in minutes of meetings, I believe that they may validly be made if they reflect the correction of an error and represent what in fact occurred at a meeting. In my view, minutes cannot be altered or amended in a manner that does not accurately reflect what transpired at a meeting.

Third, you asked whether it is "legal to remove original documents from the Town Hall leaving only copies." As I understand the law on the matter, so long as copies are true copies, they have the same effect and validity as original documents. I note that provisions have existed for years which have enabled local governments to maintain microfilm copies rather than original documents.

The agency that has general oversight concerning the maintenance of records is the State Archives and Records Administration (SARA), which is part of the State Education Department. To obtain materials regarding the treatment of town records, it is suggested that you write to that

agency at the Cultural Education Center, Albany, NY 12230 or contact SARA by phone at (518)474-6926.

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-12674
OML-AO-3304

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

May 21, 2001

Mr. Paul Conklin
Labor Relations Specialist
New York State United Teachers
Centerpointe Corporate Park
270 Essjay Road
Williamsville, NY 14221

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. Conklin:

I have received your letter of April 2 and apologize for the delay in response. You have sought "a decision on whether the St. Mary's [School for the Deaf] Board of Trustees meetings fall under the open meetings law." You indicated that staff contends that its meetings should be open "due to the fact that they are paid with funds supplied by New York State, and must follow the mandates of the New York State Education Department." You added that "the school is a privately owned, non-profit organization" that receives "a substantial portion of its operating income from the State of New York."

In this regard, it is noted at the outset that the Committee on Open Government is not empowered to render a "decision" that is binding. Rather, §109 of the Open Meetings Law states that the Committee is authorized to issue "advisory opinions." Consequently, the following comments should be considered advisory in nature.

From my perspective, it is unlikely that the meetings of the Board are subject to the requirements of the Open Meetings Law. That statute is applicable 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."

Based on the foregoing, as a general matter, the Open Meetings Law is applicable to governmental entities, those that "conduct public business" and perform a "governmental function." In my view, the receipt of government funding does not alter the character of an entity. In this instance, because the School is a private organization, I do not believe that meetings of its Board of Trustees fall within the requirements of the Open Meetings Law.

Notwithstanding the foregoing, there may be another method of attempting to obtain information relating to the School. 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."

As in the case of the Open Meetings Law, the School, a private entity, would not be subject to the Freedom of Information Law, for it is not a governmental entity. However, documentation kept by the State Education Department, or any other agency, would fall within the coverage of that statute. Its scope is expansive, for §86(4) defines the term "record" broadly to include:

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

Therefore, while the School is not required to give effect to the Freedom of Information Law, records pertaining to the School maintained by an agency could be requested from the agency and would be subject to rights of access conferred by that statute.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12677
OML-AO-3305

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May 21, 2001

E-Mail

TO: Trustee Kane <RJKane@aol.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 Trustee Kane:

I have received your letter in which you described difficulties encountered by a resident of the Village of Airmont in obtaining minutes of meetings of the Planning Board and the Zoning Board of Appeals. Based upon your description of the facts, I offer the following comments.

First, §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.

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

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

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

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

Lastly, I do not believe that any fee may be imposed relating to a search of records. From my perspective, unless a statute, an act of the State Legislature, authorizes an agency to charge a fee for personnel time, searching for records or charging more than twenty-five cents per photocopy for records up to nine by fourteen inches, no such fees may be assessed. In this instance, I know of no statute that would authorize the Village to do so.

By way of background, §87(1)(b)(iii) of the Freedom of Information Law stated until October 15, 1982, that an agency could charge up to twenty-five cents per photocopy unless a different fee was prescribed by "law". Chapter 73 of the Laws of 1982 replaced the word "law" with the term "statute". As described in the Committee's fourth annual report to the Governor and the Legislature of the Freedom of Information Law, which was submitted in December of 1981 and which recommended the amendment that is now law:

> "The problem is that the term 'law' may include regulations, local laws, or ordinances, for example. As such, state agencies by means of regulation or municipalities by means of local law may and in some instances have established fees in excess of twenty-five cents per photocopy, thereby resulting in constructive denials of access. To remove this problem, the word 'law' should be replaced by 'statute', thereby enabling an agency to charge more than twenty-five cents only in situations in which an act of the State Legislature, a statute, so specifies."

As such, prior to October 15, 1982, a local law, an ordinance, or a regulation for instance, establishing a search fee or a fee in excess of twenty-five cents per photocopy or higher than the actual cost of reproduction was valid. However, under the amendment, only an act of the State Legislature, a statute, would in my view permit the assessment of a fee higher than twenty-five cents per photocopy, a fee that exceeds the actual cost of reproducing records that cannot be photocopied, or any other fee, such as a fee for search. In addition, it has been confirmed judicially that fees inconsistent with the Freedom of Information Law may be validly charged only when the authority to do so is conferred by a statute [see Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)].

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

> "Each agency shall promulgate rules and regulations in conformance with this article...and pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the availability of records and procedures to be followed, including, but not limited to...
>
> > (iii) the fees for copies of records which shall not exceed twenty-five cents per photocopy not in excess

> of nine by fourteen inches, or the actual cost of reproducing any other record, except when a different fee is otherwise prescribed by statute."

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

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

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

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

In an effort to enhance compliance with law, copies of this response will be forwarded to the Board of Trustees and the Village Clerk,

I hope that I have been of assistance.

RJF:jm

cc: Board of Trustees
Village Clerk

OML-AO-3306

From: Robert Freeman
To: [redacted]
Date: 5/22/01 10:09AM
Subject: Dear Ms. McLelland:

Dear Ms. McLelland:

I have received your letter in which you asked whether transcripts of executive sessions must be prepared and made available by municipal bodies subject to the New York Open Meetings Law.

In this regard, although the analogous federal statute may require the preparation of transcripts of executive sessions, there is no similar requirement applicable to public bodies subject to the state's Open Meetings Law. If, for example, a public body enters into an executive session and merely discusses an issue or issues but takes no action, there is no requirement that minutes or any other record of the executive session be prepared. However, if action is taken during a properly held executive session, minutes reflective of the action, the date and the vote of the members must be recorded in minutes pursuant to section 106(2) of the Open Meetings Law. Those minutes must be made available, to the extent required by the Freedom of Information Law, within one week of the executive session [see section 106(3)].

The full text of the Open Meetings Law is available via our website under "Publications."

I hope that I have been of assistance.

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-12684
OML-AO-3307

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

May 24, 2001

E-Mail

TO: Prudence C. Spink [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. Spink:

As you are aware, I have received your inquiry concerning the status of the Chautauqua Institution Architectural Review Board under the Open Meetings Law. Following our discussion, I contacted Town officials in order to learn more of the matter. Based upon information supplied by Town officials, I do not believe that the entity in question is required to comply with the Open Meetings Law.

In this regard, 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 upon the language quoted above, a public body, in brief, would be an entity consisting of two or more members that conducts public business and performs a governmental function for one or more governmental entities.

In a letter sent to me by John W. Beckman, Town Attorney for the Town of Chautauqua, it was stated that:

> "Chautauqua Institution is a not-for-profit corporation formed and governed by special acts of the State Legislature and operates without financial assistance of the town, county, or State of New York. Its land use regulations are based on deed restrictions rather than zoning. For these and other reasons, we do not believe Chautauqua Institute falls within the ambit of the Freedom of Information Law (Article 6 of the Public Officers Law)."

Although Mr. Beckman referred to the Freedom of Information Law, I believe that his comments are also pertinent concerning the status of the Institute and the Board in question under the Open Meetings Law. If the Institute is indeed separate and distinct from government and the decision concerning your property to which you referred is based upon deed restrictions rather than an assertion of any governmental authority, I do not believe that the entity in question would be subject to either the Open Meetings or Freedom of Information Laws.

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

RJF:jm

cc: John. W. Beckman
Hon. James Weidman, III, Town Supervisor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3308

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

May 25, 2001

Ms. Barbara Bowen
[redacted]

The staff of the Committee on 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. Bowen:

I have received your letter in which you sought clarification concerning a "demand" by the Superintendent of the New Paltz Central School District that you turn off your tape recorder during a meeting of the New Paltz District Wide Committee (the "Committee"), which you described as "a statutory shared decision making group under commissioner's regulation 100.11."

Based upon the following commentary, I believe that any person may record the proceedings of the Committee, so long as the recording device is used in a manner that unobtrusive.

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

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

Several 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, although the Committee may not have the ability to make determinations, according to the Commissioner's regulations, it performs a necessary and integral function in the development of shared decision making plans. Section 100.11(b) of the regulations promulgated by the Commissioner of Education states in relevant part that:

> "By February 1, 1994, each public school district board of education and each board of cooperative educational services (BOCES) shall develop and adopt a district plan for the participation by teachers and parents with administrators and school board members in school-based planning and shared decisionmaking. Such district plan shall be developed in collaboration with a committee composed of the superintendent of schools, administrators selected by the district's administrative bargaining organization(s), teachers selected by the teachers' collective bargaining organization(s), and parents (not employed by the district or a collective bargaining organization representing teachers or administrators in the district) selected by their peers in the manner prescribed by the board of education or BOCES, provided that those portions of the district plan that provide for participation of teachers or administrators in school-based planning and shared decisionmaking may be developed through collective negotiations between the board of education or BOCES and local collective bargaining organizations representing administrators and teachers."

Section 100.11(d) provides in part that:

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

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

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

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

As stated earlier, the regulations specify that a district plan "shall be developed in collaboration with a committee." As such, a committee must, by law, be involved in the development of a plan. The regulations also indicate that a plan may be adopted by a board of education or BOCES only "after consultation with and full participation by" a committee, and that the Commissioner may approve a plan only after having found that it "complies with the requirements of this section", i.e., when it is found that a committee was involved in the development of a plan. Further, an appeal may be made to the Commissioner if a board has failed to permit "full participation" of a committee.

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

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

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

Second, because the Committee in question is a public body subject to the Open Meetings Law, again, I believe that a member of the public may record its proceedings so long as the recording is carried out without disruption.

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

Based on the foregoing, I believe that you have the right to record open meetings of the Committee, 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, copies of this response will be forwarded to the Board of Education and the Superintendent.

I hope that I have been of some 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

OML-AO-3309

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May 29, 2001

Mr. James Lombardi
[redacted]

Dear Mr. Lombardi:

You letter addressed to the Attorney General, apparently in March, and forwarded to the Commission of Investigation has been forwarded, in turn, to the Committee on Open Government. The Committee, a unit of the Department of State, is authorized to offer advice and guidance concerning the Open Meetings and Freedom of Information Laws.

One aspect of your letter deals with the Open Meetings Law, for you wrote that the Town Board of the Town of Lewiston frequently enters into executive session to discuss Town Business in private. In this regard, I point out that every meeting of a public body, such as a town board, 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. 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.

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 taken in violation of this article void in whole or in part."

Additionally, under subdivision (2), a court may award reasonable attorneys' fees to the successful party in a lawsuit brought under the Open Meetings Law.

If you have specific questions concerning the Open Meetings Law, please so indicate, and I will attempt to address them.

Lastly, many of your comments relate to the manner in which the Town expends public money. That being so, it is suggested that you might contact the Office of the State Comptroller. That agency has a Buffalo office that can be reached at (716)847-7122.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board

FOIL-AO-12087
OML-AO-3310

From: Robert Freeman
To: [redacted]
Date: 5/30/01 4:53PM
Subject: Dear Mr. and Ms. Wallace:

Dear Mr. and Ms. Wallace:

I have received your letter in which you indicated that, as "weekenders", you have had difficulty in obtaining information relating to the development of an area near your home in Highmount. In short, you wrote that most meetings are held and records made available only on weekdays.

In this regard, there is no obligation on the part of a unit of government to maintain office hours or conduct meetings on weekends. Pursuant to regulations promulgated by the Committee on Open Government, a government agency is required to accept requests for records and make records available during "regular business hours." However, requests for records need not be made in person; a request may be made by mail. A summary of the Freedom of Information Law and a sample letter of request are included in "Your Right to Know", which is available on our website under "publications."

With respect to meetings of government bodies, in my experience, they are typically held on weekday nights. It is noted that the courts have held that recording devices can be used at open meetings, so long as those devices are used unobtrusively. Therefore, if you cannot attend a meeting, perhaps you could arrange for a friend or neighbor to do so, and that person could record the meeting so that you could keep abreast of the municality's activities.

I hope that I have been of assistance. If you have questions relating to either the Freedom of Information or Open Meetings Laws, please feel free to contact me.

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

FOIL-AO-12691
OML-AO-3311

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May 31, 2001

Lt. Mark P. Coleman
Lieutenant, Florida Volunteer
Fire Department
P.O. Box 181
Florida, NY 10921

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 Lt. Coleman:

Your letter of May 9 addressed to the Attorney General has been forwarded to the Committee on Open Government. The Committee, a unit of the Department of State, is authorized to offer advice and opinions concerning the Open Meetings and Freedom of Information Laws. In brief, you have questioned the applicability of those laws to meetings and records of a volunteer fire department.

In this regard, the Open Meetings Law is applicable to meetings of public bodies. Section 102(2) of the Law defines "public body" to mean:

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

By reviewing the components in the definition of "public body", I believe that each is present with respect to the board of a volunteer fire company. The board of a volunteer fire company is clearly an entity consisting of two or more members. I believe that it is required to conduct its business by means of a quorum under the Not-for-Profit Corporation Law. Further, in my view, a volunteer fire company at its meetings conducts public business and performs a governmental function. Such a function is carried out for a public corporation, which is defined to include a municipality, such as a town or village, for example. Since each of the elements in the definition of "public body" pertains to the board of a volunteer fire company, it appears that the board of such a company is a "public body" subject to the Open Meetings Law.

I point out that the status of volunteer fire companies had long been unclear. Those companies are generally not-for-profit corporations that perform their duties by means of contractual relationships with municipalities. As not-for-profit corporations, it was difficult to determine whether or not they conducted public business and performed a governmental function. Nevertheless, in a case brought under the Freedom of Information Law dealing with the coverage of that statute with respect to volunteer fire companies, the state's highest court, the Court of Appeals, found that a volunteer fire company is an "agency" that falls within the provisions if the Freedom of Information Law [see Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575 (1980)]. In its decision, the Court clearly indicated that a volunteer fire company performs a governmental function and that its records are subject to rights of access granted by the Freedom of Information Law.

In view of the decision rendered in Westchester Rockland, I believe that the board of a volunteer fire company falls within the definition of "public body" and would be required to comply with the Open Meetings Law.

With respect to the scope of the Freedom of Information Law, as indicated above, that statute applies to agency records, and §86(3) defines the term "agency" to mean:

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

As such, the Freedom of Information Law generally pertains to records maintained by entities of state and local government.

In Westchester-Rockland, the case involved access to records relating to a lottery conducted by a volunteer fire company, and it was determined that volunteer fire companies, despite their status as not-for-profit corporations, are "agencies" subject to the Freedom of Information Law. In so holding, the Court stated that:

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

> "True, the Legislature, in separately delineating the powers and duties of volunteer fire departments, for example, has nowhere included an obligation comparable to that spelled out in the Freedom of Information statute (see Village Law, art 10; see, also, 39 NY Jur, Municipal Corporations, §§560-588). But, absent a provision exempting volunteer fire departments from the reach of article 6-and there is none-we attach no significance to the fact that these or other particular agencies, regular or volunteer, are not expressly included. For the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objections cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" (id. at 579].

Moreover, although it was contended that documents concerning the lottery were not subject to the Freedom of Information Law because they did not pertain to the performance of the company's fire fighting duties, the Court held that the documents constituted "records" subject to the Freedom of Information Law [see §86(4)].

More recently, another decision confirmed in an expansive manner that volunteer fire companies are required to comply with the Freedom of Information Law. That decision, S.W. Pitts Hose Company et al. v. Capital Newspapers (Supreme Court, Albany County, January 25, 1988), dealt with the issue in terms of government control over volunteer fire companies. In its analysis, the Court states that:

> "Section 1402 of the Not-for-Profit Corporation Law is directly applicable to the plaintiffs and pertains to how volunteer fire companies are organized. Section 1402(e) provides:
>
> > '...a fire corporation, hereafter incorporated under this section shall be under the control of the city, village, fire district or town authorities having by law, control over the prevention or extinguishment of fires therein. Such authorities may adopt rules and regulations for the government and control of such corporations.'
>
> "These fire companies are formed by consent of the Colonie Town Board. The Town has control over the membership of the companies, as well as many other aspects of their structure, organization and operation (section 1402). The plaintiffs' contention that their relationship with the Town of Colonie is solely contractual is a

mischaracterization. The municipality clearly has, by law, control over these volunteer organizations which reprovide a public function.

"It should be further noted that the Legislature, in enacting FOIL, intended that it apply in the broadest possible terms. '...[I]t is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (Public Officers Law, section 84).

"This court recognizes the long, distinguished history of volunteer fire companies in New York State, and the vital services they provide to many municipalities. But not to be ignored is that their existence is inextricably linked to, dependent on, and under the control of the municipalities for which they provide an essential public service."

Based upon the foregoing, it is clear that volunteer fire companies are subject to the Freedom of Information Law.

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 requires that meetings be conducted in public, except to the extent that there is a basis for entry in to an executive session. Paragraphs (a) through (h) of §105(1) specify and limit the subjects that may properly be discussed during an executive session.

Enclosed for your review are copies of the Freedom of Information and Open Meetings Laws, as well as "Your Right to Know", which describes both laws.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:tt
Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-12700
OML-AO-3312

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

June 4, 2001

Mr. John Kwasnicki
[redacted]

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

Dear Mr. Kwasnicki:

I have received your letter, as well as the materials appended to it. You have raised questions concerning the Tuxedo Park Library in relation to quorum requirements, the absence of oaths of office filed by members of its Board of Trustees with the County Clerk, and its alleged failure to comply with the Freedom of Information Law.

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

In this regard, I offer the following comments.

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

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

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

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

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

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

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

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

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

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

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

In consideration of the preceding commentary, I believe that quorum requirements applicable to the Tuxedo Park Library would derive from provisions of the Not-for-Profit Corporation Law, rather than statutes applicable to governmental bodies. Further, as officers of a not-for-profit corporation, I do not believe that the members of the Board of Trustees would be required to file oaths of office, for they are not public officers.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Carmela Chase, Director

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3313

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June 4, 2001

Mr. John F. Fitzgerald
[redacted]

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

Dear Mr. Fitzgerald:

As you are aware, I have received your letter in which you asked whether minutes of executive sessions conducted by a board of education must be prepared and made available to the public.

In this regard, 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."

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, you raised the following question: "if during an executive session for purposes of contract negotiation, a crime is committed, or a threat is made to harm the district by a participant, is that crime or threat protected by executive privilege." While I cannot answer your question fully because I am not an expert with respect to the Penal or Criminal Procedure Law, I note that 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).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

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June 4, 2001

Ms. Ruth Weber
Advisory Board
Upper Grandview Association
P.O. Box 551
Nyack, NY 10960

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. Weber *et al.*:

I have received your letters relating to difficulties encountered in your efforts in obtaining information from the Town of Orangetown in a timely manner.

Since you asked that I "rule" with respect to the Town's treatment of your requests for records, I note that the functions of this office are primarily advisory in nature. Neither the Committee on Open Government nor myself has the authority to "rule" or render a binding determination concerning rights of access. It is our hope, however, that the opinions rendered by this office are educational, persuasive and that they enhance compliance with and understanding of the Freedom of Information Law. With that goal, I offer the following comments concerning the variety of issues that you raised. Several of those issues were considered in an opinion addressed to you on April 25, and there is no need to reiterate those points. Additionally, certain of those and others were addressed in an opinion sought by Dennis D. Michaels, Deputy Town Attorney. A copy of my response to Mr. Michaels is attached.

First, in some instances, municipal boards have designated several records officers, i.e., the heads of departments or individuals having responsibilities in relation to certain departments. In the context of your comments, if the Director of the Office of Building, Zoning and Planning Administration and Enforcement (OBZPAE) has been designated as records access officer with respect to records maintained by that entity, it is his responsibility to "coordinate" responses to requests for those records. The absence of the records access officer would not, in my view, constitute a valid reason for stopping the process of responding to requests. Again, the function of that person is ensure that agency personnel give effect to the Freedom of Information Law when requests are made.

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

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

Therefore, once it is determined that a record is accessible under the law, I believe that it must be made available unconditionally, irrespective of its intended use.

With respect to minutes of meetings, §106(3) of the Open Meetings Law specifies that minutes of meetings must be prepared and made available to the public 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 been approved, to comply with the Open Meetings Law, it has consistently been advised that minute 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.

Next, with regard 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 my view, a public body must situate itself and conduct its meetings in a manner in which those in attendance can observe and hear the proceedings. To do otherwise would in my opinion be unreasonable and fail to comply with a basis requirement of the Open Meetings Law.

Lastly, 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 the context of the matters to which you referred, records submitted to the Town by persons or entities outside of government, such as developers, would likely be accessible, for none of the grounds for denial would apparently be relevant.

You referred to "special recommendations" offered by the Building Director to the Planning Board, suggesting that those records would not qualify for the "'internal memo' excuse" and contended that all "departmental letters" and notedsof meetings must be disclosed. Here I point out that the "internal memo" exception in the Freedom of Information Law, §87(2)(g), pertains to "inter-agency or intra-agency" materials, and that §86(3) of the law defines the term "agency" to mean:

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

Based on the foregoing, the kinds of communications to which you referred would fall within the coverage of §87(2)(g). Nevertheless, due to its structure, that provision often requires disclosure. Specifically, the cited provision enables an agency to withhold records that:

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

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

or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld. Therefore, insofar as communications between or among Town officials, or between or among Town officials and those of another agency, consist of advice, opinion, recommendation and the like, I believe that they may be withheld.

Assuming that notes consist merely of a factual rendition of what transpired at an open meeting, I believe that they would be available. In short, it was held years ago that notes of an open meeting consisting of factual information were required to be disclosed [Warder v. Board of Regents, 410 NYS 2d 742 (1978)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board
Planning Board
Hon. Charlotte Madigan, Town Clerk
John Giardiello, Director OBZPAE
Dennis D. Michaels

From: Robert Freeman
To: [redacted]
Date: 6/4/01 9:27AM
Subject: Dear Rpstine:

Dear Rpstine:

There are no specific guidelines involving the use of a tape recorder by the secretary of a village fire department for the purpose of "later transcribing the minutes into a fire department log." However, judicial decisions indicate that anyone may use a tape recorder at an open meeting, so long as the use of the recording device is not obtrusive or disruptive. Further, it is common practice for the secretary or clerk to tape record meetings so that the tape can be used as an aid in preparing minutes of a meeting and ensuring their accuracy.

Since you referred to "transcribing the minutes", I note that the law does not require that minutes consist of a verbatim account of everything said at a meeting. Section 106(1) of the Open Meetings Law contains what might be characterized as minimum requirements concerning the contents of minutes. At a minimum, minutes must consist of "a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon." In addition, section 106(3) requires that minutes be prepared and made available on request within two weeks of a meeting

I hope that I have been of assistance.

Robert J. Freeman
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June 5, 2001

Mr. Paul G. Wheeler
[redacted]

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

Dear Mr. Wheeler:

I have received your letter in which you asked whether there is an obligation on the part of a public body to answer questions raised during a public hearing.

In this regard, although members of public bodies frequently respond to questions raised by members of the public during or perhaps following public hearings or meetings, I know of no provision of law that requires that they do so. While I do not disagree with your point of view as a citizen, in good faith, I cannot advise that the Commission or the Town Board would be obligated by law to respond to questions raised by the public.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

From: Robert Freeman
To: [redacted]
Date: 6/6/01 8:19AM
Subject: Re: Change of date of Board of Education vote to decide on a 2nd school budget

Dear Ms. Blackmer:

I have received your letter concerning the possibility that the Mt. Markham Board of Education will be holding a meeting on short notice.

With respect to the notion of a "super quorum", I know of no such requirement. As a general matter, a quorum is a majority of the total membership of a public body, notwithstanding absences or vacancies. Further, action can be taken only by means of an affirmative vote of a majority of the total membership. Therefore, if a board consists of seven members and two are absent, among the five in attendance, four affirmative votes (a majority of seven) would be needed to take action or otherwise assert authority. I point out that abstentions count, in essence, as negative votes.

With regard to notice of meetings, if a meeting is scheduled at least in advance, notice must be given at least 72 hours prior to the meeting. If it is scheduled less than a week in advance, notice must given "to the extent practicable" at a reasonable time prior to the meeting. Every meeting must be preceded by notice to the news media and by means of posting in one or more "designated" conspicuous public locations; posting should be in the same place or places in each instance.

Assuming that the Board complies with the notice requirements, I believe that it may validly conduct a meeting on June 7.

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

I hope that I have been of assistance.

[redacted]

Robert J. Freeman
Executive Director
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From: Robert Freeman
To: [redacted]
Subject: Re: Thanks and 1 more question for tonight's meeting

Dear Ms. Blackmer: I have received your latest scenario, and if I understand the facts correctly, there are several ways to consider the situation.

First, if a majority of the Board gathered to discuss public business, the gathering, in my view, would have constituted a "meeting" that should have been held in a manner consistent with the Open Meetings Law.

Second and perhaps most importantly, although a quorum is a majority of the Board's total membership, one of the conditions precedent to having a quorum is reasonable notice to all of the members, and a public body cannot do what it is empowered to do without a quorum. If a majority gathered but reasonable notice was not given to all the members, there would not have been a quorum and the Board would not have had the authority to take action. The governing provision would be section 41 of the General Construction Law, entitled "Quorum and majority."

Third, if there was no majority, there would have been no authority to take action.

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

[redacted]

From: Robert Freeman
To: Internet:DeMersD@colonie.org
Date: 6/12/01 9:46AM
Subject: Dear Danielle:

Dear Danielle:

As you described the matter, the deliberations of the Sign Review Board would be quasi-judicial and outside the coverage of the Open Meetings Law. However, all other matters, including the act of voting, would be required to occur during an open meeting.

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 posted in one or more designated public locations not less than 72 hours prior to the meeting. If the meeting is scheduled less than a week in advance, notice must be given "to the extent practicable" at a reasonable time prior to the meeting to the media and by posting.

If you need additional information, please feel free to call.

I hope that I have been of assistance.

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From: Robert Freeman
To: Internet:Kathy@tughill.org
Date: 6/15/01 8:21AM
Subject: Dear Ms. Amyot:

Dear Ms. Amyot:

You referred to a situation in which "village boards have scheduled a meeting to negotiate the details associated with implementing a grant if approved", and you asked whether the meeting can be closed to the public.

Without additional information, I cannot advise with certainty. However, in an effort to provide guidance, I offer the following comments.

First, when a majority of a public body, such as a village board of trustees, gathers to conduct public business, the gathering constitutes a "meeting" that falls within the coverage of the Open Meetings Law, even if there is no intent to take action, and irrespective of the manner in which the gathering may be characterized (i.e., as a "work session").

Second, in a related vein, it was held years ago that a joint meeting held by the majority of the members of two public bodies is also subject to the Open Meetings Law.

Third, the only provision in the Open Meetings Law that refers specifically to "negotiations" is section 105(1)(e), which pertains to collective bargaining negotiations involving a public employee union. The negotiations at issue clearly would not fall within that exception. The only other provision that might be applicable, depending on the nature of the discussion, would be section 105(1)(f), which permits a public body to conduct an executive session to discuss "the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal or a particular person or corporation."

If the "negotiations" involve how the villages might allocate the grant monies, it is unlikely, in my view, that there would be a basis for entry into executive session. On the other hand, if the discussion involves an evaluation of the strengths and weaknessess of business persons or entities who might be hired to carry out a project with the use of grant monies, it would appear that section 105(1)(f) would be applicable.

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

I hope that I have been of assistance.

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June 18, 2001

Ms. Audrey J. Cooper
[redacted]

Mr. Karl Graham
[redacted]

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

Dear Ms. Cooper and Mr. Graham:

I have received your letter in which you described a series of matters relating to a "hot" issue, the elimination by the Ithaca City School District Board of Education of the position of Director of Affirmative Action and Multicultural Education.

First, you indicated that the topic in question was not on the Board's agenda. In this regard, there is nothing in the Open Meetings Law or any other statute of which I am aware that pertains to agendas or that requires that agendas be prepared. Unless the Board has established rules or policies on its own initiative concerning agendas or requiring that agendas be prepared in advance of meetings that list each subject to be considered, I do not believe that the Board would have been required to inform the public of its intention to deal with the matter at issue in advance of its meeting.

In a related vein, I point out that the Open Meetings Law, §104, requires that every meeting preceded by notice indicating the time and place of the meeting. There is no obligation to include an indication of the subject matter to be considered.

Second, you wrote that you spoke with the Board's President prior to the meeting, and that he informed you "that he couldn't comment on the issue, as it was executive session information." In my view, although the President chose not to comment, he would not have been prohibited from commenting. I point out that the Open Meetings Law is permissive. While that statute authorizes public bodies to conduct executive sessions in circumstances described in paragraphs (a) through (h) of §105(1), there is no requirement that an executive session be held even though a public body has the right to do so. The introductory language of §105(1), which prescribes a procedure that must

be accomplished before an executive session can be held, clearly indicates that a public body "may" conduct an executive session only after having completed that procedure. If, for example, a motion is made to conduct an executive session for a valid reason, and the motion is not carried, the public body could either discuss the issue in public or table the matter for discussion in the future. In a case in which the issue was "whether discussions had at an executive session of a school board are privileged and exempt from disclosure", it was held that "there is no statutory provision that describes the matter dealt with at such a session as confidential or which in any way restricts the participants from disclosing what took place" (Runyon v. Board of Education, West Hempstead Union Free School District No. 27, Supreme Court, Nassau County, January 29, 1987).

Further, if the matter involved the elimination of a position, I do not believe that there would have been any basis for conducting an executive session. On the other hand, insofar as the discussion may have focused on the performance of the incumbent of the position, an executive session could properly have been held.

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

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

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

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

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

> "...the medical, financial, credit or employment history of any person or corporation, or matters leading to the appointment, employment,

> promotion, demotion, discipline, suspension, dismissal or removal of any person or corporation..."

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

When an issue involves the creation or elimination of a position, irrespective of who might hold the position, the discussion would not pertain to a "particular person." Rather, it typically would involve, for example, the needs of a school district and its students and consideration of the means by which public monies may be allocated. Discussion of an issue of that nature must occur during an open meeting. To the extent, however, that a matter involves an evaluation of the performance of the incumbent of the position or consideration of the strengths and weaknesses of candidates for a position, I believe that §105(1)(f) could properly be asserted.

Next, having arrived early at the usual location of the Board's meetings, you wrote that you "were informed approximately three minutes before the start of the meeting, that the Board of Education was moving the meeting to the Board of Education Building to a much smaller space." In this regard, if it was known in advance that meeting would be held at the Board of Education Building, the notice given by the Board pursuant to §104 of the Open Meetings Law should have so specified.

While 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.

Lastly, although the Open Meetings Law clearly provides 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 hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Education

STATE OF NEW YORK
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June 18, 2001

Mr. Ted Conklin III
[redacted]

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. Conklin:

I have received your correspondence concerning the propriety of certain activities of the Mayor of Sag Harbor and two trustees in relation to the Open Meetings Law. You referred to instances in which the Mayor and the two trustees appeared to have represented themselves as the Board of Trustees, but the other two members of the Board were not aware of their actions.

With respect to one of those instances, you enclosed a copy of a letter sent by the Mayor and the two trustees to the Governor. Although it was not prepared on Village letterhead, centered on the top of the letter in capital letters and bold print is the following:

VILLAGE OF SAG HARBOR, NEW YORK
BOARD OF TRUSTEES

The first paragraph of the letter to Governor Pataki states:

> "Once, again, we, the Mayor and Trustees of Sag Harbor, are writing to ask your help in our seemingly endless struggle to find a workable method of traffic calming that will solve present problems, avoid future problems and preserve the special character of this historic Village."

Another letter, prepared on the same stationery, was sent by the Mayor and the same two trustees to the Chair of the Mashashimuett Park Board, included a request to hold a meeting and present a plan to the Park Board. In neither of those instances were the remaining two members of the Village Board informed or aware of the activities of the other three.

From my perspective, the clear implication in both instances, in consideration of the bold print at the top of the two letters, as well as the remarks in the letters, is that the three members held

themselves out as the Board of Trustees, even though the other two members knew nothing of their actions. If my view is accurate, the Mayor and the two trustees acted in a manner inconsistent with law.

In this regard, while no law would preclude one member of the Board from conferring with another, in those situations in which action is or must be taken by the Board, collectively, as a body, such action may in my view be taken only at a meeting of the Board during which a quorum is present and only by means of an affirmative vote of a majority of its total membership.

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

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

I believe that a village board of trustees clearly constitutes a "public body" that is subject to the requirements of the Open Meetings Law.

Also 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."

Based upon the language quoted above, a village 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, even though the Mayor and two trustees constitute a majority of the Board, they can not take action as the Board, except at a meeting preceded by notice to each member during which a majority is present.

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. Again, however, the presence of a majority does not necessarily signify the presence of a quorum, which is a gathering of a majority of the total membership preceded by reasonable notice given to each member.

Next and perhaps most importantly, in a judicial decision dealing with a situation in which four members of a town board approved the publication of a letter by phone without informing the fifth, the court reached the same conclusion as offered here and cited an opinion rendered by this office. In Cheevers v. Town of Union (Supreme Court, Broome County, September 3, 1998), the court stated that:

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

In sum, for the reasons described above, I do not believe that the Mayor and two trustees could validly have acted as the Board of Trustees in the manner presented.

Lastly, you asked whether it is "legal or fraudulent to create" the letterhead that "pretends not to be 'official' village stationery..." In this regard, since the advisory jurisdiction pertains to matters involving the Open Meetings and Freedom of Information Laws, I cannot offer guidance concerning that issue.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Trustees

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June 20, 2001

Mr. Tim Tenaglia
[redacted]

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

Dear Mr. Tenaglia:

I have received your letter concerning requests made to the Shoreham Wading River School District under the Freedom of Information Law. It appears that the District has delayed making records available to you. You also allege that the District "is in violation of the Open Meetings Law", for minutes of meetings have not been made available in a timely manner.

Having reviewed your correspondence and the requests that you forwarded, I offer the following comments.

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

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

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

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, it is emphasized that the Freedom of Information Law pertains to existing records. If, for example, the District did not prepare a record indicating the locations where a job announcement was posted, there would be no obligation to create or prepare a new record containing that information on your behalf. I note, too, that in one request, you sought the provision of the "state education law regarding the release of photos or videos of our students." From my perspective, in some instances, a request for a law that may applicable might not be viewed as a request for a record, but rather an interpretation of law that requires a judgment. Depending on the nature of the matter, any number of provisions might be applicable, and a disclosure of some of them, based on one's knowledge, may be incomplete due to an absence of expertise regarding the content and interpretation of each such law. Further, two people, even or perhaps especially two attorneys, might differ as to the applicability of a given provision of law. In contrast, if a request is made, for example, for "section 1716 of the Education Law", no interpretation or judgment is necessary, for the request would involve a portion of a record that must be disclosed. Again, a request for laws that might be applicable is not, in my view, a request for a record as envisioned by the Freedom of Information Law.

Third, an issue that might be pertinent with respect to some aspects of your requests involves the extent to which the requests "reasonably describe" 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 District, to the 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.

Next, 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. Insofar as your requests involve existing records that can be located with reasonable effort, I believe that the records must be disclosed, for none of the grounds for denial would appear to be pertinent.

Lastly, §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.

Further, in relation to votes by members of the Board of Education, although it is reiterated that the Freedom of Information Law generally pertains to existing records and ordinarily does not require that a record be created or prepared [see §89(3)], an exception to that rule involves voting by members of government agencies. Specifically, §87(3) of the Freedom of Information Law has long required that:

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

Stated differently, when a final vote is taken by members of an agency, such as a board of education, a record must be prepared that indicates the manner in which each member who voted cast his or her vote. Further, in an Appellate Division decision that was affirmed by the Court of Appeals, it was found that "[t]he use of a secret ballot for voting purposes was improper", and that the Freedom of Information Law requires "open voting and a record of the manner in which each member voted" [Smithson v. Ilion Housing Authority, 130 AD 2d 965, 967 (1987), aff'd 72 NY 2d 1034 (1988)].

Based on the foregoing, to comply with the Freedom of Information Law, I believe that a record must be prepared and maintained indicating how each member cast his or her vote, disclosure of the record of votes represents the only means by which the public could know how their representatives asserted their authority. A record of votes of the members typically appears in minutes required to be prepared pursuant to §106 of the Open Meetings Law.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Robert Pellicone
Andrew Miller

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June 20, 2001

E-Mail

TO: Judy Mosser [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. Mosser:

I have received your letter in which you asked that I transmit an advisory opinion to the Board of Education of the Greenwood Lake School District concerning "their use of legal counsel in conducting tuition negotiations with another school district..." You wrote that '[t]heir hope is by invoking attorney-client privilege, the community need not be informed of the negotiations."

Although the matter as you described it is not completely clear, I offer the following comments.

If you are referring to a situation in which the attorney, as the representative of the Board of Education, meets with officials of another district, and no quorum of the Board is present, the Open Meetings Law would not apply. In short, that statute pertains to meetings of public bodies, gatherings of a majority of the members of public bodies for the purpose of conducting public business.

On the other hand, if you are referring to a situation in which the Board meets with its attorney, the Open Meetings Law may be applicable. I note that there are two vehicles that may authorize a public body to discuss public business in private. One involves entry into an executive session. Section 102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded, and the Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, §105(1) states in relevant part that:

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

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed and the motion must be carried by majority vote of a public body's membership before such a session may validly be held. The ensuing provisions of §105(1) specify and limit the subjects that may appropriately be considered during an executive session. Therefore, a public body may not conduct an executive session to discuss the subject of its choice. Further, I would agree that the subject of "tuition negotiations" likely would not fall within any of the grounds for entry into executive session.

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

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

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

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

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

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

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

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

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

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

> "While there is no question that Executive Sessions can be conducted for proper reasons and that an exception exists under the Open Meetings Law for attorney-client privileged communications, the scope of that privilege is limited. Once the legal advice is offered, discussions with regard to substance (e.g.) the closing date of a bus system, do not fall within the privilege of the exception. See Exhibit C, April 8, 1996 Open Meetings Law Advisory Opinion #2595, Robert J. Freeman, Executive Director of Committee on Open government at page 4:
>
> > "I note that the mere presence of an attorney does not signify the existence of an attorney-client relationship; in order to assert the attorney-client privilege, the attorney must in my view be providing services in which the expertise of an attorney is needed and sought. Further, if at some point in a discussion, the attorney stops giving legal advice and a public body may begin discussing or deliberating independent of the attorney. When that point is reached, I believe that the attorney-client privilege has ended and that the body should return to an open meeting."

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

As you requested, a copy of this opinion will be forwarded to the Board of Education.

RJF:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
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June 22, 2001

Ms. Belle Brown
[redacted]

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. Brown:

I have received your letter and a variety of related materials. The primary issue, as it relates to the duties of this office, involves the status of the Camillus Fire Department under the Freedom of Information and Open Meetings Laws.

In this regard, the Open Meetings Law is applicable to meetings of public bodies. Section 102(2) of the Law defines "public body" to mean:

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

By reviewing the components in the definition of "public body", I believe that each is present with respect to the board of a volunteer fire company. The board of a volunteer fire company is clearly an entity consisting of two or more members. I believe that it is required to conduct its business by means of a quorum under the Not-for-Profit Corporation Law. Further, in my view, a volunteer fire company at its meetings conducts public business and performs a governmental function. Such a function is carried out for a public corporation, which is defined to include a municipality, such as a town or village, for example. Since each of the elements in the definition of "public body" pertains to the board of a volunteer fire company, it appears that the board of such a company is a "public body" subject to the Open Meetings Law. I point out that the status of volunteer fire companies had long been unclear. Those companies are generally not-for-profit corporations that perform their duties by means of contractual relationships with municipalities. As not-for-profit corporations, it was difficult to determine whether or not they conducted public business and performed a governmental function. Nevertheless, in a case brought under the Freedom of Information Law dealing with the coverage of that statute with respect to volunteer fire companies, the state's highest court, the Court of Appeals, found that a volunteer fire company is

an "agency" that falls within the provisions if the Freedom of Information Law [see Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575 (1980)]. In its decision, the Court clearly indicated that a volunteer fire company performs a governmental function and that its records are subject to rights of access granted by the Freedom of Information Law.

In view of the decision rendered in Westchester Rockland, I believe that the board of a volunteer fire company falls within the definition of "public body" and would be required to comply with the Open Meetings Law.

In brief, the Open Meetings Law requires that meetings of public bodies be conducted in public, except to the extent that there may a basis for entry into a closed or "executive" session. Since one of the issues to which you referred involved the suspension of members of the Department, I note that one of the grounds for entry into an executive session would have permitted the Board to discuss that kind of issue in private. Section 105(1)(f) of the Open Meetings Law permits a public body to enter into executive session to discuss:

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

You also referred to the ability of persons in attendance to speak at meetings. While the Open Meetings Law clearly provides the public with the right "to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy" (see Open Meetings Law, §100), the Law is silent with respect to the issue of public participation. Consequently, by means of example, if a public body does not want to answer questions or permit the public to speak or otherwise participate at its meetings, I do not believe that it would be obliged to do so. On the other hand, a public body may choose to answer questions and permit public participation, and many do so. When a public body does permit the public to speak, I believe that it should do so based upon reasonable rules that treat members of the public equally.

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.

With respect to the scope of the Freedom of Information Law, as indicated above, that statute applies to agency records, and §86(3) defines the term "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or

> proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

As such, the Freedom of Information Law generally pertains to records maintained by entities of state and local government.

In Westchester-Rockland, the case involved access to records relating to a lottery conducted by a volunteer fire company, and it was determined that volunteer fire companies, despite their status as not-for-profit corporations, are "agencies" subject to the Freedom of Information Law. In so holding, the Court stated that:

> "We begin by rejecting respondent's contention that, in applying the Freedom of Information Law, a distinction is to be made between a volunteer organization on which a local government relies for performance of an essential public service, as is true of the fire department here, and on the other hand, an organic arm of government, when that is the channel through which such services are delivered. Key is the Legislature's own unmistakably broad declaration that, '[a]s state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (emphasis added; Public Officers Law, §84).
>
> "True, the Legislature, in separately delineating the powers and duties of volunteer fire departments, for example, has nowhere included an obligation comparable to that spelled out in the Freedom of Information statute (see Village Law, art 10; see, also, 39 NY Jur, Municipal Corporations, §§560-588). But, absent a provision exempting volunteer fire departments from the reach of article 6-and there is none-we attach no significance to the fact that these or other particular agencies, regular or volunteer, are not expressly included. For the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objections cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" (id. at 579].

Moreover, although it was contended that documents concerning the lottery were not subject to the Freedom of Information Law because they did not pertain to the performance of the company's fire

fighting duties, the Court held that the documents constituted "records" subject to the Freedom of Information Law [see §86(4)].

More recently, another decision confirmed in an expansive manner that volunteer fire companies are required to comply with the Freedom of Information Law. That decision, S.W. Pitts Hose Company et al. v. Capital Newspapers (Supreme Court, Albany County, January 25, 1988), dealt with the issue in terms of government control over volunteer fire companies. In its analysis, the Court states that:

> "Section 1402 of the Not-for-Profit Corporation Law is directly applicable to the plaintiffs and pertains to how volunteer fire companies are organized. Section 1402(e) provides:
>
> > '...a fire corporation, hereafter incorporated under this section shall be under the control of the city, village, fire district or town authorities having by law, control over the prevention or extinguishment of fires therein. Such authorities may adopt rules and regulations for the government and control of such corporations.'
>
> "These fire companies are formed by consent of the Colonie Town Board. The Town has control over the membership of the companies, as well as many other aspects of their structure, organization and operation (section 1402). The plaintiffs' contention that their relationship with the Town of Colonie is solely contractual is a mischaracterization. The municipality clearly has, by law, control over these volunteer organizations which reprovide a public function.
>
> "It should be further noted that the Legislature, in enacting FOIL, intended that it apply in the broadest possible terms. '...[I]t is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (Public Officers Law, section 84).
>
> "This court recognizes the long, distinguished history of volunteer fire companies in New York State, and the vital services they provide to many municipalities. But not to be ignored is that their existence is inextricably linked to, dependent on, and under the control of the municipalities for which they provide an essential public service."

Based upon the foregoing, it is clear that volunteer fire companies are subject to the Freedom of Information Law.

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.

Enclosed for your review are copies of the Freedom of Information and Open Meetings Laws, as well as "Your Right to Know", which describes both laws.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt
Encs.

cc: President, Camillus Fire Department

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DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-12758
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June 26, 2001

Mr. Charles L. Hunt
[redacted]

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

Dear Mr. Hunt:

I have received your letters and a variety of materials relating to them. You have raised a series of issues concerning the implementation of open government laws by the Town of Elma. Based on a review of the correspondence and your questions, I offer the following comments.

It is emphasized at the outset that there is no legal distinction between a "work session" or "working meeting" and a formal meeting. By way of background, the definition of "meeting" [see Open Meetings Law, §102(1)] has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals, 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 "working meeting" held by a majority of a town board is a "meeting", the board 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 "working meetings", as well as other meetings, the Open Meetings Law contains what might be viewed as minimum requirements concerning the contents of minutes. Specifically, §106 of the Open Meetings Law states that:

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

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

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 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.

You questioned the propriety of meetings of the Town Board being held at 8 a.m. In this regard, although the Open Meetings Law does not specify when meetings must be held, §103(a) of the Law states in part that "Every meeting of a public body shall be open to the general public..." Further, the intent of the Open Meetings Law is clearly stated in §100 as follows:

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

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

In my opinion, every provision of law, including the Open Meetings Law, should be implemented in a manner that gives reasonable effect to its intent. That principle would be applicable with respect to the time of meetings and whether, in view of the intent of the Open Meetings, it is reasonable to schedule meetings at 8 a.m. In a decision that dealt in part with meetings of a board of education held at 7:30 a.m., it was stated that:

> "It is...apparent to this Court that the scheduling of a board meeting at 7:30 a.m. -- even assuming arguendo that such meetings were properly noticed and promptly conducted -- does not facilitate attendance by members of the public, whether employed within or without the home, particularly those with school age or younger children, and all but insures that teachers and teacher associates at the school are unable to both attend and still comply with the requirement that they be in their classrooms by 8:40 a.m." (Matter of Goetchius v. Board of Education, Supreme Court, Westchester County, New York Law Journal, August 8, 1996).

While the Court focused on the matter as it related to a Board of Education, I believe that similar factors would be present with respect to the ability of Town residents to attend meetings at 8 a.m. Many may be unable to attend because they too have small children, because of work schedules, commuting, and other matters that might effectively preclude them from attending meetings held so early in the morning. In short, in view of the decision cited above, the reasonableness of conducting meetings at 7 a.m. is in my view questionable.

Next, you referred to executive sessions held by the Board and the ambiguity of motions made to enter into executive sessions. 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 Town of Elma."

The language of the so-called "personnel" exception, §105(1)(f) of the Open Meetings Law, is limited and precise, and I emphasize that the term "personnel" appears nowhere in that Law. 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 courts have 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.

Lastly, you questioned the legality of a response to a request for records, which were redacted prior to disclosure. Having reviewed your request and in consideration of the redaction, it appears that the Town provided the information that you requested. Although the pages containing the information were incomplete, the portions of those pages that were disclosed appear to reflect the information that you sought.

As a general matter, however, I would agree with your contention that "[a]ccess to financial records is...a public matter..." In brief, in a manner similar to the Open Meetings Law, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

In addition to rights conferred by the Freedom of Information Law, I point out that §29 of the Town Law specifies that the Town Supervisor must keep and disclose certain financial records. Subdivision (4) of §29 states that a town supervisor:

> "Shall keep an accurate and complete account of the receipt and disbursement of all moneys which shall come into his hands by virtue of his office, in books of account in the form prescribed by the state department of audit and control for all expenditures under the highway law and in books of account provided by the town for all other expenditures. Such books of account shall be public records, open and available for inspection at all reasonable hours of the day, and, upon the expiration of his term, shall be filed in the office of the town clerk."

In an effort to enhance understanding of and compliance with 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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June 26, 2001

Hon. Gerald O. Keller
Supervisor
Town of Glen
7 Erie Street
Fultonville, NY 12072

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 Supervisor Keller:

I have received your letter in which you sought an opinion relating to the application of the Open Meetings Law. You wrote that:

> "...just before my calling the meeting to order, three of my Town Councilmen went outside of the building to meet. When they came back into the meeting, I addressed this meeting they had held outside of the building with them. I was then informed by one of my Councilmen that they had held a caucus. This would be fine, except that one of the Councilmen is a Republican, one is a Democrat, and one is an Independent."

From my perspective, a gathering of three of the five members of the Town Board, under the circumstances that you described, constituted a "meeting" that should have been held in accordance with the Open Meetings Law. In this regard, I offer the following comments.

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

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

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

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

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

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

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

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

Those decisions, however, were essentially reversed by the enactment of an amendment to the Open Meetings Law in 1985. Section 108(2)(a) of the Law now states that exempted from its

provisions are: "deliberations of political committees, conferences and caucuses." Further, §108(2)(b) states that:

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

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

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

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

Since the gathering described in your letter was attended by members of more than one political party, I do not believe that it could be described as a political caucus exempt from the Open Meetings Law. Again, it would appear to have been a "meeting" that fell within the coverage of that statute.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
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June 26, 2001

E-Mail

TO: Jack Whiting <[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. Whiting:

As you are aware, I have received your letter in which you asked whether "meetings of Central School District or Building Level Shared Decision Making Teams [are] open to the public." If they are open, you questioned whether the ability to attend "extend[s] to a member of the Board of Education attending such a meeting as an observer, not a participant."

From my perspective, the "central" or district-wide committee is clearly required to comply with the Open Meetings Law; whether a "building level" or school-based committee is required to comply with that statute would be dependent on its responsibilities. In this regard, I offer the following comments.

By way of background, §100.11(b) of the regulations promulgated by the Commissioner of Education states in relevant part that:

> "By February 1, 1994, each public school district board of education and each board of cooperative educational services (BOCES) shall develop and adopt a district plan for the participation by teachers and parents with administrators and school board members in school-based planning and shared decisionmaking. Such district plan shall be developed in collaboration with a committee composed of the superintendent of schools, administrators selected by the district's administrative bargaining organization(s), teachers selected by the teachers' collective bargaining organization(s), and parents (not employed by the district or a collective bargaining organization representing teachers or administrators in the district) selected by their peers in the manner prescribed by the board of education or BOCES, provided that those portions of the district plan that provide

> for participation of teachers or administrators in school-based planning and shared decisionmaking may be developed through collective negotiations between the board of education or BOCES and local collective bargaining organizations representing administrators and teachers."

The committee to which reference is made in the provision quoted above is characterized frequently as the "shared decision-making committee", a district-wide committee or, as in your letter, the "central school district committee."

Section 100.11(d) provides in part that:

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

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

> "In the event that the board of education or BOCES fails to provide for consultation with, and full participation of, all parties in the development of the plan as required by subdivisions (b) and (d) of this section, the aggrieved party or parties may commence an appeal to the commissioner pursuant to section 310 of the Education Law. Such an appeal may be instituted prior to final adoption of the district plan and shall be instituted no later that 30 days after final adoption of the district plan by the board of education or BOCES."

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

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

Judicial decisions indicate generally that advisory bodies having no power to take final action, other than committees consisting solely of members of public bodies, fall outside the scope

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

In this instance, however, although the district-wide committee may or may not have the ability to make determinations, according to the Commissioner's regulations, it performs a necessary and integral function in the development of shared decision making plans. As stated earlier, the regulations specify that a district plan "shall be developed in collaboration with a committee." As such, a committee must, by law, be involved in the development of a plan. The regulations also indicate that a plan may be adopted by a board of education or BOCES only "after consultation with and full participation by" a committee, and that the Commissioner may approve a plan only after having found that it "complies with the requirements of this section", i.e., when it is found that a committee was involved in the development of a plan. Further, an appeal may be made to the Commissioner if a board has failed to permit "full participation" of a committee.

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

Again, according to the Commissioner's regulations, which have the force and effect of law, a plan cannot be adopted absent "collaboration" and participation by a district-wide committee. Since a district-wide committee carries out necessary functions in the development of shared decision making plans, 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 district-wide committee is an entity consisting of more than two members; it is required in my view to conduct its business subject to quorum requirements (see General Construction Law, §41); and, based upon the preceding commentary, a committee conducts public business and performs a governmental function for a public corporation, such as a school district or a BOCES.

While the Commissioner's regulations make reference to "school-based" committees, there is no statement concerning their specific role, function or authority. It is my

understanding, based upon a discussion with a representative of the State Education Department, that school-based committees carry out their duties in accordance with the plans adopted individually by boards of education in each school district, and that those plans are intended to provide the committees in question varied roles in the decision-making process.

When, for example, a plan provides decision making authority to school-based committees within a district, those committees, in my opinion, would clearly constitute public bodies required to comply with the Open Meetings Law. Similarly, when a school-based committee performs a function analogous to that of the shared decision-making committee, i.e., where the school-based committee has the authority to recommend, and the decision maker or decision making body must consider its recommendations as a condition precedent to taking action, I believe that the committee would be a public body subject to the Open Meetings Law, even when the recommendations need not be followed. On the other hand, however, if a school-based committee has no decision-making authority, and if the Board of Education is not required to seek such a committee's input or otherwise consult with the committee prior to the Board's assertion of its authority, the committee, in my opinion, would not constitute a "public body" subject to the Open Meetings Law.

Lastly, when meetings are held in accordance with the Open Meetings Law, §103(a) provides that they are open to the "general public." In my view, the general public includes any person, including you as a member of the public, or even as an interested member of the board of education joining others in the audience.

I hope that I have been of assistance.

RJF:jm

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June 28, 2001

Mr. John Rowe
[redacted]

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

Dear Mr. Rowe:

I have received your correspondence in which you expressed a variety of concerns relating to the responsiveness of officials of the Moravia Central School District. Based on a review of your commentaries, I offer the following remarks.

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..."

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

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, although you did not enclose copies of your requests, I point out that the Freedom of Information Law pertains to existing records, and that §89(3) states in part that an agency is not required to create a record in response to a request. You referred, for example, to questioning the District concerning the allocation of its surpluses. I am unaware of the means by which the District maintains its records. However, if there are no records that specify how those moneys might have been allocated, the District in my view would not have been required to engage in research or prepare new records in an effort to satisfy your request.

In a related vein, §89(3) requires that an applicant "reasonably describe" the records sought. It has been held that the nature of an agency's filing or record keeping system may bear upon whether or the extent to which a request meets that standard [see Konigsberg v. Coughlin, 68 NY2d 245 (1986)]. If, for instance, purchase vouchers are kept chronologically, a request for vouchers pertaining to a certain period would reasonably describe the records, for the request would have been made in a manner consistent with the agency's filing system. On the other hand, if a request is made for vouchers indicating the purchase of certain items, and locating the vouchers would involve a page by page review of thousands of records, the request would not meet the standard of reasonably describing the records.

Lastly, you referred to a limitation on public comments at meetings of the Board of Education. In this regard, the Open Meetings Law clearly provides the public with the right "to

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

While public bodies have the right to adopt rules to govern their own proceedings (see e.g., 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 hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

From: Robert Freeman
To: Internet:Karl.Klug@co.suffolk.ny.us
Date: 6/28/01 11:09AM
Subject: Dear Mr. Klug:

Dear Mr. Klug:

The quick response to your question is that any gathering of a majority of a public body, such as a board of fire commissioners, for the purpose of conducting public business, constitutes a "meeting" that falls within the coverage of the Open Meetings Law, even if there is no intent to vote or take action and regardless of the manner in which the gathering is characterized. Further, there is no distinction between a "workshop" and a "meeting." Again, if the workshop involves a gathering of a majority for the purpose of conducting public business, collectively, as a body, the gathering would be a meeting subject to the Open Meetings Law.

To obtain more detailed information, our website includes opinions rendered under the Open Meetings Law, and you might review opinions under "meeting" and "work session."

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
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July 3, 2001

Hon. Kathleen Robin
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 Robin:

I have received your memorandum in which you described a special meeting held by the Vienna Town Board to conduct an "exit conference" with a representative of the Department of Audit and Control (the State Comptroller's office). You indicated that notice of the special meeting was given twenty-four hours prior to the meeting, that four of the five Board members attended, and that the gathering was not open to the public. You added that the representative of the State Comptroller said that the meeting was "exempt from disclosure" based on a claim of "executive privilege." It is your belief that the gathering should have been held in accordance with the Open Meetings Law.

In this regard, it is noted at the outset that I have discussed the status of so-called "exit conferences" with representatives of the Department of Audit and Control on various occasions. They contend that those gatherings are convened by an auditor, that there is no intent on the part of municipal officials to deliberate or take action and that, therefore, they are not subject to the requirements of the Open Meetings Law. The issue, to the best of my knowledge, has not been reviewed by any court.

If indeed a quorum of a public body attends an exit conference, or convenes at any time for the purpose of conducting public business, collectively, as a body, I believe that such a gathering would constitute a "meeting" that falls within the requirements of the Open Meetings Law.

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

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

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

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

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

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

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

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

With respect to an exit conference, if the members of the public body attend, presumably they do so in the performance of their official duties and for the purpose of conducting public business. Therefore, based upon the judicial interpretation of the Open Meetings Law, I believe that the presence of a quorum at an exit conference would constitute a meeting subject to the Open Meetings Law.

I point out that local governments operate differently in many cases from most state agencies. State agencies are often headed by an executive rather than a governing body, as in the case of the Department of Audit and Control. Exit conferences held with respect to audits of state agencies likely include the staff of an agency; no public body would be present or otherwise involved. Moreover, since municipalities are headed by governing bodies, I believe that those bodies have generally become used to conducting their business in public. Similar business conducted by state agencies, for reasons mentioned earlier, likely would not involve a public body and the Open Meetings Law does not become an issue.

From my perspective, the policy of the Office of the State Comptroller places municipal bodies in an anomalous position. When the members constituting a quorum of such a body want to attend an exit conference or meet with an auditor, if they accede to the policy of the Office of the State Comptroller, they are faced with the possibility of violating the Open Meetings Law. Additionally, since the municipality is the subject of the audit, any criticism or embarrassment that might arise if an exit conference is held in public would likely be directed to the municipality rather than an auditor or the office that person represents. If municipal officials are willing to subject themselves to openness, it is difficult to understand why the Department of Audit and Control would object. It has been suggested by officials of that agency that if the meetings are held in public, auditors will not attend, and municipal officials would, therefore, be unable to gain the benefit of an auditor's explanation of findings or expertise. Consequently, while I disagree with the position taken by the Department of Audit and Control, it appears that the only sure method of avoiding a controversy regarding the Open Meetings Law would involve insuring that less than quorum of the Board be present.

With respect to the claim of "executive privilege", I know of no case in which executive privilege has been asserted to close a meeting that would otherwise be open to the public. It is noted, however, that the state's highest court, the Court of Appeals, has determined that the companion statute of the Open Meetings Law, the Freedom of Information Law, abolished the governmental or executive privilege with regard to public access to government records. In short, the Court found that the ability to deny access to records is limited to the grounds for denial of access listed in the Freedom of Information Law [Doolan v. BOCES, 48 NY2d 341 (1978)]. In like manner, a variety of judicial decisions indicate that the grounds for entry into executive session appearing in the Open Meetings Law should be narrowly construed in order to maximize public access to meetings.

Lastly, assuming that the gathering in question constituted a "meeting" of the Town Board, I point out that the phrase "special meeting" is found in §62(2) of the Town Law. That provision, from my perspective, generally deals with unscheduled meetings. Specifically, it states in relevant part that:

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

The provision quoted above pertains to notice given to members of a town board, and the requirements of that provision are separate from those contained in the Open Meetings Law. That statute requires that notice be given to the news media and posted prior to every meeting. Specifically, section 104 of that statute provides that:

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

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

As you requested, copies of this response will be sent to the Department of Audit and Control and to residents who were asked to leave.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Nicole Pilcher
Michael Dixon
June F. O'Neill, Executive Coordinator for Intergovernmental Relations

STATE OF NEW YORK
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July 5, 2001

Ms. Amy Baxter
Office of Assemblymember Pete Grannis
1672 First Avenue
New York, NY 10128

The staff of the Committee on 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. Baxter:

I have received your memorandum, which was prepared on behalf of Assemblymember Pete Grannis. You have sought an advisory opinion concerning the status of a committee created by Community Board 8 in Manhattan.

According to your memorandum:

> "On March 14, 2001, at a Land Use meeting of Manhattan's Community Board 8, the full Board created the Memorial Sloan Kettering Cancer Center Special Committee, to be co-chaired by Edith Fisher and Hedi White (both Board members). Formed to study the impact of the hospital's rezoning application on the community, the subcommittee has met some nine times since its inception.
>
> "The special committee consists only of Board members and has been treated like any other subcommittee, temporary or permanent in nature, that this Board has created."

You indicated that the Board's chair has sought and received an opinion from the Corporation Counsel, which neither he nor Corporation Counsel has disclosed, in which it was advised that the Special Committee may hold meetings to "craft and vote on a resolution without the presence of the public."

Based on the language of the Open Meetings Law and the legislative history relating to its scope, I believe that the Special Committee is required to comply with that statute. In this regard, I offer the following comments.

First, as you may be aware, community boards were created initially by local law No. 39, which was added to the New York City Charter in 1969. Under that provision, community boards were governed by §84 of the New York City Charter. Section 84 of the Charter was repealed by the passage of local law No. 102 enacted in 1977. The cited provision was replaced by §2800 of the Charter entitled "Community Boards." According to §2800, the members of a community board are appointed by a borough president. As I understand the provisions of the City Charter, community boards perform a variety of functions, some of which are advisory. However, in at least one area of responsibility, they perform a legally necessary step in the decision making process. Paragraph (17) of §2800(d) states that each community board shall:

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

Based on the foregoing, before the City Planning Commission can act with respect to land use, a community board must conduct a public hearing and submit a written recommendation to the Commission. Although a community board does not render a final and binding decision, it performs an obligatory function in the process leading to a determination. Because a community board performs a necessary function pursuant to the City Charter and was created pursuant to law, I believe that it clearly constitutes a public body required to comply with the Open Meetings Law.

Second, with regard to the Special Committee, by way of background, when the Open Meetings Law went into effect in 1977, questions consistently arose with respect to the status of committees, subcommittees and similar bodies that had no capacity to take final action, but rather merely the authority to advise. Those questions arose due to the definition of "public body" as it appeared in the Open Meetings Law as it was originally enacted. Perhaps the leading case on the subject involved a situation in which a governing body, a school board, designated committees consisting of less than a majority of the total membership of the board. In Daily Gazette Co., Inc. v. North Colonie Board of Education [67 AD 2d 803 (1978)], it was held that those advisory committees, which had no capacity to take final action, fell outside the scope of the definition of "public body".

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

Due to the determination rendered in Daily Gazette, supra, which was in apparent conflict with the stated intent of the sponsor of the legislation, a series of amendments to the Open Meetings Law was enacted in 1979 and became effective on October 1 of that year. Among the changes was a redefinition of the term "public body". Although the original definition made reference to entities that "transact" public business, the current definition makes reference to entities that "conduct"

public business. Moreover, the definition makes specific reference to "committees, subcommittees and similar bodies" of a public body.

In view of the amendments to the definition of "public body", I believe that any entity consisting of two or more members of a public body, such as the committee in question or any committee or subcommittee consisting of members of a community 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, a community board consists of fifty-one, its quorum would be twenty-six; in the case of a committee consisting of two or more members, a quorum would be a majority of the committee's total membership.

When a committee is subject to the Open Meetings Law, I believe that it has the same obligations regarding notice and openness, for example, as well as the same authority to conduct executive sessions, as a governing body [see Glens Falls Newspapers, Inc. v. Solid Waste and Recycling Committee of the Warren County Board of Supervisors, 195 AD 2d 898 (1993)]. As you may be aware, the Open Meetings Law is based on a presumption of openness. Stated differently, a public body must conduct its meetings in public except to the extent that an executive session may properly be held in accordance with §105(1). Paragraphs (a) through (h) of that provision specify and limit the subjects that may validly be considered during an executive session.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Kenneth Moltner

STATE OF NEW YORK
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July 9, 2001

Mr. Ronald B. McGuire, Esq.
30 Newport Parkway
Suite 2608
Jersey City, N.J. 07310

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. McGuire:

I have received your letter and the materials attached to it. You have sought an opinion concerning whether the College Senate of Hostos Community College, which is part of the City University of New York (CUNY), is subject to the Open Meetings Law.

Based on the College's Charter of Governance, which was approved by the CUNY Board of Trustees, it appears that its College Senate constitutes a public body subject to the Open Meetings Law.

Article I, Section 1 of the Charter states in part that:

> "The College Senate will, in consultation with the administration and other groups in the College, recommend policy on all College matters, except for those within the domain of the President or any other Officer of the College of The City University of New York, as set forth in the By-laws of the Board of Trustees. The Senate shall be specifically responsible for the formulation of academic policy and for consultative and advisory functions related to the programs, standards and goals of the College.
>
> The College Senate shall undertake any course of action within its authority, to help achieve the mission of the College within the College community and the City University.
>
> The College Senate shall serve in an advisory capacity and have representation on all committees established by the President or the Deans to further the mission of the College.

> It shall have the power to formulate new policy recommendations and to review already existing ones..."

In its initial paragraph, Article IV, Section 2 provides that:

> "The Senate shall have the power to review proposals for, and recommend, the creation of new Academic Units and/or Programs of Study, the elimination of existing Academic Units or Programs of Study, and the transfer of Academic Units and/or Program of Study from one Department to another."

Perhaps most importantly, Article VIII states that:

> "Any modification of this Charter as presently accepted shall be made according to the following procedures:
>
> Section 1
>
> Motions to amend this Charter may be proposed only by a member of the Executive Committee or by the written petition of no less than ten (10) Senators.
>
> Section 2
>
> Such motions to amend must be discussed at two (2) consecutive meetings of the Senate before being brought to a vote.
>
> Section 3
>
> Such motions must be approved by two-thirds (2/3) of the total membership of the Senate.
>
> Section 4
>
> Within thirty (30) calendar days following one vote of the Senate, ten percent (10%) of either faculty or students may request a referendum of their constituent body on the proposed amendment. A majority vote of faculty or students participating in the referendum supersedes the vote of the Senate.
>
> Section 5

> Approved amendments shall be submitted to the President for approval and recommendation to the Board of Trustees."

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

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

Judicial decisions indicate generally that advisory bodies 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 Senate performs a necessary and integral function in the implementation of policy and programs by the College. Article VIII of the College's Charter, specifies that any action to alter the Charter must be approved by two-thirds of the membership of the Senate. Consequently, the Senate has the authority to recommend, but in addition, the power, in essence, to veto potential changes in the governance of the College.

In the decisions cited earlier, all of the entities at issue 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). In a criticism by CUNY's counsel of an earlier opinion rendered by this office involving a similar matter, he referred to the fact that MFY did not cite any precedent for its conclusion. The reason, however, for the absence of reliance on precedent relates to the year in which the decision was rendered. In short, MFY was decided in 1977, less than a year after the Open Meetings Law was in effect; there was no precedent at that time.

Moreover, in a decision rendered by the Court of Appeals involving a CUNY community college association that functioned essentially as the student government body, the Court found that

the association constituted a public body for purposes of the Open Meetings Law. In its consideration of the matter, the Court stated that:

> "In determining whether an entity is a public body, various criteria or benchmarks are material. They include the authority under which the entity was created, the power distribution or sharing model under which it exists, the nature of its role, the power it possesses and under which it purports to act, and a realistic appraisal of its functional relationship to affected parties and constituencies...
>
> It may be that an entity exercising only an advisory function would not qualify as a public body within the purview of the Open Meetings Law... More pertinently here, however, a formally chartered entity with officially delegated duties and organizational attributes of a substantive nature, as this Association, Inc. enjoys, should be deemed a public body that is performing a governmental function (compare, [*Matter of Syracuse United Neighbors v. City of Syracuse*, 80 AD2d 984, 985 appeal dismissed 55 NY2d 995).] It is invested with decision-making authority to implement its own initiatives and, as a practical matter, operates under protocols and practices where its recommendations and actions are executed unilaterally and finally, or received merely perfunctory review or approval. This Association, Inc. therefore, is manifestly not just a club or extracurricular activity." [Matter of Smith v. CUNY, 92 NY2d 707, 713-714 (1999)].

As in the case of the student association in Smith, the Senate in this instance is integrally involved in the governance of the College. It is clearly "not just a club or extracurricular activity". On the contrary, it is involved, by charter, in virtually every aspect of the implementation and development of educational policy in the College. It has not only the duty to recommend policy, but also the power to reject potential changes in policy and the governance of the College That being so, it is, in my view, a "public body" required to comply with the Open Meetings Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Roy Moskowitz

STATE OF NEW YORK
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July 11, 2001

Trustee David J. Almeter
Village Trustee, Village of Warsaw
[redacted]

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 Almeter:

As you are aware, I have received a variety of materials from you over the course of weeks that relate to your efforts in seeking a variance concerning your property in the Village of Warsaw. By means of twenty questions, you asked whether the Open Meetings Law "was violated" by Village officials.

In this regard, it is emphasized at the outset that the scope of the Open Meetings Law is limited. In general, that statute deals with the extent to which public bodies must conduct meetings in public. Similarly, the functions of this office are limited to matters involving the statutes within its advisory jurisdiction, one of which is the Open Meetings Law. Many of your questions have little or no relationship to the Open Meetings Law, and that statute offers neither guidance nor governing principles in those instances. For instance, a letter sent to you by the Chair of the Zoning Board of Appeals suggesting that you contact the village assessor in my view has no relationship to the Open Meetings Law. A refusal by the Board to consider your application or appeal may involve other provisions law, but it is unrelated to the requirements imposed by the Open Meetings Law. A refusal to permit you to rebut an attorney's arguments may involve considerations relating to due process, but it does not involve a matter governed by the Open Meetings Law. That law has no bearing on your contention that "facts" contained in a letter written by the Mayor may be inaccurate. Decisions by the Village Board of Trustees to authorize its attorney to offer unsolicited advice may deal with powers and duties conferred by the Village Law, but again, they are unrelated to the Open Meetings Law. Decisions by the Zoning Board to adhere to the strictest interpretations of the building code or compel you to comply with a higher standard than the code requires may involve the propriety of the Board's actions; in my view, however, they do not deal with the Open Meetings Law. Further, a failure to discuss an issue at length or perhaps not discuss certain issues at all do not represent matters that fall within the purview of the Open Meetings Law.

In short, while several of your questions appear to relate to issues involving the construction or implementation of various provisions of law, few involve the Open Meetings Law. However, in the following commentary, I will attempt to address those questions that do indeed relate to that statute.

First and most importantly, the Open Meetings Law pertains to meetings of public bodies, such as a village board of trustees, a planning board, or a zoning board of appeals. If a gathering includes less than a majority of a public body, the Open Meetings Law would not apply. For example, a meeting held by the Chair of the Board and the Board's attorney would not constitute a "meeting" for purposes of the Open Meetings Law; no majority, or quorum, would have been present.

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

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

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

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

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

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

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

Second, when meetings are held, the Open Meetings Law is based on a presumption of openness. Stated differently, meetings of public bodies must be conducted open to the public, unless there is a basis for entry into an executive session. The grounds for entry into executive session are specified and limited in paragraphs (a) through (h) of §105(1) of the Law. Therefore, a public body cannot enter into an executive session to discuss the subject of its choice. In your question 14, you referred to a meeting held by the Board of Trustees "in closed session" during which it "debated" or "discussed the issues before they appeared in a public meeting..." In that situation, it appears that any debate or discussion should have occurred in public, for none of the grounds for entry into executive session would appear to have been pertinent.

Lastly, you questioned the accuracy of the contents of minutes of meetings. 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."

Based on the foregoing, minutes need not consist of a verbatim account of everything that was said; on the contrary, so long as the minutes include the kinds of information described in §106, I believe that they would be appropriate and meet legal requirements. Most importantly, I believe that minutes must be accurate. Alteration of minutes in a manner that does not accurately reflect what occurred or what was said at a meeting, would, in my view, be inconsistent with law.

Additionally, I do not believe that a member of a board may unilaterally alter or direct that minutes be altered. That person is one among five or seven members; in my view, minutes may be amended only pursuant to action taken by a majority of vote of the total membership of the board. Moreover, as suggested earlier, any such alteration must accurately reflect what transpired at a meeting.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
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July 12, 2001

E-MAIL

TO: Marty Worth@hotmail.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 facts presented in your correspondence.

Dear Mr./Ms. Worth:

I have received your letter in which you sought information concerning the "penalty phase for a municipality which is in violation of the Sunshine Law, as well as failure to provide information or a response when a Freedom of Information request form has been filed."

In this regard, the full text of the Freedom of Information and Open Meetings Laws is available on the Committee's website under "publications." The website also includes frequently asked questions and perhaps most importantly, thousands of advisory opinions rendered by this office. They are available through indices to opinions prepared in relation to both statutes.

With respect to "penalties", under the Freedom of Information Law, if an agency denies access to records in a manner inconsistent with law, a court may award attorney's fees to the person denied access under certain circumstances. Section 89(4)(c) states that:

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

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

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

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

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

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

With regard to the Open Meetings Law, under §107, any aggrieved person may bring an action, and a court in such proceeding has discretionary authority to nullify action taken by a public body in private in violation of that statute and may award attorney's fees to the successful party.

I hope that I have been of assistance.

RJF:tt

From: Robert Freeman
To: [redacted]
Date: 7/12/01 9:12AM
Subject: Dear Ms. Lehotsky:

Dear Ms. Lehotsky:

I have received your communication in which you asked whether a homeowner association is subject to the Open Meetings Law and whether meetings of such an association held in a town hall may be tape recorded.

In this regard, the Open Meetings Law is applicable to public bodies, and section 102(2) of that law defines the phrase "public body" to mean an entity that consists of two or more members that conducts public business and performs a governmental function for the state or a municipal government. That being so, I do not believe that a homeowner association would be subject to the Open Meetings Law.

It has been held any person may tape record open meetings of a public body, so long as the recording device is used in a manner that is unobtrusive. However, I know of no decision or statute that deals with the use of a tape recorder at a gathering of an entity that is not governmental in nature. I would conjecture that a homeowner association, like other private organizations, would have the authority to adopt rules to govern its own proceedings.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
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From: Robert Freeman
To: [redacted]
Date: 7/12/01 3:36PM
Subject: Re: Dear Mr. Mallette:

Dear Mr. Mallette:

I have reviewed your commentary relating to the special meeting held in 1999. From my perspective, although the executive session may have been improperly held, it is unlikely that a legal proceeding would lead to a favorable result.

The most significant penalty that may imposed against a public body under the Open Meetings Law would involve a situation in which that body enters into an executive session to discuss a subject that should have been discussed in public and then takes action during the executive session. In that situation, a court may, upon good cause shown, invalidate the action taken during the closed session. However, if a public body merely discusses an issue or issues behind closed doors and takes no action, there is no action to be invalidated and, therefore, no significant remedy or penalty.

If action is taken during an executive session, minutes indicating the nature of the action taken and the vote of the members would be required to be prepared and made available within one week of the executive session. If such minutes are prepared late, I note that the law provides that "The statute of limitations in an article seventy-eight proceeding with respect to an action taken at executive session shall commence to run from the date the minutes of such executive session have been made available to the public." Stated differently, an Article 78 proceeding could be commenced up to four months after minutes of an executive session are made available to the public.

Lastly, another possible avenue involves injunctive relief. As you may be aware, an injunction may be issued only when there is a need to prevent "irreparable harm" and there is a likelihood of success on the merits of the case.

I hope that I have been of assistance.

Robert J. Freeman
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[redacted]

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July 16, 2001

Ms. Sharon P. McLelland
[redacted]

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. McLelland:

I have received your letter of May 25, which reached this office on June 5. You have raised a series of issues relating to meetings held in the Town of Wilton, as well as the preparation and disclosure of records pertaining to those meetings. Based on your remarks and a review of the materials that you forwarded, I offer the following comments.

First, since you referred to the federal Government in the Sunshine Act, I point out that that statute is applicable to entities created by and operating within the federal government. In my view, it has no application in the situation that you described. It appears, however, that the state counterpart, the New York Open Meetings Law, is pertinent. That statute is applicable to meetings of "public bodies", and §102(2) defines the phrase "public body" to mean:

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

In consideration of the foregoing, in brief, a public body is an entity consisting of at least two members that conducts public business and performs a governmental function, in this instance, for a municipality. A legislative body, such as a town board, clearly constitutes a public body. Similarly, assuming that the Parks and Recreation Commission consists of the components in the definition quoted above, I believe that it, too, would constitute a public body subject to the Open Meetings Law.

A "meeting" [see Open Meetings Law, §102(1)] is gathering of a majority, or quorum, of a public body for the purpose of conducting public business, and it has been held that any such gathering, irrespective of its characterization or the absence of an intent to take action, falls within the coverage of the Open Meetings Law [see e.g., Orange County Publications v. Council of the City of Newburgh, 60 AD2d 409, aff'd 45 NY2d 947 (1978)]. If less than a quorum is present, the Open Meetings Law does not apply. Further, a gathering of public officers or employees, such as employees of a town department who do not serve on a town board or other public body, would fall beyond the coverage of the Open Meetings Law.

Second, every meeting of a public body must be preceded by notice. Section 104 of 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 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. While a public body may choose to provide notice to an individual having a particular interest in a meeting, there is no obligation to do so.

Third, the Open Meetings Law contains what might be characterized as minimum requirements concerning the contents of minutes of meetings. Specifically, §106 provides that:

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

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

Based on the foregoing, it is clear that a verbatim transcript of a meeting need not be prepared to comply with the Open Meetings Law. So long as minutes include the items referenced above, a public body would be acting in compliance with law.

Next, with respect to access to notes of meetings, I direct your attention to the Freedom of Information Law. That statute pertains to existing records, and §89(3) states in part that an agency is not required to create a record in response to a request. Therefore, if, for example, there is no record containing an explanation of the rationale for a certain action taken by a board or commission, there would be no requirement that a new record be prepared that includes an explanation. However, I point out that §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."

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

Insofar as notes of a meeting have been prepared, of likely significance would be §87(2)(g). Although that provision represents a ground for a denial of access, due to its structure, it may require the disclosure of substantial portions of records. Section 87(2)(g) permits an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

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

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

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Hon. John E. Sweeney
Hon. Shirley Murray
Town Board
Parks and Recreation Commission

STATE OF NEW YORK
DEPARTMENT OF STATE
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July 23, 2001

Hon. Sandy Leonard
Town Board Member
Town of Monroe
[redacted]

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

Dear Board Member Leonard:

I have received your letter in which you asked that I review a notice given prior to a meeting held jointly by the Town Board and the Planning Board of the Town of Monroe and comment with respect to its propriety. In brief, the notice indicated that a meeting would be held at 7:30 and that "[i]mmediately upon opening, the meeting *will adjourn into executive session* to discuss contractual negotiations for the acquisition of property" (emphasis added).

You expressed the belief that:

> "...the intent was to let the public know that we needed to discuss an important matter (I believe that it was the acquisition of real property where the price might be affected) before we met with a second group of people. We did not want the public to show up at the appointed time and become angry with us for immediately going into executive session without any warning. Many times people that come to our meetings are coming home from work in the city and we try to let them know what's going on. There was no intention of trying to cover something up. In fact it was exactly the opposite."

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

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

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

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

For the reasons expressed in the preceding commentary, a public body cannot in my view schedule an executive session in advance of a meeting. In short, because a vote to enter into an executive session must be made and carried by a majority vote of the total membership during an open meeting, technically, it cannot be known in advance of that vote that the motion will indeed be approved. However, 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 Board on its agenda or notice of a meeting could refer to or schedule a motion to enter into executive session to discuss certain subjects. Reference to a motion to conduct an executive session would not represent an assurance that an executive session would ensue, but rather that there is an intent to enter into an executive session by means of a vote to be taken during a meeting. I understand that the intent was to be considerate to the public, and by indicating that an executive session is likely to be held (rather than *scheduled*), the public would implicitly be informed that there may be no overriding reason for arriving at the beginning of a meeting.

Lastly, based on the information that you provided, it appears that an executive session could properly have been held. Section 105(1)(h) of the Open Meetings Law states that public body may enter into executive to discuss "the proposed acquisition, sale or lease of real property....but only when publicity would substantially affect the value thereof."

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

No
OML-AO-
3348

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3341

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July 24, 2001

Mr. Tom Pritchard
Director
Otsego County Office of Employment
and Training
12 Dietz Street, Suite 204
Oneonta, NY 13820-1814

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

Dear Mr. Pritchard:

As you are aware, I have received your correspondence concerning the status of "workforce investment boards" under the Open Meetings Law. Those entities are creations of federal law, but you wrote that their membership is appointed by local government officials at the local level.

Specifically, §117(e) of the Workforce Investment Act, also known as "Sunshine Provision", states that:

> "The local board shall make available to the public, on a regular basis through open meetings, information regarding the activities of the local board, including information regarding the local plan prior to submission of the plan, and regarding membership, the designation of one-stop operators, the award of grants or contracts to eligible providers of youth activities, and on request, minutes of formal meetings of the local board."

Based upon the foregoing, there is clearly an expressed intent that local boards conduct "open meetings" and provide information to the public.

Notwithstanding the foregoing, based on a decision rendered by the State's highest court, the Court of Appeals, it appears that an entity created pursuant to federal law would not be subject to the New York Open Meetings Law. The decision dealt with a "laboratory animal use committee"

(LAUC) that was required to be established pursuant to federal law and was instituted at the State University at Stony Brook, and it was determined that the entity in question fell beyond the scope of the Open Meetings Law.

That statute pertains to meetings of public bodies, and §102(2) defines the phrase "public body" to mean:

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

Following its reference to the definition, the Court found that:

> "It is thus evident that the Open Meetings Law excludes Federal bodies from its ambit.
>
> "The LAUC's constituency, powers and functions derive solely from Federal law and regulations. Thus, even if it could be characterized as a governmental entity, it is at most a *Federal* body that is not covered under the Open Meetings Law" [ASPCA v. Board of Trustees of the State University of New York, 79 NY 2d 927, 929 (1992)].

Due to the similarity relative to the creation and basis for existence between the LAUC and a local workforce investment board, again, it appears that such a board would not constitute a "public body" required to comply with the Open Meetings Law.

The foregoing is not intended to suggest that a workforce investment board should not hold open meetings; on the contrary, the guidance offered in federal law encourages openness and disclosure. In a somewhat similar situation involving community action agencies, which are also creations of federal law and are required by federal law to provide "reasonable access to information, including but not limited to public hearings," it has been suggested that due to the vagueness of the federal law requiring openness, the Open Meetings Law might be used as a guide in considering the extent to which meetings should be open or, conversely, conducted in private.

The full text of the Open Meetings Law is available on our website under the heading of "Publications."

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

OML-AO-3342

From: Robert Freeman
To: [redacted]
Date: 7/25/01 8:22AM
Subject: Re: EX. SESSION

Good morning Ms. Jones:

As you may recall, during the forum last spring, I mentioned that the word "personnel" does not appear in the Open Meetings Law. The so-called "personnel" exception for entry into executive session, section 105(1)(f), enables the Board to do so 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."

Rather than referring to a "particular personnel matter" (which would not indicate that the issue involves a particular person), it has been advised and confirmed judicially that a motion should include two components: 1) reference to the key word, "particular"; and 2) reference to one of the topics appearing in section 105(1)(f). For instance, a proper motion might be: "I move to enter into executive session to discuss the employment history of a particular person". Although the person need not be named, by means of a motion of that nature, there would be an indication that the issue focuses on a "particular person" in conjunction with an appropriate topic for consideration in executive session.

For a more detailed review of the scope of the three most commonly cited grounds for entry into executive session and the case law dealing with the nature of motions to be made in relation to those exceptions, you might want to go the index to opinions rendered under the Open Meetings Law on our website, click on to "E" and scroll down to "executive session, sufficiency of motion." Opinion #2621 is quite expansive.

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

[redacted]

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3343

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

August 2, 2001

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 in which you expressed concern with respect to a meeting held in the Town of Chili at which you "had to enter another Town Hall Entrance because the Main Meeting Room Door was locked."

In this regard, as you are aware, §104 of the Open Meetings Law requires that notice of the time and place of every meeting be given to the news media and by means of posting. Further, §103 provides that meetings shall be open to the general public and that public bodies shall make or cause to be made reasonable efforts to conduct meetings in facilities that permit barrier free access to physically handicapped persons.

While there is nothing in the Open Meetings Law or the provisions to which reference was made above that deal directly with the problem that you described, I believe that every law should be implemented in a manner that gives reasonable effect to its intent. In the context of the matter at hand, a public body must, in my view, ensure that those interested in attending have the ability to locate and enter the meeting without restraint or difficulty.

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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OML-AO-3344

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August 2, 2001

E-Mail

TO: Mary Neagle Smith [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. Smith:

As you are aware, I have received your letter concerning your "FOIA request to the Tuckahoe Schools regarding minutes pertaining to the redesignation of the LIFE Skills Special Education Class from 12:1:1 to a 15:1." Your request was denied on the ground that the District maintains no records containing the information sought. You expressed the belief, however, that minutes should have been prepared to "memorialize" the action take to change the class size.

In this regard, it would seem that determination to alter a program or a class would have involved the creation of some sort of a record. If any such record was created, I believe that it would be accessible under the Freedom of Information Law. In this regard, I offer the following comments.

If the action taken involved the duties of the Board of Education and could have only been taken by the Board, its action, in my view, could only have been accomplished at a meeting held in accordance with the Open Meetings Law. Section 102(1) of the Open Meetings Law defines the term "meeting" to mean "the official convening of a public body for the purpose of conducting public business". Based upon an ordinary dictionary definition of "convene", that term means:

"1. to summon before a tribunal;

2. to cause to assemble syn see 'SUMMON'" (Webster's Seventh New Collegiate Dictionary, Copyright 1965).

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

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

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

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

In short, if the action to which you referred was taken by the Board of Education, I believe that it should have been taken at a meeting. Further, in consideration of the subject, I do not believe that there would have been any basis for discussing the matter in private in an executive session.

When action is taken by a public body, it must be memorialized in minutes, for §106 of the Open Meetings Law provides that:

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

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

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

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

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

Therefore, if the Board reached a "consensus" that is reflective of its 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."

If Board action was not required and the action could have been taken administratively, again, it would be reasonable, in my view, to assume that some sort of record would have been prepared to reflect the action taken. Here I point out that when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section

89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." If you consider it worthwhile to do so, you could seek such a certification.

If a record containing the information sought does exist, I believe that it would be available under the Freedom of Information Law. In brief, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Relevant under the circumstances would be §87(2)(g). Although that provision potentially serves as a ground for a denial of access, due to its structure, it often requires disclosure. Specifically, §87(2)(g) authorizes 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.

From my perspective, a record indicating action taken or a change in class size would be accessible, for it would consist of factual information accessible under subparagraph (i), or it would be reflective a final agency policy or determination accessible under subparagraph (iii).

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

I hope that I have been of assistance.

RJF:jm
cc: Board of Education
Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML AO - 3345

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August 2, 2001

Ms. Patricia & Mr. 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 facts presented in your correspondence.

Dear Ms. and Mr. Pawlaczyk:

I have received your letter in which you raised questions concerning a governing body's "rules of order."

My understanding is that you have been criticized for not following the rules of order of the Village of Bergen, but that your efforts to learn of the rules has been unsuccessful. You wrote that:

> "During the meeting of 23 May, we asked the Village of Bergen Board to provide the rules of order. One Board member, Ed Adams, stated that the Board follows Robert Rules of Order. Mayor Jim McConnell abruptly interrupted and told Mr. Adams that he would handle this. The Mayor said that the meeting, in fact, follows 'Jim's Rules of Order.' When we requested a copy of these rules, the Mayor said that they were not written down. We asked the Mayor if he could state the rules verbally. The Mayor responded that they are just 'Jim's Rules of Order' and went on to say that these rules were adapted and unanimously approved by the Board at the re-organizational meeting on 4 April 2001. We asked if the rules of order were documented in the minutes for that date. The Mayor said they were not. We asked how could he expect us to follow rules when we do not know what they are. The Mayor did not respond..."

In this regard, §4-412 of the Village Law is entitled "The board of trustees", and subdivision (2), entitled "Procedure for meetings", states in relevant part that:

> "The mayor of the village shall preside at the meetings of the board of trustees as provided in section 4-400 of this article. A majority of

> the board shall constitute a quorum for the transaction of business, but a less number may adjourn and compel the attendance of absent members. Whenever required by a member of the board, the vote upon any question shall be taken by ayes and noes, and the names of the members present and their votes shall be entered in the minutes. The board may determine the rules of its procedure..."

Based on the foregoing, while the mayor of the village presides at meetings of a board of trustees, the board is authorized to "determine the rules of its procedure."

If indeed rules were adopted at a meeting, I believe that any such action must be reflected in the minutes of that meeting to comply with the Open Meetings Law.

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

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

Based upon the language quoted above, a public body cannot carry out its powers or duties except by means of an affirmative vote of a majority of its total membership taken at a meeting duly held upon reasonably notice to all of the members.

Further, whenever action is taken by a public body, it must be memorialized in minutes, for §106 of the Open Meetings Law provides that:

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

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

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

In view of the foregoing, it is clear in my opinion that minutes must include reference to action taken by a public body, such as any action taken to adopt rules of order.

Lastly, while public bodies have the right to adopt rules to govern their own proceedings, the courts have found in a variety of contexts that such rules must be reasonable. In my view, the issue in this instance involves the reasonableness of whatever rules may exist.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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August 2, 2001

Mr. Dennis O'Leary
Director, Government Affairs
New York State Society of Certified
Public Accountants
530 Fifth Avenue
New York, NY 10036-5101

The staff of the Committee 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. O'Leary:

I have received your letter and the materials attached to it. You have sought an advisory opinion concerning the Open Meetings Law on behalf of the New York State Society of Certified Public Accountants.

The matter involves:

> "...a meeting held by the Executive Committee of the New York State Board for Public Accountancy on March 1, 2001. This committee met via telephone conference call which included five members of the Board and its executive director (see attached letter from the State Education Department dated May 1, 2001). By the attached March 1st memorandum to State Board Executive Directors from the Executive Director of the NYS Board for Public Accountancy, the action taken during the March 1st conference call was described as unanimous approval of a resolution by the Executive Committee of the NYS Board, 'calling upon the National Association of State Boards of Accountancy to take specific action in regard to the Uniform CPA Examination.'"

In the letter to which you referred in the passage quoted above, the Deputy Commissioner for the Professions wrote that:

> "The 'meeting' referred to in your April 20, 2001 letter was a telephone discussion focusing on the Uniform CPA Examination by five members of the State Board of Accountancy and Daniel Dustin, the Executive Secretary of the State Board for Public Accountancy. The result of that planning discussion was that an item was placed on the agenda for consideration and discussion by the full board of public accountancy at their scheduled meeting on April 25, 2001. The Department has historically interpreted a quorum of the board as being a majority of the statutory size of the board, which would be 12, not the five members who engaged in a telephone discussion in anticipation of the general board meeting...
>
> "A key consideration in this matter is the definition of what constitutes a 'meeting'. The term has been consistently interpreted as requiring that the gathering in question be of members of an entity that constitute a quorum in order to trigger an inquiry about whether the nature of the meeting should have been subject to the Open Meetings Law. At least four decisions of the State Commission on Open Government (AO#3049, AO#3027, AO#2865 and AO#2848) unequivocally affirm that the Open Meetings Law provisions do not apply unless the meeting is of a quorum of the body which is authorized to transact business, and the meeting is for the purpose of doing public business..
>
> "It was clearly understood by the individuals participating in the conference call that they did not have authority under the board's by laws, regulation or statute to take any official action. The Open Meetings Law was not intended to include preliminary discussions among board members relating to meeting agendas and background information within the definition of 'meeting'."

Notwithstanding the characterization of the event by the Deputy Commissioner, a memorandum pertaining to the event prepared by the Executive Secretary to the State Board for Public Accountancy ("the Board") stated that:

> "On March 1, the Executive Committee of the New York State Board of Public Accountancy unanimously approved a resolution calling on NASBA to take specific action in regard to the Uniform CPA Examination. The resolution recognizes that state boards of accountancy are statutorily charged with the mandate to license and regulate Certified Public Accountants and that the current examination process does not provide state boards with the necessary control of the Uniform CPA Examination.
>
> "The resolution calls upon NASBA to take five specific actions:

- Create an Examinations Assurance Team to audit the actual costs of the examination, the deficiency spending reported by the AICPA, and forecast the costs for the computer-based examination,
- Create within NASBA, a committee structure and process for policy direction for the development and delivery of the uniform CPA examination,
- Formally notify the AIPCA to suspend all activities related to achieving by November 2003, a computerized examination due to the significant number of unresolved issues, risks and cost factors,
- Calls upon NASBA to issue a Request for Proposals, on behalf of its member boards, for the development and maintenance of a computerized uniform CPA examination and,
- Calls upon NASBA to issue a Request for Proposals, on behalf of its members, for the delivery of a computer-based exam...

"The Executive Committee has asked me to share this resolution with you so that your board can consider it prior to NASBA's May 10 examination meeting in Chicago."

As I understand the contents of the letter of May 1 prepared by the Deputy Commissioner, there is an entity known as the Executive Committee, that consists of at least five members of the Board, and it is your view that the position taken by officials of the Education Department represents a misinterpretation of and failure to comply with the Open Meetings Law. If indeed such a committee has been designated, I would agree with your contentions. Nevertheless, for reasons to be considered later, that may not be so. In this regard, I offer the following comments.

First, §7403 of the Education Law specifies that "A state board for public accountancy shall be appointed by the board of regents" and that such board "shall be composed of not less than twenty licensed accountants..."

Second, when a committee consists solely of members of a public body, such as the State Board, I believe that the Open Meetings Law is applicable, for a committee itself constitutes a "public body."

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 professional licensing board created by the Education Law, 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 General Construction Law, §41). Therefore, if, for example, the Board consists of twenty, its quorum would be eleven; in the case of a committee consisting of five, its quorum would be three.

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

In an effort to seek clarification regarding the matter, I contacted Kathy A. Ahearn, Counsel and Deputy Commissioner for Legal Affairs at the State Education Department. She indicated that:

> "The Dustin memo incorrectly indicated that the 'Executive Committee' of the State Board of Accountancy met on March 1, 2001 and approved a 'resolution.' This so-called 'committee,' however, is not a committee, but an ad-hoc group of four individuals – not all of whom are members of the State Board – who meet informally on an irregular basis to advise the State Board on possible topics for future State Board agendas...
>
> "This ad-hoc group is not an official standing committee established in the Board by-laws, as are other committees. Furthermore, the group does not include a majority of the membership of the Board (4 versus 12), does not consist solely of members of the Board (Mr. Dustin is a State Education Department employee acting as staff to the State Board, and is not a member of the State Board), and has no authority to take final and binding action on any matter [emphasis added by Ms. Ahearn].
>
> "On March 1, this ad-hoc group agreed in a telephone conversation to recommend to the State Board that it place on the Board's agenda the issue of licensure examinations for certified public accountants. This is the agreement reflected in the documents mischaracterized by Mr. Dustin as a 'resolution.' The fact that this 'resolution' was neither signed nor dated by the ad-hoc group is further evidence of the group's informal status and its lack of authority to take final and binding action. Rather, the State Board itself met on April 25, 2001, in a public meeting properly noticed with a quorum present, and voted to take a policy position on this issue."

If Ms. Ahearn's characterization of the "group" is accurate, the Open Meetings Law would not apparently be applicable [see 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)]. It is emphasized, however, that the State Board's standing committees, based on the language of the Open Meetings Law, its legislative history and its judicial construction, in my opinion clearly constitute "public bodies" required to comply with the Open Meetings Law.

As it applies to the State Board and its standing committees, §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." I note that new provisions in §102(1) and §41 of the General Construction Law pertain to the ability of a public body to conduct meetings by videoconference. Those provisions, however, are inapplicable to the situation at issue.

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, in this instance, the Executive Committee. While nothing in the Open Meetings Law refers to the capacity of a member to participate or vote at a remote location by telephone or mail, it has consistently been advised that a member of a public body cannot cast a vote unless he or she is physically present at a meeting of the body.

As indicated earlier, the definition of "public body" refers to entities that are required to conduct public business by means of a quorum. The term "quorum" is defined in §41 of the General Construction Law, which has been in effect since 1909. The cited provision states that:

> "Whenever three of more public officers are given any power or authority, or three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of the whole number of such persons or officers, 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 consideration of the language quoted above, a public body cannot carry out its powers or duties except by means of an affirmative vote of a majority of its total membership taken at a meeting duly held upon reasonably notice to all of the members. As such, it is my view that a public body has the capacity to carry out its duties only at meetings during which a quorum has convened. A quorum of a committee would be a majority of its total membership.

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

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

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

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

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

In a decision rendered within the past two weeks, the court cited and concurred with an opinion rendered by this office in which it was advised that "absent specific statutory authority to do so", members of a public body may not take action or vote, by proxy or otherwise, unless they are present at a meeting (Inner City Press/Community on the Move v. The New York State Banking, Supreme Court, New York County, NYLJ, July 20, 2001). Further, the amendments to the Open Meetings Law and the General Construction Law involving videoconferencing to which allusion was made earlier clarify the circumstances in which "meetings" may properly be held. Section 102(1)

was amended to define "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"*; §41 of the General Construction Law was amended to indicate that quorum is "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..."* (italics represents the language of amendments added by Ch. 289, L. 2000).

In sum, when an entity is subject to the requirements of the Open Meetings Law, I do not believe that it may validly adopt a resolution, take action or conduct a valid meeting by phone. Its authority do so, in my view, is limited to those instances in which a quorum has physically convened or has convened by videoconference.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Johanna Duncan-Poitier
Daniel J. Dustin
Kathy Ahearn

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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August 3, 2001

Hon. Dennis Valente
Councilman
Town of Davenport
P.O. Box 123
Davenport Center, NY 13751

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 Councilman Valente:

I have received your letter in which you sought advice concerning the propriety of two executive sessions recently held by the Davenport Town Board. You described them as follows:

> "Case One.
> Executive Session was called to discuss if the Town Board should fill a vacancy created by the early retirement of Town Justice. Reason given to the public 'personal matters'.
>
> "Case Two.
> Executive Session was called to request financial documents from the retire Town Justice. Reason given to the public 'personal matters'."

In this regard, based on the language of the Open Meetings Law and its judicial interpretation, it is unlikely that the topics described could validly have been considered in executive session.

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

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

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

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

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

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

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

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

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

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

When a discussion concerns matters of policy, such as the manner in which public money will be expended or allocated, the functions of a department or perhaps the creation or elimination of positions, I do not believe that §105(1)(f) could be asserted, even though the discussion may relate to "personnel". For example, if a discussion of possible layoffs relates to positions and whether those positions should be retained or abolished, the discussion would involve the means by which public monies would be allocated. In "Case Two" involving a review of financial records, it does not appear that the issue would have focused on any "particular person" or involved the subjects relating to a particular person delineated in §105 (1)(f). In short, in order to enter into an executive session pursuant to §105(1)(f), I believe that the discussion must focus on a particular person (or persons) in relation to a topic listed in that provision. As stated judicially, "it would seem that under the statute matters related to personnel generally or to personnel policy should be discussed in public for such matters do not deal with any particular person" (Doolittle v. Board of Education, Supreme Court, Chemung County, October 20, 1981).

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

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

> "...the public body must identify the subject matter to be discussed (See, Public Officers Law § 105 [1]), and it is apparent that this must be accomplished with some degree of particularity, i.e., merely reciting the statutory language is insufficient (see, Daily Gazette Co. v Town Bd., Town of Cobleskill, 111 Misc 2d 303, 304-305). Additionally, the topics discussed during the executive session must remain within the exceptions enumerated in the statute (see generally, Matter of Plattsburgh Publ. Co., Div. of Ottaway Newspapers v City of Plattsburgh, 185 AD2d §18), and these exceptions, in turn, 'must be narrowly scrutinized, lest the article's clear mandate be thwarted by thinly veiled references to the areas delineated thereunder' (Weatherwax v Town of Stony Point, 97 AD2d 840, 841, quoting Daily Gazette Co. v Town Bd., Town of Cobleskill, supra, at 304; see, Matter of Orange County Publs., Div. of Ottaway Newspapers v County of Orange, 120 AD2d 596, lv dismissed 68 NY 2d 807).

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

Lastly, with respect to "Case One", if the issue involved whether the Town Board should fill a vacancy or wait until an election, a discussion of that nature should, in my view, have occurred during an open meeting. Again, the focus would not have involved any "particular person". Even if the discussion did involve specific individuals under consideration to fill the vacancy, case law indicates that the discussion should have been held in public. Based on the language of §105(1)(f), it would appear that a discussion focusing on the individual candidates could validly be considered in an executive session, for it would involve a matter leading to the appointment of a particular person. Nevertheless, in the only decision of which I am aware that dealt directly with the propriety of holding an executive to discuss filling a vacancy in an elective office, the court found that there was no basis for entry into executive session. As you indicated to the Town Board, in determining that an executive session could not properly have been held, the court stated that:

> "...respondents' reliance on the portion of Section 105(1)(f) which states that a Board in executive session may discuss the 'appointment...of a particular person...' is misplaced. In this Court's opinion, given the liberality with which the law's requirements of openness are to be interpreted (Holden v. Board of Trustees of Cornell Univ., 80 AD2d 378) and given the obvious importance of protecting the voter's franchise this section should be interpreted as applying only to employees of the municipality and not to appointments to fill the unexpired terms of elected officials. Certainly, the matter of replacing elected officials, should be subject to public input and scrutiny" (Gordon v. Village of Monticello, Supreme Court, Sullivan County, January 7, 1994), modified on other grounds, 207 AD 2d 55 (1994)].

In consideration of the foregoing, notwithstanding its language, the court in Gordon held that §105(1)(f) could not be asserted to conduct an executive session. I point out that the Appellate Division affirmed the substance of the lower court decision but did not refer to the passage quoted above. Whether other courts would uniformly concur with the finding enunciated in that passage

is conjectural. Nevertheless, since it is the only decision that has dealt squarely with the issue at hand, I believe that it is appropriate to consider Gordon as an influential precedent.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
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August 7, 2001

Hon. Michael E. Boyle, Jr.
Council Member
City of New Rochelle
[redacted]

The staff of the Committee on 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 Boyle:

I have received your letter concerning the status of so-called "3 x 3 meetings" held by member of the New Rochelle City Council.

According to your letter, the Council consists of seven members, and often, three members of the Council meet with staff and others to discuss matters of City business. You expressed the view that those "3 x 3 meetings were a way in which meetings could be set up with the intent to circumvent the open meetings law." Most recently, you wrote that you received an email stating that

> "Nick DeSantis, our auditor and a partner with the firm of Bennett, Kielson, Storch et al, would like to discuss the FY 2000 city audit report results and the city's financial condition in a Private meeting with City Council. This can only be done in a 3x3 session."

It is your contention that the foregoing serves "as a clear intent to have a 3x3 meeting to circumvent the open meetings law before council would hear the presentation in public at our July 10, 2001 meeting."

In this regard, as a general matter, I do not believe that the Open Meetings Law applies unless a quorum is present. Even when a meeting is scheduled and reasonable notice is given to all the members in a manner consistent with the requirements of §41 of the General Construction Law, but less than a majority attends, the gathering would not constitute a "meeting" and the public would have no right to attend. Section 41 of the General Construction Law, entitled "Quorum and majority", states in relevant part that:

> "Whenever three of more public officers are given any power or authority, or three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of the whole number of such persons or officers, gathered together in the presence of each other or though 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 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."

The issue in the context of your inquiry involves the application of the Open Meetings Law to a situation in which, by design, a gathering includes less than a quorum of the Council. If there is an intent to ensure the presence of less than a quorum at any given time in order to evade the Open Meetings Law, there is a judicial decision that infers that such activity would contravene that statute. As stated in Tri-Village Publishers v. St. Johnsville Board of Education:

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

In Tri-Village, the Court found no evidence of an intent to circumvent the Open Meetings Law when a series of meetings was held, each involving less than a quorum of a board of education. However, as I interpret the passage quoted above, when there is an intent to evade the application of the Open Meetings Law by ensuring that less than a quorum is present, and, by design, less than a quorum gathers to discuss public business, such action would represent a failure to comply with that statute. If there is or has been an intent to circumvent the Open Meetings Law in the context of the situation of your concern, a court could in my opinion find that the Open Meetings Law has been infringed.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
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August 9, 2001

Mr. Norman Verbanic
[redacted]

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

Dear Mr. Verbanic:

I have received your letter of July 5 in which you raised a series of issues relating to a proceeding before the Town of Elma Board of Assessment Review ("BAR").

In this regard, it is emphasized at the outset that the advisory jurisdiction of the Committee on Open Government is limited to matters relating to public access to government information. Consequently, the following commentary will focus on your inability to obtain a verbatim transcript of a proceeding conducted by the BAR and your contention that the summary minutes of the proceeding are inaccurate.

You wrote that a court stenographer "took all the minutes verbatim" at a meeting of the BAR, but that the Chair of the BAR refused to make the verbatim transcript available to you or to the Town Clerk following her request.

In this regard, I offer the following comments.

First, irrespective of where the record at issue may be kept, I believe that it falls within the scope of the Freedom of Information Law. It is emphasized that the Freedom of Information Law pertains to agency records and that §86(4) of the Law defines the term "record" expansively to mean:

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

In a case in which an agency contended, in essence, that it could choose which documents it considered to be "records" for purposes of the Freedom of Information Law, the state's highest court rejected that claim. As stated by the Court of Appeals:

> "...respondents' construction -- permitting an agency to engage in a unilateral prescreening of those documents which it deems to be outside the scope of FOIL -- would be inconsistent with the process set forth in the statute. In enacting FOIL, the Legislature devised a detailed system to insure that although FOIL's scope is broadly defined to include all governmental records, there is a means by which an agency may properly withhold from disclosure records found to be exempt (see, Public Officers Law §87[2]; §89[2],[3]. Thus, FOIL provides that a request for access may be denied by an agency in writing pursuant to Public Officers Law §89(3) to prevent an unwarranted invasion of privacy (see, Public Officers Law §89[2]) or for one of the other enumerated reasons for exemption (see, Public Officers Law §87[2]). A party seeking disclosure may challenge the agency's assertion of an exemption by appealing within the agency pursuant to Public Officers Law §89(4)(a). In the event that the denial of access is upheld on the internal appeal, the statute specifically authorizes a proceeding to obtain judicial review pursuant to CPLR article 78 (see, Public Officers Law §89[4][b]). Respondents' construction, if followed, would allow an agency to bypass this statutory process. An agency could simply remove documents which, in its opinion, were not within the scope of the FOIL, thereby obviating the need to articulate a specific exemption and avoiding review of its action. Thus, respondents' construction would render much of the statutory exemption and review procedure ineffective; to adopt this construction would be contrary to the accepted principle that a statute should be interpreted so as to give effect to all of its provisions...
>
> "...as a practical matter, 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 FOIL 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 could thwart the entire objective of FOIL by creating an easy means of avoiding compliance, should be rejected" [Capital Newspapers v. Whalen, 69 NY 2d 246, 253-254 (1987)].

The transcript would not be in the possession of the Chair of the BAR but for his role in Town government. That being so, it is my opinion that the record in question is subject to rights conferred by the Freedom of Information Law.

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

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

Further, §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..."

While others may have physical possession of the records, I point out that §30 of the Town Law indicates that the Town Clerk shall has legal custody of all Town records. Consistent with that provision is §57.19 of the Arts and Cultural Affairs Law, which states in part that a town clerk is the "records management officer" for a town.

Third, the failure to share the transcript with the clerk may effectively preclude the clerk from carrying out her duties as records management officer, or as the designated as records access officer for purposes of responding to requests under the Freedom of Information Law. In short, if the records access officer cannot obtain Town records, that person may not have the ability to grant or deny access to records in a manner consistent with the requirements of the Freedom of Information Law.

Fourth, with respect to the implementation of the Freedom of Information Law, §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 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."

As such, the Town Board has the duty to promulgate rules and ensure compliance. 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, I believe that other Town officials and employees are required to cooperate with the records access officer in an effort to enable her to carry out his or her official duties.

In short, I believe that the Chair of the BAR must either disclose the transcript to you at the direction of the Town Clerk, and/or furnish the transcript to the Town Clerk at her request in order to enable her to carry out her official duties.

Lastly, for reasons discussed earlier, I believe that the transcript clearly constitutes a Town record. However, I note that the Open Meetings Law does not require the preparation of a transcript. Section 106 of that Law prescribes what might be considered to be minimum requirements concerning the contents of minutes. Specifically, the cited provision states that:

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

Based on the foregoing, minutes need not consist of a verbatim account of everything that was said; on the contrary, so long as the minutes include the kinds of information described in §106, I believe that they would be appropriate and meet legal requirements. Most importantly, I believe that minutes must be accurate. Preparation or alteration of minutes in a manner that does not accurately reflect what occurred or what was said at a meeting, would, in my view, be inconsistent with law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Patricia King, Town Clerk
John Simme, Chair, BAR

STATE OF NEW YORK
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August 9, 2001

E-Mail

TO: Josh Frankel <jfrankel@ix.netcom.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. Frankel:

I have received your letter of July 10 in which you sought an opinion concerning the Open Meetings Law.

According to your correspondence, the Village of Scarsdale Board of Trustees has conducted executive sessions to discuss "a matter that had been remitted to the Board pursuant to a court order issued following an Article 78 proceeding." In his consideration of the controversy, the Judge described it as follows:

> "This is a CPLR Article 78 proceeding commenced by a pro se petitioner who seeks to annul and vacate a May 16, 2001 determination of respondent Board of Trustees of Scarsdale (the 'Board') which vacated the Village of Scarsdale Committee on Historic Preservation ('CHP') and the Village of Scarsdale Board of Architectural Review's ('BAR') determinations and, correspondingly, issued a Certificate of Appropriateness so as to allow the demolition of an alleged house of 'substantial historic significance' situated at 270 Meadow Road, Scarsdale, New York. The premises is owned by intervenor-respondent Fox Meadow-Scarsdale Building Corporation ('Fox Meadow')."

In his decision, the Judge wrote that:

> "The Court reaffirms its position and, upon finding that neither the answers [of the Board] nor the record adequately redress the deficiencies in the [Board's] May 16, 2001 determination, the Court hereby vacates and annuls the matter to the Board for further proceedings consistent with this Court's decision, including the rendering of a determination where there are findings of fact, based upon the record before it, will sufficient detail so as to allow intelligent judicial review of its determination."

You indicated that the local newspaper questioned the Mayor concerning the Board's response to the Court order and published an article that stated that:

> "Reached by telephone Wednesday evening, Scarsdale Mayor David Kroenlein said the village board would soon 'respond to the judge's request.' The board did not plan to hold another hearing: 'We have the record that we will review, and as the judge directed us, enunciate the reasons that we previously did not enunciate.'
>
> "Kroenlein said, 'The trustees came to the same conclusion from different points of view, and it was certainly my understanding that what we produced was appropriate and fitting.' He said the board's decision would not change."

Based on the foregoing, you raised the following questions:

> "1) Was the board's decision to convene an executive session to discuss this matter (both on May 11 and again on July 10) violative of the Open Meetings Law?
>
> "2) Given the Mayor's comment that the board's decision would not change, and that the sole purpose of their 'further proceedings' is simply to justify and support their prior decision, is it fair to say that there is nothing 'quasi-judicial' about their discussion(s) in this regard? In other words, since they are clearly not deliberating towards a decision, but simply seeking to support one, hasn't the 'quasi-judicial' aspect of these proceedings been removed?"

In this regard, first, it does not appear that the Board would have had a basis for conducting an executive session.

By way of background, as a general matter, the Open Meetings Law is based on a presumption of openness. Stated differently, meetings of public bodies must be conducted open to the public, except to the extent that an executive session may properly be held . Further, that statute requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, §105(1) states in relevant part that:

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

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

It would appear that the only pertinent ground for entry in executive session would have been §105(1)(d), which permits a public body to enter into an executive session to discuss "proposed, pending or current litigation". Based on judicial decisions, the scope of the so-called litigation exception is narrow. As stated judicially:

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

In view of the foregoing, the exception is intended to permit a public body to discuss its litigation strategy behind closed doors, so as not to divulge its strategy to its adversary, who may be present with other members of the public at the meeting. As I understand the situation, the litigation to which you referred ended, and the Board would not have discussed "litigation strategy", but rather, in accordance with the judicial decision, would have conducted "further proceedings...including the rendering of a determination...where there are findings of facts...with sufficient detail so as to allow intelligent review of its determination." If my understanding is accurate and the Board did not discuss litigation strategy, I do not believe that any of the grounds for entry into executive session would have been applicable.

Second, as you are aware, a different provision that may authorize a private discussion related to "exemptions" from the Open Meetings Law found in §108. If an exemption applies, the Open Meetings Law is inapplicable.

In relation to your question, relevant is §108(1), which exempts "judicial or quasi-judicial proceedings" from the coverage of the Open Meetings Law. 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.

In a decision rendered under the Open Meetings Law dealing with the concept of the quasi-judicial proceeding, 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)].

Based on the facts that you presented, there was no new notice or hearing, no new evidence was presented and no additional opportunity to be heard was afforded.

Another authority, Black's Law Dictionary (revised fourth edition), 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."

At the gatherings in question, there appears to have been no investigation of facts; rather it appears that the Board prepared reasons purportedly justifying the conclusion that had been reached previously.

Also of significance in my view is the decision rendered by the Appellate Division, Second Department, in Orange County Publications v. City of Newburgh, in which it was found that:

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

Based on the Mayor's statements as reported in the news article, it is questionable whether Board members "weighed the evidence" or deliberated toward a decision. If there was no such activity, and if the Board was involved in developing a justification for a conclusion previously reached, it is doubtful, in my view, that the gatherings at issue could be characterized as "quasi-judicial."

I hope that I have been of assistance.

RJF:jm

cc: Board of Trustees

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August 9, 2001

E-Mail

TO: Diane Carlton <carltond@co.otsego.ny.us>

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. Carlton:

You have asked that I confirm opinions offered to you during a telephone conversation that occurred some time ago.

As I understand the first issue that you raised, the Otsego County Planning Department received requests from several groups to have agendas sent to them in advance of meetings of the County Planning Board. You added that the agendas have since become available via the County's website.

In this regard, there is nothing in the Open Meetings Law or any other statute of which I am aware that requires that a public body, such as the Planning Board, prepare an agenda. While many public bodies do so, there is no statutory obligation to do so. If an agenda has been prepared, I believe that it would constitute a "record" that falls within the coverage of the Freedom of Information Law, and that an agency must respond to a request for an agenda in a manner consistent with that statute.

It has been advised, however, that if a request is made prospectively for records that have not yet been prepared, the Freedom of Information Law does not apply. Since that statute pertains to existing records, and since, in a technical sense, an agency can neither grant nor deny access to a record that does not yet exist, it need not honor a request that is prospective in nature for records that do not yet exist. Further, if it is arranged that records, such as agendas, will be transmitted to certain persons or groups, in fairness, I believe that the same service would have to be provided to all who may seek it. Doing so, however, could result in an administrative or perhaps a financial burden.

You also referred to advice that I had given to the effect that:

> "...posting on the bulletin board and on the web as well as providing public notice to the newspaper once a year that the county planning board meets 'on the third Wednesday of each month for the calendar year 2001 at 7:30 pm in the County Annex Building' was sufficient for meeting the state statutes."

Here I direct your attention to §104 of the Open Meetings Law which states that:

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

Based on the foregoing a public body must provide notice of the time and place of every meeting to the news media and by means of posting.

Often, particularly at a public body's organizational meeting, it determines a schedule of its meetings to be held for a certain period. If the meetings are scheduled to be held consistently in the manner that you described, I believe that the public body would meet its obligations regarding notice to be given under §104 for the duration of that period. The only instance in which an additional notice would be required would involve the holding of an unscheduled meeting.

I hope that I have been of assistance.

RJF:jm

cc: James Konstanty, County Attorney

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August 13, 2001

E-MAIL

TO: Bill Miller [redacted]

FROM: Robert J. Freeman, Executive Director RJF

Dear Mr. Miller:

I have received your letter in which you questioned the propriety of the members of the Mt. Markham Board of Education taking action by voting via e-mail.

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 instant messaging, 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 a related vein, I point out that §87(3)(a) of the Freedom of Information Law requires that a record be prepared indicating the manner in which each member of a public body voted whenever a final vote is taken.

I hope that I have been of assistance.

RJF:tt

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August 13, 2001

E-Mail

TO: Roy Mallette [redacted]

FROM: David M. Treacy, Assistant 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. Mallette:

I have received your recent e-mails in which you raised several issues relating to procedures used by a Town Board at recent meetings.

You questioned the Board's failure to "produce any legal notice, or affidavit of posting." You also inquired about the propriety of entering into executive session "to discuss a land deal because it "could change the price of land if discussion was public." Additionally, you asked about the ability of a Board to "call a meeting for any purpose."

In this regard, I offer the following comments.

First, with respect to the Board's failure to produce a legal notice or affidavit indicating the posting of a public notice, the Open Meetings Law requires that notice be given to the news media and posted prior to every meeting. Specifically, §104 of that statute provides that:

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

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

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

I point out that subdivision (3) of §104 specifies that a legal notice need not be given prior to a meeting. Stated differently, to comply with the Open Meetings Law, a public body is not required to pay to place a legal notice in a newspaper or to "advertise" that a meeting will be held at a certain time and place; a public body must merely "give" notice to the news media and post the notice. In some circumstances, public bodies have given notice to the news media, and the newspapers or radio stations in receipt of the notices have chosen not to print or publicize the meetings to which the notices relate. In those cases, despite the failure of a notice to be publicized, a public body would have complied with law. In consideration of the foregoing, the Open Meetings Law does not require the Board to publish legal notice or prepare proof of posting a public notice of a meeting. If a record exists reflective of proof of posting, I believe that such a record would be accessible under the Freedom of Information Law.

Second, regarding the Town Board's authority to discuss a "land deal" during an executive session, as you are likely aware, the Open Meetings Law is based on a presumption of openness. Stated differently, meetings of public bodies must be conducted open to the public, except to the extent that an executive session may properly be conducted in accordance with paragraphs (a) through (h) of §105(1). Pertinent to the matter is §105(1)(h), which authorizes a public body to enter into executive session to discuss:

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

Insofar as discussions by the Board, if conducted publicly, would have substantially affected the value of the property under consideration, I believe that executive sessions would properly have been held. When the public is aware of a possible real property transaction in advance of a meeting, particularly the site of the property, the extent to which executive sessions may validly be held is questionable; the more that the public is aware of the details of a transaction, the less likely it may be that publicity would substantially affect the value of the property.

Third, you raised questions regarding the necessity of a Town Board to reconvene an open meeting following an executive session for purposes of adjourning. As you may be aware, a public

body is authorized to enter into executive sessions to discuss certain topics specified in §105(1) of the Open Meetings Law. It is noted that §102(3) defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. As such, an executive session is not separate and distinct from an open meeting; rather, it is a portion of an open meeting.

In this regard, I believe there are essentially two methods of adjourning a meeting. One would involve a motion to adjourn. From my perspective, such a motion should be made during an open meeting. The other means of adjourning would involve a situation in which a sufficient number of members of a public body depart from a meeting or the executive session portion of the meeting so that the number remaining constitutes less than a quorum. For instance, if a public body consists of five members, a majority of its total membership would constitute a quorum. If four members are present at a meeting and two depart, there is no longer a quorum and the meeting would automatically be adjourned.

Lastly, with respect to special meetings, I direct your attention to §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 includes requirements concerning notice given to members of a town board, which are separate from those contained in the Open Meetings Law, §104, which was previously discussed.

I hope that I have been of assistance.

DMT:jm

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August 15, 2001

Ms. Margaret Carey
[redacted]

The staff of the Committee on 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. Carey:

I have received your letter of July 13. You have requested an advisory opinion concerning the Open Meetings Law relating to a series of events in which the Onteora Board of Education, upon which you serve, and certain of its members, have been involved.

With respect to the initial event, you wrote that:

> "On May 29, 2001, the Onteora Board of Education held a special meeting for the purpose of conducting an executive session with its attorney to discuss on-going litigation. No public business was conducted at the May 29, 2001 meeting.
>
> "At the end of the executive session, the board president announced he had received a letter of resignation from Trustee Vanacore, effective June 5, 2001. Without returning to a formal public session to decide on a method to fill the vacancy, Mr. Millman unilaterally directed the District Clerk to place advertisements in local newspapers announcing the upcoming (not yet effective) vacancy. These advertisements required an expenditure of district funds, which were not authorized at a public meeting of our Board of Education. Mr. Millman also directed the advertisements contain a deadline of June 15, 2001 (at 3:30 p.m.) for receipt of applications and resumes and that interviews with applicants would follow."

In this regard, 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.

While the beginning of the executive session appears to have been validly held, for it involved consideration of "on-going litigation" [see Open Meetings Law, §105(1)(d)], the remainder, in my view, concerned matters that should have been discussed in public. In short, none of the grounds for conducting an executive session would, in my opinion, have been pertinent or applicable.

Next, at the ensuing "scheduled public board meeting", which was held on June 4, you indicated that:

> "...the board approved Trustee Vanacore's resignation. In the only public discussion regarding the board's plan to fill the vacancy, I made a motion to accept letters of interest and resumes for the board vacancy until Friday, July 6, 2001, 5:00 PM at the District Offices. The motion was defeated. At the public session the board did not authorize Mr. Millman's previous unilateral directives."

You wrote that the matter of filling the vacancy on the Board was not discussed at the Board meeting of June 18, but that a newspaper article published subsequent to that meeting stated that Trustee Millman said that:

> "...he, Trustee Doan, Trustee Walters and Trustee Perry had discussed the applications '....after a school board meeting, in the hallway'."

With respect to the foregoing, first, 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 that §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, by e-mail, or by gathering "in the hallway", 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 and action may be taken 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.

Just as significant, particularly in consideration of your remarks, based on §41, one member, acting unilaterally, would not ordinarily have the legal authority to take action on behalf of the board on which he or she serves.

I note, too, that the legislative declaration of the Open Meetings Law, §100, 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.

Second, with regard to the process of filling a vacancy in an elective office, the only provision that might justify 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. I point out that the Appellate Division affirmed the substance of the lower court decision but did not refer to the passage quoted above. Whether other courts would uniformly concur with the finding enunciated in that passage is conjectural. However, since it is the only decision that has dealt squarely with the issue at hand, I believe that it is appropriate to consider Gordon as an influential precedent.

Lastly, while it is not entirely clear whether action was taken during an executive session, based on judicial decisions, a board of education may do so only in rare instances. 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. None of those circumstances would appear to relevant in the context of the information that you provided.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

From: Robert Freeman
To: "gsimonds@pls-net.org".GWIA.DOS1
Date: 8/14/01 2:48PM
Subject: Re: waiver of notice

Dear Ms. Simonds:

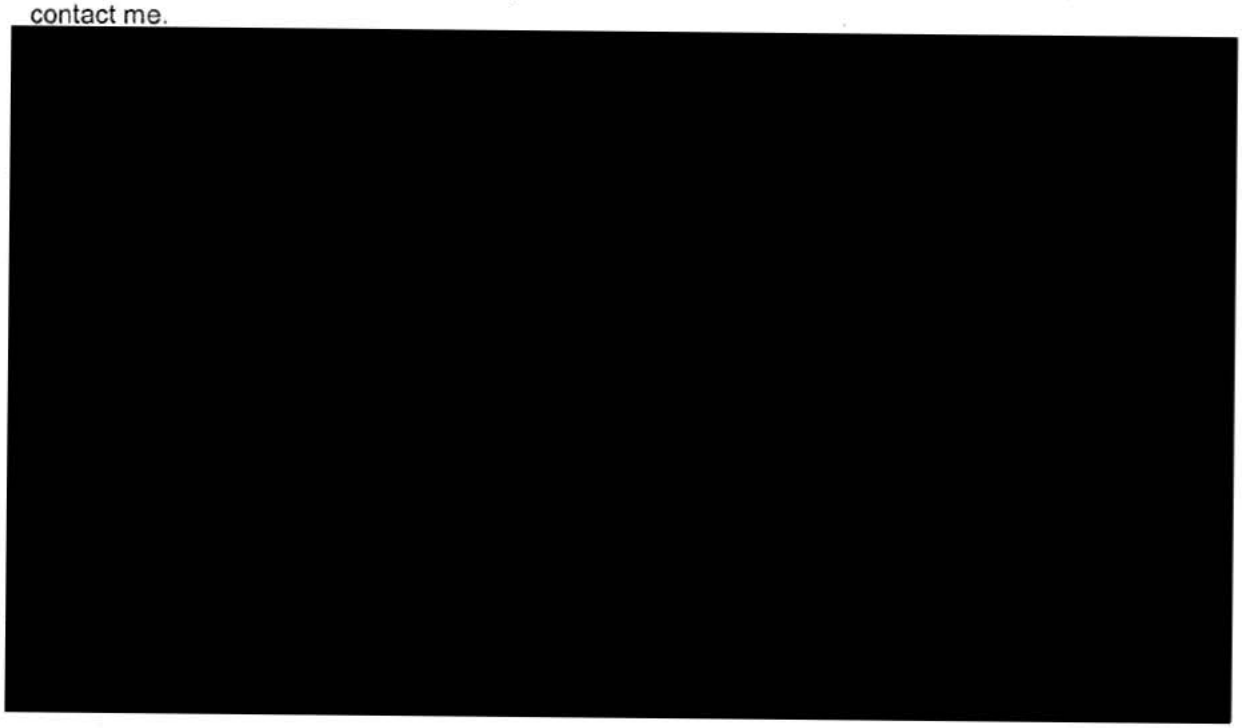
I do not believe that a public body, such as a board of education, may "waive" the statutory requirement that notice be given to the news media and posted prior to every meeting imposed by section 104 of the Open Meetings Law. In short, if a meeting is scheduled less than a week in advance, that section requires that notice be given to the news media and posted in one or more designated, conspicuous public locations "to the extent practicable" at a reasonable time prior to the meeting. From my perspective, if indeed there is an emergency and a meeting must be held, the Board, to satisfy the notice requirements, should telephone or fax a notice indicating the time and place of the meeting to the local news media, and post notice at the designated location.

The only "waiver of notice" of which I am aware may relate to notice given to board members. It is my understanding that the members of the board must be given at least 24 hours notice prior to a meeting, but that they may "waive" that notice. In a context involving a different kind of municipal body, the Attorney General has advised that the requirement involving notice to the members may be waived if each has received notice and participates at the meeting.

I note, too, that it has been held judicially that a public body should not hold so-called "emergency" meetings unless there is a real emergency.

Lastly, a court has the authority to invalidate action taken in private at a meeting held in violation of the Open Meetings Law, but action cannot be invalidated based solely on an "unintentional failure to fully comply" with the notice requirements. It is suggested that you might print and distribute a copy of the Open Meetings Law so that Board members may become familiar with its requirements and can not contend that a failure to comply was "unintentional." The text of the law is available on our website under "publications." You might also want to go to the index to opinions rendered under the Open Meetings Law, click on to "N" for "Notice of Unscheduled Meetings" or "E" for "Emergency Meeting."

I hope that I have been of assistance. If you need additional information or assistance, please feel free to contact me.



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3356

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August 17, 2001

Ms. Stella Gittle
[redacted]

The staff of the Committee on 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. Gittle:

I have received your letter in which you sought an opinion concerning the application of the Open Meetings Law to a "Republican Committee meeting which recently took place in the Town of Glen."

According to your letter, the gathering was held in private in the office of Deputy Supervisor and was attended by "[a]ll four board members of the Republican Committee...as well as the Town of Glen Supervisor, one Town of Glen Councilman [and] the Town of Glen Deputy Clerk."

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

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

Based on the foregoing, in general, the Open Meetings Law is applicable to meetings of governmental bodies, such as a town board, a city council, a board of education, etc. Further, a "meeting" of a public body [see definition of "meeting, §102(1)] involves a gathering of a majority of its total membership for the purpose of conducting public business. In this instance, as I understand the matter, there was no majority or quorum of a public body present.

Second, and most important in consideration of your inquiry, §108(2)(a) of the Open Meetings Law exempts from its coverage the "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 language quoted above, in general, either the majority or minority party members of a legislative body, such as a town board, may conduct closed political caucuses, either during or separate from meetings of the public body. Additionally, as suggested earlier, the Open Meetings Law applies to public bodies, and a political party committee would not, in my view, constitute a public body or be required to enable the public to attend its meetings.

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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August 23, 2001

Mr. Richard M. Gardella
Office of Counsel to the
Village Attorney
Village of Scarsdale
Scarsdale, NY 10583

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. Gardella:

As you are aware, I have received your letter of August 16 and related materials. The correspondence concerns a series of meetings held by the Village of Scarsdale Board of Trustees to consider a variety of issues pertaining to the demolition of a house in the Village and an advisory opinion that I prepared on August 9 at the request of a resident, [redacted]

By way of brief background, the staff of the Committee on Open Government has, since the Committee's creation, responded to inquiries made by state and local government officials, members of the public and the news media. Our only goal has involved offering what we believe to be the correct response based on applicable law, irrespective of the identity or interest of the person making an inquiry. Of necessity, we have assumed that those presenting information do so in good faith and in a manner that is factually accurate. Nevertheless, it is also recognized that individuals' perceptions may differ, and that versions of "facts" may differ, even though those describing the facts were present at the same event.

My intent in this response is to offer clarification, and although some of the following comments might be viewed by some as overly technical, I believe that to be necessary in consideration of the issues and the problems that may have arisen.

You may recall that in a recent conversation with you, I indicated that [redacted] had telephoned me on several occasions to discuss the Open Meetings Law, particularly in terms of the ability to exclude the public from meetings. He sought to focus on and distinguish the meaning and impact of certain words and phrases, and in my view, the imprecise use of words and phrases by Village officials may have created problems. I hope that you will recognize that references to statements offered by those officials are not intended to constitute criticism or suggest that they are

anything but well intentioned; they are intended, however, to demonstrate that there is often a need for precision, particularly when an issue involves a matter of controversy.

In my opinion, the phrase "executive session" has been used too broadly and in a manner which, in this context and others, been technically inaccurate. Section 102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. Section 105(1) requires that a public body accomplish a procedure, in public, before it may enter into an executive session, and paragraphs (a) through (h) of that provision specify and limit the subjects that may properly be considered during an executive session. In short, the executive session serves as one vehicle under which a public body may exclude the public from a meeting.

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.

In your letter to me, you referred to a meeting that you attended during which an "executive session [was] held to discuss the court's decision, and to begin deliberations toward a new determination", and you wrote that you "gave legal advice to the Board at that meeting." You then referred to an ensuing meeting at which "[t]he Board again went into executive session for legal advice from [you] and to continue their deliberations." You wrote that soon thereafter, [redacted] contacted you and "argued that the Board's executive session was illegal", but that you "emphatically disagreed pointing out that they were meeting as a quasi-judicial body reviewing a record of evidence an applying law in order to reach a final determination with findings of fact only reviewable in court."

From my perspective, [redacted] appears to have been correct with respect to substantial portions of the gatherings in question. In short, a review of the eight grounds for entry into an "executive session" appearing in paragraphs (a) through (h) of §105(1) of the Open Meetings Law suggests that only one of the grounds might have been applicable, and in that instance for only a portion of the first meeting to which you referred. Again, while I do not want to appear to be overly technical, seeking advice from an attorney or engaging in quasi-judicial deliberations would not, in my opinion, constitute grounds for entry into executive session. They may, however, represent elements of meetings that would have fallen within two of the exemptions from the Open Meetings Law appearing in §108.

Before considering the exemptions, it appears with respect to the first meeting that §105 (1)(d) might have been pertinent. That provision authorizes an agency to enter into executive session to discuss "proposed, pending or current litigation", and as suggested in the opinion addressed to [redacted] it has been found by the Appellate Division that the purpose of the exception is to enable

a public body to discuss its "litigation strategy" in private. To reiterate a passage from a decision rendered in the Second Department:

> "The purpose of paragraph d is to "enable a public body to discuss pending litigation privately, without barding 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)].

Without having been present at the gathering, I cannot ascertain the extent to which the Board might have discussed litigation strategy which if discussed in public would have given an advantage to an actual or potential adversary. Nevertheless, based on the decisions cited above, I believe that an executive session could properly have been held only to the extent that the Board discussed its litigation strategy.

As suggested earlier, two exemptions from the Open Meetings Law appear to have been pertinent with respect to some aspects of the gatherings in question.

First is subdivision (3) of §108, which exempts "any matter made confidential by federal or state law" from the coverage of the Open Meetings 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 village board of trustees, 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.

As suggested above, the procedural methods of entering into an executive session and asserting the attorney-client privilege differ. In the case of the former, the Open Meetings Law applies, and the procedural steps described in §105(1) would be required. 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.

Second, as you know, subdivision (1) of §108 exempts "quasi-judicial" proceedings from the coverage of the Open Meetings Law. As advised in the discussion regarding the attorney-client privilege, a public body may engage in a quasi-judicial proceeding in private, even though the subject under consideration does not fall within any of the grounds for entry into executive session. For that reason, again, I do not believe that a public body conducts an executive session to engage in a quasi-judicial function; rather, a proceeding of that nature is exempt from and outside the scope of the Open Meetings Law.

As indicated at the outset, when information is transmitted to this office, it is assumed to be accurate, and in [redacted] communication, it was assumed that the statement attributed to the

Mayor in Scarsdale's local newspaper represented an accurate rendition of the facts. In my view, since a mayor is the chief elected official of a village, a statement offered by a mayor can be assumed to represent an accurate rendition of facts. In this regard, when [redacted] questioned whether the Board would be conducting or had conducted a quasi-judicial proceeding, you wrote in your letter to me that you responded by stating that "the Mayor's published prediction comment did not change the nature of their deliberations" and that the Mayor "was only one of seven members of the Board." My opinion was based in part on the published comments of the Mayor, and as I interpreted his comments, whether or the extent to which the Board was involved in carrying out a quasi-judicial function was "questionable." In that opinion, I attempted to describe the elements necessary to find that a proceeding is quasi-judicial and advised that if the Board did not weigh the evidence or deliberate toward a decision, but rather "was involved in developing a justification for a decision previously reached", its proceeding might not have been quasi-judicial in nature. However, the converse would also be true: insofar as the elements necessary to find that the proceeding was quasi-judicial were present, the Open Meetings Law would not have applied.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:tt

cc: Wayne Esannason
Josh Frankel

STATE OF NEW YORK
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August 23, 2001

Mr. Steven Helmin

[redacted]

Mr. Ronald C. Crewell

[redacted]

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. Helmin and Mr. Crewell:

I have received your letter in which you sought clarification concerning a situation that was the subject of an advisory opinion prepared at the request of Supervisor Gerald O. Keller of the Town of Glen. In brief, he questioned the status of a gathering of three of the five members of the Town Board who characterized the gathering as a "caucus." However, the Supervisor added that of the three, one is a republican, the second a democrat, and the third an independent. Based on that information, it was advised that, since all three were not from the same political party, the gathering constituted a "meeting" subject to the Open Meetings Law, not a "political caucus" that would have been exempt from the coverage of that statute.

You indicated that the facts presented by the Supervisor are accurate, but that all three were endorsed by the democratic party and ran on a democratic line. Consequently, you have sought my views "with respect to the caucusing of members of different political parties who have been endorsed and have accepted the endorsement of the same political party."

In this regard, as you aware, endorsement by more than one political party is not unusual, and in my view, in consideration of the intent of the Open Meetings Law and its judicial interpretation, the kind of gathering at issue would be subject to the requirements of that statute.

As indicated in the opinion addressed to Supervisor Keller, an ordinary dictionary definition of the term "caucus" refers to "a closed meeting of a group of persons belonging to the same political party..." In a decision dealing with the intent of the Open Meetings Law and its relation to the

exemption from the law regarding political caucuses, Buffalo News v. Buffalo Common Council [585 NYS 2d 275 (1992)], the court stressed that exemptions should be construed narrowly. Reference was made to the decision cited in the opinion sought by the Supervisor, and it was stated 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 three members may have a philosophy or inclination similar to one another. Nevertheless, by virtue of their political party registration, it appears that they have affirmatively chosen to distinguish themselves with respect to political party affiliation. It is widely

known that 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 at issue.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Hon. Gerald O. Keller

From: Robert Freeman
To: [redacted]
Date: 8/27/01 12:33PM
Subject: Dear Ms. Harrington:

Dear Ms. Harrington:

In your capacity as Town Clerk, you wrote that the Town Board "wants to get together informally....to get ideas for revising the 1959 ordinance..." You added that the public "will not be there, this is just a get together for Board members"; no action will be taken. You indicated that the Supervisor and Board members want to know whether you must attend based on their belief that "three Board members are a quorum and the Town Clerk by law has to attend." You questioned, "being not a meeting", whether the clerk is required to attend.

In my view, the assumptions made regarding the application of the Open Meetings Law are inaccurate. In short, it was held by the state's highest court more than twenty years ago that any gathering of a quorum (a majority) of a public body for the purpose of conducting public business constitutes a "meeting" subject to the Open Meetings Law, even if there is no intent to take action, and irrespective of the manner in which the gathering is characterized (i.e., as a workshop or work session).

Based on your description of the event, I believe that it would clearly constitute a meeting that must be held in compliance with the Open Meetings Law. That being so, it should be preceded by notice of the time and place given to the news media and by means of posting, and any member of the public would have the right to attend.

With respect to your presence, section 106 of the Open Meetings Law prescribes minimum requirements concerning the contents of minutes. At a minimum, minutes must consist of a record or summary of all motions, proposals, resolutions, action taken and the vote of each member.

Section 30 of the Town Law states that the clerk is required to attend all meetings of the town board. However, if it is known in advance that none of the occurrences that would require the preparation of minutes under section 106 of the Open Meetings Law (i.e., if it is known that there will be no motions, proposals resolutions or actions taken), it has been advised that, technically, minutes need not be prepared and that there may be no reason for the clerk to attend.

I hope that the foregoing serves to clarify your understanding of the matter and that I have been of assistance. Should any further questions arise, please feel free to contact me.

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

From: Robert Freeman
To: [redacted]
Date: 8/28/01 9:41AM
Subject: Dear Councilwoman Harrington:

Dear Councilwoman Harrington:

I have received your letter in which you wrote that the Mayor of the Village of Limestone has contended that you cannot have a copy of minutes of meetings of the Board of Trustees until the minutes have been "passed" by the Board. Although you informed the Mayor that the Town Board on which you serve must make minutes available within two weeks, he said that "because of something called home rule, he does not have to comply with the same rules that Towns have to."

In short, while both towns and village have some home rule powers, I do not believe that the issue that you raised involves the ability to assert those powers in a manner that conflicts with the Open Meetings Law. That law is a statute enacted by the State Legislature that requires that minutes of open meetings be prepared and made available to the public within two weeks (see Open Meetings Law, section 106). I note that there is nothing in that statute or any other that deals with or requires the approval of minutes. To comply with the Open Meetings Law in the event that minutes are not approved and it is a board's policy to approve them, it has been suggested that the minutes may be marked "unapproved", "draft" or "preliminary", for example, prior to disclosing them. By doing so, the government agency would be complying with law, but also providing an indication that the minutes are subject to change.

I point out, too, that section 110 of the Open Meetings Law (which is also known as Article 7 of the Public Officers Law) specifies that "Any provision of a charter, administrative code, local law, ordinance, or rule or regulation affecting a public body which is more restrictive with respect to public access than this article [the Open Meetings Law] shall be deemed superseded hereby to the extent that such provisioin is more restrictive than this article." Based on the foregoing, I do not believe that the Village has the authority to assert any power by means of any law that is more restrictive than the Open Meetings Law.

In an effort to enhance his knowledge of and compliance with the Open Meetings Law, it is suggested that you share this opinion with the Mayor. In addition, the text of the Open Meetings Law is available on our website under "Publications". Other opinions on the same subject can be viewed and printed by going to the index to opinions rendered under the Open Meetings Law on the website, clicking on to "M", and scrolling down to "Minutes, unapproved". The opinions prepared within the past nine years are available in full text.

I hope that I have been of assistance.

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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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OML-AO-3361

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August 30, 2001

E-MAIL

TO: Mary Lee Lasota <[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 Ms. Lasota:

As you are aware, I have received your letter in which you raised questions relating to the process of filling a vacancy on the Hilton Central School District Board of Education.

The first area of inquiry involves any requirement that the District publicize or disclose the names of those who have applied to fill the vacant position. In this regard, there is nothing in the Freedom of Information Law or any other law of which I am aware that would require that the District, on its own initiative, to disclose the names of applicants. However, in response to a request made under the Freedom of Information Law, I believe that the District would be required to disclose a record or records identifying the applicants.

In brief, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. The only ground for denial of significance in my view would be §87(2)(b), which authorizes an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." The Court of Appeals, the state's highest court, held that the intent of the exception is to permit agencies to protect against disclosure of "intimate details" of persons' lives, and that the standard should consider the reasonable person of ordinary sensibilities [Hanig v. State Department of Motor Vehicles, 79 NY 2d 106 (1992)]. From my perspective, the fact that a person has applied to fill a vacancy in what ordinarily is an elective office would not represent a disclosure of an intimate personal detail or would, therefore, constitute an unwarranted invasion of personal privacy.

Similar considerations would be pertinent in determining rights of access "application letters" and resumes of applicants. I note, too, that §89(2)(b) includes a series of examples of unwarranted

invasions of personal privacy. Based on those examples, a person's employment history, other than public employment, may be withheld; medical information may be withheld; other details, such as a social security number, may also be withheld in my view. However, some details within the records would not in my opinion rise to the level of an unwarranted invasion of personal privacy if disclosed. For instance, it has been held that one's general educational background must be disclosed [see Ruberti, Girvin & Ferlazzo v. NYS Division of State Police, 641 NYS2d 411, 218 AD2d 494(1996)].

The remaining area of inquiry involves the Board's ability to interview or discuss the applicants in executive session. By way of background, the Open Meetings Law is based on a presumption of openness. In a manner analogous to the Freedom of Information Law, 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 opinion, the only provision that might justify 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. I point out that the Appellate Division affirmed the substance of the lower court decision but did not refer to the passage quoted above. Whether other courts would uniformly concur with the finding enunciated in that passage is conjectural. Nevertheless, since it is the only decision that has dealt squarely with the issue at hand, I believe that it is appropriate to consider Gordon as an influential precedent.

I hope that I have been of assistance.

RJF:tt

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3362

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September 5, 2001

Mr. Jerry J. Mastan, Sr.
[redacted]

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

Dear Mr. Mastan:

I have received your letter and appreciate your kind words, as well as the opportunity to have addressed the Board of Education of the Watervliet Enlarged School District Board of Education and residents of the City of Watervliet on July 17.

According to your letter, following my presentation, the Board entered into executive session to discuss several issues, including "the subject of the Powers and Duties of the Board President..." You expressed the view that consideration of that issue "should not have been raised as a topic behind closed doors." Consequently, you have sought my views concerning the propriety of the executive session, and you asked additionally "whether the Board members and Superintendent have the authority to usurp the powers and duties of the Board President in Executive Sessions and/or at other meetings..."

In this regard, as indicated to you and others who attended the forum on July 17, the Committee on Open Government is authorized to provide advice and opinions concerning public access to government information, primarily in relation to the Freedom of Information and Open Meetings Laws. Issues pertaining to the powers and duties of a board of education or its president are beyond the jurisdiction of this office, unless they relate to the statutes cited above. In short, I do not believe that I can appropriately respond to your question involving the relationship between yourself as President and the Board. It is suggested that you might consult with the District's attorney or the New York State School Boards Association.

With respect to the executive session, I agree with your contention that consideration of the powers and duties of the board president should have occurred during a meeting open to the public.

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.

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

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

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

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

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

> "...the medical, financial, credit or employment history of a <u>particular</u> person or corporation, or matters leading to the appointment,

> employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation..." (emphasis added).

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

When a discussion concerns matters of policy, such as the manner in which public money will be expended or allocated, the functions of a department, the creation or elimination of positions, or, as in this instance, the powers and duties inherent in the position of president of the board, I do not believe that §105(1)(f) may be asserted. In the circumstance that you described, the issue would not have focused on any "particular person", nor would it have involved the subjects relating to a particular person delineated in §105 (1)(f). In short, in order to enter into an executive session pursuant to §105(1)(f), I believe that the discussion must focus on a particular person (or persons) in relation to a topic listed in that provision. As stated judicially, "it would seem that under the statute matters related to personnel generally or to personnel policy should be discussed in public for such matters do not deal with any particular person" (Doolittle v. Board of Education, Supreme Court, Chemung County, October 20, 1981).

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

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

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

Daily Gazette Co. v Town Bd., Town of Cobleskill, supra, at 304; see, Matter of Orange County Publs., Div. of Ottaway Newspapers v County of Orange, 120 AD2d 596, lv dismissed 68 NY 2d 807).

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3363

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September 6, 2001

Mr. Charles Hunt
[redacted]

Dear Mr. Hunt:

I have received your letter of August 8 in which you referred to an issue raised in previous correspondence. Specifically, you have sought "another advisory opinion" concerning the propriety of meetings held at 8 a.m. by the Elma Town Board.

Having reviewed my response to you of June 26, I do not believe that I can offer an opinion that is substantially different from that response. From my perspective, however, even though the decision that was cited involved a board of education, it serves as useful precedent regarding meetings of all governmental bodies subject to the Open Meetings Law. In short, while that statute does not indicate precisely when meetings must or must not be held, it is reiterated that every law must in my opinion be implemented in a manner that gives reasonable effect to its intent.

In the case involving the board of education, I believe that the court found that, in consideration of the facts presented, meetings held early in the morning would effectively preclude many of those interested in attending from doing so, and that, consequently, it was unreasonable to hold meetings at that time. If the factual circumstances in the Town of Elma involve the same result, that those interested in attending do not have a reasonable opportunity to do so, I believe that a court would find that it is unreasonable to hold meetings early in the morning as has been the case. On the other hand, if, due to the nature of the community, those residents of the Town of Elma interested in attending do have a reasonable opportunity to attend the meetings in question, a court would, in my view, likely hold that the scheduling of those meetings is not unreasonable or inconsistent with the intent of the Open Meetings Law.

Since you referred to reporters for a local newspaper, perhaps you might contact the newspaper to suggest that it conduct a survey of its readers in an attempt to gauge the community's views concerning the reasonableness of holding meetings at 8 a.m. If that could be accomplished, you and the Town Board could ascertain the general sentiments of the Town's residents.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board
Rosemary Bapst, Town Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3364

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September 10, 2001

Mr. Donald W. Long
[redacted]

Dear Mr. Long:

Assemblyman Marc Butler has forwarded your letter of August 21 to this office for response. The Committee on Open Government, a unit of the Department of State, is authorized to provide advice and opinions relating to the Open Meetings Law.

You wrote that a certain individual is, in your view, "completely wrong when he asserts that he or anyone else can speak at any meeting of any elected board." That individual's contention, according your letter, is that since a municipality, such as the Village of Herkimer, receives federal, state and county monies, "this 'co-mingling' of taxes means that anyone can demand to be placed on any agenda, or speak at any governmental body meeting." You expressed the concern that if such a contention is accurate, a public body "could easily have several hundred non-residents speaking at every meeting" and that "[t]his would effectively destroy the ability of any government to function." In consideration of the foregoing, you raised the following question: "Can any person, from anywhere in the U.S., demand to speak or be placed on the agenda of any governmental body in New York State?"

From my perspective, the issue does not hinge upon the residence of the person who demands to speak; rather, I believe that it pertains to the mistaken assumption that the public has the right to speak at meetings of government bodies. In this regard, I offer the following comments.

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

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, that statute is silent with respect to the issue of public participation. Consequently, if a public body does not want to answer

questions or permit the public to speak or otherwise participate at its meetings, I do not believe that it would be obliged to do so. Nevertheless, a public body may choose to answer questions and permit public participation, and many do so. When a public body does permit the public to speak, it has been advised that it should do so based upon rules that treat members of the public equally.

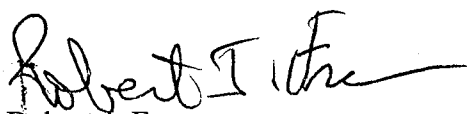
Although public bodies have the right to adopt rules to govern their own proceedings [see e.g., County Law, §153; Town Law, §63; Village Law, §4-412; Education Law, §1709(1)], the courts have found in a variety of contexts that such rules must be reasonable. For example, although a board of education may "adopt by laws and rules for its government and operations", in a case in which a board's rules prohibited the use of tape recorders at its meetings, the Appellate Division found that the rule was unreasonable, stating that the authority to adopt rules "is not unbridled" and that "unreasonable rules will not be sanctioned" [see Mitchell v. Garden City Union Free School District, 113 AD 2d 924, 925 (1985)]. Similarly, if by rule, a public body chose to permit certain citizens to address it for ten minutes while permitting others to address it for three, or not at all, such a rule, in my view, would be unreasonable.

Lastly, I note that §103 of the Open Meetings Law provides that meetings of public bodies are open to the "general public." As such, any member of the public, whether a resident of the municipality in which a public body functions or of another jurisdiction, would have the same right to attend. That being so, I do not believe that a member of the public can be required to identify himself or herself by name or by residence in order to attend a meeting of a public body. Further, since any person can attend, I do not believe that a public body could by rule limit the ability to speak to residents only. There are many instances in which people other than residents, such as those who may own commercial property or conduct business and who pay taxes within a given community, attend meetings and have a significant interest in the operation of a municipality or school district. In short, I do not believe that a public body may validly prohibit a member of the public from speaking at its meeting based solely upon residency.

In sum, in my view, the public does not have the right to speak at meetings of public bodies. Nevertheless, a public body may choose to permit the public to participate in conjunction with reasonable rules that treat members of the public equally and without regard to residency.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Marc Butler

OML-AO-3365

From: Robert Freeman
To: [redacted]
Date: 9/14/01 11:51AM
Subject: Dear Mr. Liebrand:

Dear Mr. Liebrand:

I have received your letter in which you wrote that the "issue of having a meeting with teachers only and excluding principals and other administration has been raised by some of [your] colleagues." It is assumed that the term "colleagues" is intended to mean members of the Board of Education, since you serve in that capacity. You added that a quorum of the Board would not be present and asked whether you may "exclude the non-teachers and press from this meeting or even simply ask them not to attend."

In this regard, the Open Meetings Law is applicable to meetings of public bodies, i.e., boards of education. Unless a quorum (a majority of the total membership) of a public body convenes for the purpose of conducting public business, the gathering would not constitute a meeting of a public body, and the Open Meetings Law would not apply.

Based on the facts that you presented, since no quorum would be present, i believe that the gathering would fall beyond the coverage of the Open Meetings Law.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
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liebrand 1

OML-AO-3366

From: Robert Freeman
To: [redacted]
Date: 9/20/01 11:35AM
Subject: Dear Mr. Cross:

Dear Mr. Cross:

I have received your inquiry concerning what you characterized as a "gag order" imposed by a town supervisor concerning your ability to offer comments at town board meetings.

In this regard, the Open Meetings Law provides the public with right to attend meetings of public bodies, but it is silent with respect to the ability of those in attendance to speak or otherwise participate. Therefore, there is no requirement that a board permit the public to speak. However, if a board chooses to permit the public to speak, and most do, it has been suggested it do so by means of reasonable rules that treat members of the public equally.

Further, it has been held that if commentary is permitted concerning a certain aspect of a municipality's functions, comments, both favorable and unfavorable, must be permitted. By means of example, a board may choose to preclude commentary regarding the performance of its employees altogether. However, if it chooses to permit comments offering praise, it must also permit comments offering criticism.

To obtain a more detailed discussion of the issues, it is suggested that you go to our website and the index to advisory opinions rendered under the Open Meetings Law. From there, click on to "p" and scroll down to "public participation". The higher the numbers, the more recent are the opinions. At the end of opinion #3046 are citations to cases in which the issue that you raised were considered in some respects.

With regard to "recourse", it is my hope that the opinions available on the website will be useful to you. If you find that to be so, you may download and distribute them as you see fit. In addition or perhaps in the alternative, you would have the right to initiate a proceeding under Article 78 of the Civil Practice Law and Rules challenging the reasonableness of the Town's practices.

I hope that I have been of assistance.

Robert J. Freeman
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FOIL-AO-12955
OML-AO-3367

From: Robert Freeman
To: [redacted]
Date: 9/24/01 9:55AM
Subject: Dear Ms. Harrington:

Dear Ms. Harrington:

I have received your inquiry in which you asked whether towns and villages "have to take minutes of public hearings" and, if so, whether the minutes are subject to the Freedom of Information Law (FOIL).

In this regard, it is noted that there is a distinction between a "hearing" and a "meeting".

A hearing is usually held by law to enable the public to express points of view concerning a particular subject or action to be taken by a board. For instance, both the Town and Village Law require that a public hearing be held to enable the public to comment with respect to proposed budgets. There are no requirements involving the preparation of minutes in relation to hearings.

A meeting involves the gathering of a board for the purpose of discussing public business, deliberating and potentially taking action. The Open Meetings Law includes provisions concerning minutes of meetings. In brief, minutes must, at a minimum, consist of a record or summary of motions, proposals, resolutions, action taken and the vote of each member.

Even though there may be no requirement that minutes of hearings be prepared, often summaries or tape recordings of hearings are prepared. If any such record is prepared, it would be subject to the FOIL. I note that FOIL is applicable to all records of a government agency and defines the term "record" to include any information in any physical form whatsoever maintained by or for the agency. Therefore, a tape recording of a hearing or a meeting, for example, would constitute a "record" that clearly falls within the coverage of FOIL.

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

FOIL-AO-3368

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

September 24, 2001

Ms. Sally Blackmer
[redacted]

The staff of the Committee on 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. Blackmer:

I have received your letter of August 21 and the materials attached to it. You have contended that the Board of Education of the Honeoye Central School District has, in a variety of areas, failed to comply with the Open Meetings Law. As you requested, and in an effort to enhance compliance with and understanding of that statute, copies of this opinion will be forwarded to District officials.

Based on your comments and a review of the materials, I offer the following remarks.

Your initial area of complaint involves what you characterized as "misuse of waiver of notice." In this regard, the only provision of which I am aware that might authorize a waiver of notice is §1606(3) of the Education Law, which states that "A meeting of the board may be ordered by any member thereof, by giving not less than twenty-four hours' notice of the same." The notice referenced in the foregoing deals with notice to members; separate and distinct are the notice requirements imposed by the Open Meetings Law, which, in my view, can never be waived. Specifically, §104 of that statute provides that:

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

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

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

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

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

> practicable, to the news media' nor was it 'conspicuously posted in one or more designated public locations' at a reasonable time 'prior thereto' (emphasis added)" [524 NYS 2d 643, 645 (1988)].

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

You also contend that the Board has "misused" and "over used" executive sessions. On the basis of the materials that you forwarded, the descriptions of executive sessions in the minutes do not include sufficient detail offer a conclusion. However, as you are likely aware, in general, the Open Meetings Law is based upon a presumption of openness. Stated differently, meetings of public bodies must be conducted open to the public, unless there is a basis for entry into executive session. Moreover, the Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, §105(1) states in relevant part that:

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

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

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

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

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

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

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

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

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

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

When a discussion concerns matters of policy, such as the manner in which public money will be expended or allocated, the functions of a department or perhaps the creation or elimination of positions, I do not believe that §105(1)(f) could be asserted, even though the discussion may relate to "personnel". For example, if a discussion involves staff reductions or layoffs due to budgetary concerns, the issue in my view would involve matters of policy. Similarly, if a discussion of possible layoff relates to positions and whether those positions should be retained or abolished, the discussion would involve the means by which public monies would be allocated. In none of the instances described would the focus involve a "particular person" and how well or poorly an individual has performed his or her duties. One of the items noted on the agenda for consideration in executive session involved the "status of vacant Senior Attendance Officer Position." If the discussion pertained to the position, not any particular person who might fill it, it is doubtful in my view that the matter should have been considered in private.

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 the like 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)].

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

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

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

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

Next, you wrote that minutes are not made available in a timely manner. 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. 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.

Lastly, you indicated that meetings are held in rooms too small to accommodate those interested in attending. 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: Board of Education
Jerry Passer, President
R. Tim Marks, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3369

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September 25, 2001

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 in which you sought assistance. You wrote that, in your capacity as Executive Director of the Town of Oyster Bay Housing Authority, you have been the target of "abusive, abrasive" and critical comments by a particular member of the Authority. When you asked that he refrain from so doing, you also asked that your comment be included in the minutes. Nevertheless, the minutes do not include your statement, and you asked what your recourse might be.

In this regard, the Open Meetings Law contains what might be characterized as minimum requirements concerning the contents of minutes. Specifically, §106 of the Open Meetings Law provides that:

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

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

Based on the foregoing, minutes need not consist of a verbatim account of everything that was said; on the contrary, so long as the minutes include the kinds of information described in §106, I believe that they would be appropriate and meet legal requirements. Most importantly, I believe that minutes must be accurate.

In similar situations, such as those in which members of public bodies have met with resistance when attempting to include their comments in the minutes, it has been advised that a motion be made to include their statements in the minutes. If such a motion is approved, the inclusion of a statement is guaranteed. I recognize that you are not a member of the Authority. Nevertheless, I believe that you may ask any member to introduce a similar motion in an effort to ensure that your statement becomes part of the minutes.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

OML-AO-3370

From: Robert Freeman
To: [redacted]
Date: 9/25/01 11:58AM
Subject: Hi Kathy:

Hi Kathy:

You are correct: just when we believe that we've heard every question, there's a new one.

With respect to yours, I believe that the reference to minutes not being written in pencil is designed to ensure that the permanent minutes are indeed permanent. Pencil, as you know, gets smudged and lightens over the course of time. The shorthand minutes, which are essentially the notes that you take in order to enable you to prepare the permanent minutes, if my memory is correct, must be retained for a minimum of four months, at which time they can be discarded. The same issue has come up in relation to tape recordings of meetings. Like the shorthand notes, they are used to enable the clerk to prepare accurate minutes, and the retention period for the tapes is also four months.

Although I'm quite sure of my response, I would suggest that you take a look at your retention schedule or call your regional rep from the State Archives to confirm.

All the best.

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
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3371

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September 26, 2001

Mr. Richard M. Hunter
Luboja & Thau, LLP
10 East Fortieth Street
New York, NY 10016

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

Dear Mr. Hunter:

I have received your letter of August 27. You indicated that you and others are "opposed to the issuance of permits and any zoning or code changes which would allow certain proposed mine and quarrying operations in Saugerties..." In relation to the foregoing, you wrote that the Town of Saugerties Planning Board has "prevented citizens from using video and audio recording devices at [an] open public meeting at which the mine proposal has been on the agenda."

You have sought an advisory opinion "as to whether the Planning Board, or any other government body or committee which hold[s] public meetings at which the proposed mine is discussed has the right to prohibit the use of audiotape or videotape recording." In this regard, I offer the following comments.

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

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

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 the only reported decision on the subject, Peloquin v. Arsenault, 616 NYS2d 716 (1994), 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, the subject matter of a meeting or the possibility that there may be controversy would have no bearing on the capacity to use audio or video recording devices at the meeting. On the contrary, based on judicial decisions, only to the extent that the use those devices is disruptive or obtrusive could a public body prohibit their use.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Planning Board

OMLAO- 3372

From: Robert Freeman
To: [redacted]
Date: 9/26/01 5:09PM
Subject: Re: goal setting workshop

Dear Ms. Simonds:

I have received your inquiry in which you questioned the status of a "goal setting workshop" to be held by the Honeoye Central School District Board of Education immediately following a regular meeting.

In brief, it has been held that any gathering of a majority of the membership of a public body, such as a board of education, for the purpose of conducting public business, constitutes a "meeting" that falls within the coverage of the Open Meetings Law. That is so even if there is no intent to take action, and irrespective of the manner in which the gathering is characterized.

Further, as a member of the Board, you are likely aware that all meetings of the Board are presumptively open to the public. Assuming that the goal setting workshop is a meeting, which appears to be so, it must be conducted open to the public, except to the extent that an executive session may be convened. The grounds for entry into executive session are specified and limited, and if indeed the Board intends to discuss policies and goals, it is unlikely that there would be any basis for conducting an executive session.

To obtain more detailed information, it is suggested that you might review advisory opinions rendered under the Open Meetings Law that are available via our website. You might look for opinions under the following "key phrases": "meeting", "work session" and "retreat". In addition, the text of the Open Meetings Law is available under "publications."

I hope that I have been of assistance.

Robert J. Freeman
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[redacted]

STATE OF NEW YORK
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OML-AO-3373

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October 9, 2001

Donald R. Gerace, 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. Gerace:

I have received your letter of September 6. In your capacity as the attorney for the Oneida-Herkimer-Madison Board of Cooperative Educational Services, you indicated that a member of the Board asked whether voting for officers on the Board should be conducted "by secret ballot, or by a show of hands, i.e., public ballot." You added that the Board follows Roberts Rules of Order, which, according to your letter, "allows for either balloting procedure." You have sought an opinion "as to whether a secret or paper ballot with respect to the election of Board President and Vice President is authorized by the Public Officers Law."

In this regard, first, Roberts Rules of Order do not constitute law, and insofar as such rules are inconsistent with law, I believe that they are superseded.

Second, the Freedom of Information Law, which preceded the passage of the Open Meetings Law, has always included what some have characterized as an "open vote" provision. Section 87(3)(a) provides that:

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

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

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

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

Moreover, in an Appellate Division decision that was affirmed by the Court of Appeals, it was found that "The use of a secret ballot for voting purposes was improper." In so holding, the Court stated that: "When action is taken by formal vote at open or executive sessions, the Freedom of Information Law and the Open Meetings Law both require open voting and a record of the manner in which each member voted [Public Officers Law §87[3][a]; §106[1], [2]" Smithson v. Ilion Housing Authority, 130 AD 2d 965, 967 (1987); aff'd 72 NY 2d 1034 (1988)]. In addition, in a case that dealt specifically with the election of officers, 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).

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-3324

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October 9, 2001

Hon. Cecil M. Miller III
Ward 3 Councilman
Town of Ellicott
[redacted]

The staff of the Committee on 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 Miller:

As you are aware, I have received your letter of September 5 in which you questioned the propriety of an executive session recently held by the Ellicott Town Board to discuss a "personnel issue." You indicated that the subject involved "proposed employment agreements with three non-union Town employees, and that "the session was about the merit of the agreement and the cost to the Town."

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

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

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

Although it is used frequently, the term "personnel" appears nowhere in the Open Meetings Law. Although one of the grounds for entry into executive session often relates to personnel matters,

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

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

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

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

If indeed the discussion dealt with the merits of the agreement and its financial impact on the Town, and if it did not focus on the performance of a "particular person" in terms of whether he or she deserved an increase based on performance, I do not believe that §105(1)(f) would validly have served as a basis for conducting an executive session.

As you suggested in your letter, the provision that makes reference to contract negotiations, §105(1)(e), pertains to "collective negotiations under 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. No union would have been involved in the situation that you described, and §105(1)(e) would have been inapplicable.

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

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

"...the public body must identify the subject matter to be discussed (See, Public Officers Law § 105 [1]), and it is apparent that this must be accomplished with some degree of particularity, i.e., merely reciting the statutory language is insufficient (see, Daily Gazette Co. v Town Bd., Town of Cobleskill, 111 Misc 2d 303, 304-305). Additionally, the topics discussed during the executive session must remain within the exceptions enumerated in the statute (see generally, Matter of Plattsburgh Publ. Co., Div. of Ottaway Newspapers v City of Plattsburgh, 185 AD2d §18), and these exceptions, in turn, 'must be narrowly scrutinized, lest the article's clear mandate be thwarted by thinly veiled references to the areas delineated thereunder' (Weatherwax v Town of Stony Point, 97 AD2d 840, 841, quoting Daily Gazette Co. v Town Bd., Town of Cobleskill, supra, at 304; see, Matter of Orange County Publs., Div. of Ottaway Newspapers v County of Orange, 120 AD2d 596, lv dismissed 68 NY 2d 807).

"Applying these principles to the matter before us, it is apparent that the Board's stated purpose for entering into executive session, to wit, the discussion of a 'personnel issue', does not satisfy the requirements of Public Officers Law § 105 (1) (f). The statute itself requires, with respect to personnel matters, that the discussion involve the 'employment history of a particular person" (id. [emphasis supplied]). Although this does not mandate that the individual in question be identified by name, it does require that any motion to enter into executive session describe with some detail the nature of the proposed discussion (see, State Comm on Open Govt Adv Opn dated Apr. 6, 1993), and we reject respondents' assertion that the Board's reference to a 'personnel issue' is the functional equivalent of identifying 'a particular person'" [Gordon v. Village of Monticello, 620 NY 2d 573, 575; 209 AD 2d 55, 58 (1994)].

In short, the characterization of an issue as a "personnel matter" is inadequate, for it fails to enable the public or even members of the Board to know whether subject at hand may properly be considered during an executive session.

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-3375

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October 30, 2001

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 in which you referred to the requirements concerning notice found in §104 of the Open Meetings Law and questioned whether notices of public hearings must be posted.

In this regard, I note that there is a distinction between a "meeting" and a "hearing". The former involves a gathering of a majority of a public body for the purpose of conducting public business collectively, as a body. As such, meetings are ordinarily held for the purpose of discussion, deliberation, taking action and the like. A "hearing" typically is held to enable members of the public express their views on a particular subject, i.e., a budget, a change in zoning, etc. The notice requirements relating to meetings are prescribed in §104 of the Open Meetings Law, and as you know, that statute requires that every meeting be preceded by the posting of notice of the time and place of a meeting. I am unaware, however, of any general requirement that notices of hearings be posted. Similarly, there are no general provisions of which I am aware that deal with hearings, and different statutes impose different requirements. For example, while boards of education, town boards and village boards of trustees must hold hearings prior to the adoption of their budgets, those requirements are separately imposed, respectively in the Education Law, the Town Law, and the Village Law; each of those statutes is unique.

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
Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3376

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November 1, 2001

Mr. Michael Doyle
[redacted]

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

Dear Mr. Doyle:

As you are aware, I have received your letter in which you requested an advisory opinion concerning the propriety of an executive session held by the Penfield Board of Education. According to your letter, although the Board cited "personnel issues" as the basis for entry into executive session, no "formal motion or vote" was made or taken to do so. You added that, [d]uring this session, they discussed the matter of School District policy on Field Trips, and voted to allow the Superintendent to change said policy..."

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

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

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

Second, although it is used frequently, the term "personnel" appears nowhere in the Open Meetings Law. Although one of the grounds for entry into executive session often relates to

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

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

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

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

In my view, a discussion held to discuss policy relative to field trips would not fall within the scope of §105(1)(f). In short, consideration of an issue of that nature would apparently not focus on a "particular person" in relation to the topics listed in §105(1)(f).

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

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

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

> Matter of Plattsburgh Publ. Co., Div. of Ottaway Newspapers v City of Plattsburgh, 185 AD2d §18), and these exceptions, in turn, 'must be narrowly scrutinized, lest the article's clear mandate be thwarted by thinly veiled references to the areas delineated thereunder' (Weatherwax v Town of Stony Point, 97 AD2d 840, 841, quoting Daily Gazette Co. v Town Bd., Town of Cobleskill, supra, at 304; see, Matter of Orange County Publs., Div. of Ottaway Newspapers v County of Orange, 120 AD2d 596, lv dismissed 68 NY 2d 807).
>
> "Applying these principles to the matter before us, it is apparent that the Board's stated purpose for entering into executive session, to wit, the discussion of a 'personnel issue', does not satisfy the requirements of Public Officers Law § 105 (1) (f). The statute itself requires, with respect to personnel matters, that the discussion involve the 'employment history of a particular person" (id. [emphasis supplied]). Although this does not mandate that the individual in question be identified by name, it does require that any motion to enter into executive session describe with some detail the nature of the proposed discussion (see, State Comm on Open Govt Adv Opn dated Apr. 6, 1993), and we reject respondents' assertion that the Board's reference to a 'personnel issue' is the functional equivalent of identifying 'a particular person'" [Gordon v. Village of Monticello, 620 NY 2d 573, 575; 209 AD 2d 55, 58 (1994)].

In short, the characterization of an issue as a "personnel matter" is inadequate, for it fails to enable the public or even members of the Board to know whether subject at hand may properly be considered during an executive session.

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

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

OML-AO-3377

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November 1, 2001

Mrs. W.R. Powell
[redacted]

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

Dear Mrs. Powell:

I have received your letter concerning the validity of the "acceptance" of minutes by the Roosevelt Board of Education. Three of those who voted to accept the minutes were not members of the Board when the meetings relating to the minutes in question were held.

In this regard, first, I know of no provision that would preclude a new member of a public body, such as a board of education, from casting a vote in relation to matters heard or occurring before he or she became a member.

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

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

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

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

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.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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November 1, 2001

Mr. John Wolcott
[redacted]

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

Dear Mr. Wolcott:

I have received your letter of October 11 in which you questioned the propriety of a rule apparently adopted by the City of Troy Zoning Board of Appeals "banning non-residents from speaking" at meetings. You added that those wishing to speak must provide their names and addresses, and that you believe that the rules in question "violated freedom of speech."

You have sought my views on the matter, and in this regard, I offer the following comments.

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

In the case of the New York Open Meetings Law, in a statement of general principle and intent, that statute confers upon the public the right to attend meetings of public bodies, to listen to their deliberations and observe the performance of public officials. However, as you are aware, that right is limited, for public bodies in appropriate circumstances may enter into closed or executive sessions. As such, it is reiterated that, in my opinion, there is no constitutional right to attend meetings.

Within the language of the Open Meetings Law, there is nothing that pertains to the right of those in attendance to speak or otherwise participate. Certainly a member of the public may speak or express opinions about meetings or about the conduct of public business before or after meetings to other persons. However, since neither the Open Meetings Law nor any other provision of which

I am aware provides the public with the right to speak during meetings, I do not believe that a public body is required to permit the public to do so during meetings. As suggested in earlier opinions, a public body may in my view permit the public to speak, and if it does so, it has been suggested that rules and procedures be developed that regarding the privilege to speak that are reasonable and that treat members of the public equally.

Although 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 rules prohibited the use of tape recorders at its meetings, the Appellate Division found that the rule was unreasonable, stating that the authority to adopt rules "is not unbridled" and that "unreasonable rules will not be sanctioned" [see Mitchell v. Garden City Union Free School District, 113 AD 2d 924, 925 (1985)]. Similarly, if by rule, a public body chose to permit certain citizens to address it for ten minutes while permitting others to address it for three, or not at all, such a rule, in my view, would be unreasonable.

I note that §103 of the Open Meetings Law provides that meetings of public bodies are open to the "general public." As such, any member of the public, whether a resident of the City or of another jurisdiction, would have the same right to attend. That being so, I do not believe that a member of the public can be required to identify himself or herself by name or by residence in order to attend a meeting of a public body. Since any person can attend, I do not believe that a public body could by rule limit the ability to speak to residents only. There are many instances in which people other than residents, such as those who may own commercial property or conduct business and who pay taxes within a given community, attend meetings and have a significant interest in the operation of a municipality. Further, viewing the matter from a different perspective, there are situations in which persons may reasonably object to disclosing their home addresses, such as parents of children or perhaps senior citizens or persons with disabilities.

In short, I do not believe that the Board could validly have prohibited you or anyone else from speaking at its meeting based upon residency.

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

OML-AO-3379

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November 1, 2001

Mr. Joseph W. Vogt
[redacted]

The staff of the Committee 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. Vogt:

As you are aware, I have received your letter of October 5. Please accept my apologies for the delay in response, which is due in part to a substantial backlog of requests for advisory opinions. As a matter of policy, inquiries are generally answered in the order in which they are received.

You referred to a meeting held on June 28 by the Little Falls Urban Renewal Agency and its failure to approve a motion to enter into an executive session to discuss "business with a loan recipient." It is your view that the Agency was "violating" the Open Meetings Law.

I note that I have also received a copy of a letter sent to you by the regional office of HUD that appears to pertain to the same meeting. The Director of the Community Planning and Development Division wrote that:

> "It is our conclusion that the session was not an official meeting of the Urban Renewal Agency. This was an informal gathering of some Agency personnel to discuss the finances of a Little Falls loan recipient whose private finances are not a matter for public disclosure. The Urban Renewal Agency acted appropriately in protecting the citizen's privacy. This session has nothing to do with the formal Urban Renewal Agency meeting that ensued afterwards. For convenience the persons involved decided to meet right before the official meeting. This meeting was not in violation of any HUD regulation. Therefore this Office considers the matter closed."

In this regard, the initial issue involves whether the Open Meetings Law would have been applicable. As you are likely aware, that statute pertains to meetings of public bodies. Based on §102(1), a "meeting" is a gathering of a majority of a public body for the purpose of conducting public business. Section 102(2) defines the phrase "public body" to mean:

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

In the context of the situation at issue, the "public body" would be the governing body of the Agency, its board. If indeed a majority of the board convened to discuss or conduct matters within the scope of its duties, I believe that the gathering would have constituted a "meeting" subject to the requirements of the Open Meetings Law.

If, on the other hand, the gathering involved "Agency personnel", and if a majority of the Agency's governing body was not present, the Open Meetings Law would not have applied.

When a gathering is a meeting subject to the Open Meetings Law, 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.

Since the discussion in question involved a loan recipient, it is possible that there may have been a basis for entry into executive session. Section 105(1)(f) of the Open Meetings Law 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..."

Based on the foregoing, if the gathering was a "meeting", insofar as the discussion involved the "financial, credit or employment history of a particular person or corporation", I believe that there would have been a valid basis for conducting an executive session.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Little Falls Urban Renewal Agency
Michael F. Merrill

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13042
OML-AO-3380

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November 2, 2001

Ms. Elizabeth Kalil
[redacted]

The staff of the Committee on 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. Kalil:

As you are aware, I have received your letter and a variety of materials relating to your efforts in gaining access to records from the Utica School District. You have sought my views and advice concerning the issues raised in the correspondence. My comments will focus on applicable law rather than the specifics of the information that you provided, and in most instances, they will be general. Further, to attempt to enhance compliance with and understanding of the issues, copies of this response will be forwarded to District officials.

With respect to procedures and the timeliness of responses to requests for records, it is noted at the outset that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests and appeals. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. 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)].

Since you referred to certifying copies of records, §89(3) of the Freedom of Information Law states in relevant part that, in response to a request for a record, "the entity shall provide a copy of such record and certify to the correctness of such copy if so requested..." From my perspective, the certification required by the Freedom of Information Law does not involve an assertion that the contents of a record are accurate, but rather that a copy of a record made available in response to a request is a true copy. In essence, the certification is supposed to signify that the applicant received an actual copy of a record maintained by an agency, irrespective of the accuracy or the "factuality" of the contents of the record. There is no requirement in the law that the signature of the person who certifies that a copy of a record is a true copy be notarized.

Before considering rights of access to records, I note that the Freedom of Information Law pertains to existing records, and that §89(3) provides that an agency need not create a record in response to a request for information or supply answers to questions. For instance, in one request, you sought information indicating "proof of posting." If such a record exists, I believe that it would be accessible. If, however, no record containing the information sought exists, the District would not be obliged to prepare a new record containing proof of posting.

An exception to the general rule that an agency need not create a record to comply with the Freedom of Information Law relates to one of the areas of your concern. Specifically, §87(3) of the Freedom of Information Law states in relevant part that:

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

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

It has been suggested that the records retention and disposal schedules developed by the State Archives and Records Administration at the State Education Department may be used as a substitute for the subject matter list. It is suggested that you ask to review the retention schedule applicable to the District. Alternatively, you could request a copy of the schedule from the State Archives and Records Administration by calling (518)474-6926.

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 an agency's authority to withhold "records or portions thereof" that fall within the grounds for denial that follow. The phrase quoted

in the preceding sentences indicates that a single record or report may be available or deniable in whole or in part, and that an agency is required to review the contents of records in their entirety to determine which portions, if any, may justifiably be withheld.

Since you requested records concerning events relating to a student, relevant is the initial ground for denial, §87(2)(a), which pertains to records that are "specifically exempted from disclosure by state or federal statute." Insofar as disclosure of the records sought would or could identify a student or students, I believe that they must be withheld. A statute that exempts records from disclosure is the Family Education Rights and Privacy Act (20 U.S.C. section 1232g), which is commonly known as "FERPA." In brief, FERPA applies to all educational agencies or institutions that participate in grant or loan programs administered by the United States Department of Education. As such, FERPA includes within its scope virtually all public educational institutions and many private educational institutions. The focal point of the Act is the protection of privacy of students. It provides, in general, that any "education record," a term that is broadly defined, that is personally identifiable to a particular student or students is confidential, unless the parents of students under the age of eighteen waive their right to confidentiality, or unless a student eighteen years or over similarly waives his or her right to confidentiality. Further, the federal regulations promulgated under FERPA define the phrase "personally identifiable information" to include:

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

Based upon the foregoing, references to students' names or other aspects of records that would make a student's identity easily traceable must in my view be withheld in order to comply with federal law.

In a related vein, some aspects of the materials involve records that deal with a particular individual in relation to her status as a foreign national. While I am unfamiliar with the substance of those records, insofar as they include information of a personal or intimate nature, particularly items relating to her nationality or immigration status, it is likely that they may be withheld pursuant to §87(2)(b) and/or §89(2)(b) on the ground that disclosure would constitute "an unwarranted invasion of personal privacy."

You also referred to delays in the disclosure of minutes of meetings of the Board of Education and minutes of executive sessions. Here I direct your attention to §106 of the Open Meetings Law which 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." It is also clear that minutes not consist of a verbatim account of what is said at a 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.

I point out that 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 §106(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 records identifiable to students may be withheld, minutes containing information of that nature would not be accessible to the public.

Also in relation to the Open Meetings Law, you referred to executive sessions held to discuss "personnel." In this regard, by way of background, the Open Meetings Law is based upon a presumption of openness. Stated differently, meetings of public bodies must be conducted open to the public, unless there is a basis for entry into executive session. Moreover, the Law requires that

a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, §105(1) states in relevant part that:

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

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

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

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

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

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

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

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

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

It has been advised that a motion describing the subject to be discussed as "personnel" or "specific personnel matters" is inadequate, and that the motion should be based upon the specific language of §105(1)(f). For instance, a proper motion might be: "I move to enter into an executive session to discuss the employment history of a particular person (or persons)". Such a motion would not in my opinion have to identify the person or persons who may be the subject of a discussion. By

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

It is noted that the Appellate Division 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:

> "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; 267 AD 2d 55 (1994)].

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
David Bruno
Donald Gerace

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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OML-AO-3381

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December 6, 2001

Mr. Anthony R. Gray
[redacted]

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. Gray:

I have received your letter in which you sought an advisory opinion concerning a denial of access to certain meetings the Board of the University Auxiliary Services Corporation("UAS"). UAS is a not-for-profit corporation that contracts with SUNY/Albany to carry out a variety of functions "in furtherance of the educational goals of the University," according to UAS tax forms, including the operation of the food service, the campus bookstore and beverage vending. You indicated that "UAS by-laws require not less than one-third, nor more than one-half, of the board members be students of the University [and] the remainder is faculty and administrators of the University at Albany." You added that you were informed that a "meal plan rate increase was approved" at a meeting of the UAS Board from which you and others were "ordered to leave." You also wrote that the executive director of UAS "maintains that the UAS is a private organization that is subject to neither the Freedom of Information Law nor the Open Meetings Law."

From my perspective, based on judicial decisions, UAS is required to comply with both of those statutes. In this regard, I offer the following comments.

First, even if UAS has no independent responsibility to comply with the Freedom of Information Law, I believe that its records fall within the coverage of that statute.

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."

While the status of UAS as an "agency" has not been determined judicially, it is clear that the State University is an "agency" required to comply with the Freedom of Information Law.

In this regard, §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, the Court of Appeals, the state's highest court, found that documents maintained by the Auxiliary Services Corporation, a not-for-profit corporation providing services for a different branch of the State University, were kept on behalf of the University and constituted agency "records" falling within 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. Auxillary Services Corporation of the State University of New York at Farmingdale, 87 NY 2d 410, 417 (1995)]. Therefore, if a document is produced for an agency, it constitutes an agency record, even if it is not in the physical possession of the agency. In the context of the situation that you described, irrespective of whether UAS is an "agency", its records would be maintained for the University at Albany and would, based on Encore, constitute agency records subject to the Freedom of Information Law.

Second, while profit or not-for-profit corporations would not in most instances be subject to the Freedom of Information Law because they are not governmental entities, there are several judicial determinations in which it was held that certain not-for-profit corporations, due to their functions and the nature of their relationship with government, are "agencies" that fall within the scope of the Freedom of Information Law.

In the first decision in which it was held that a not-for-profit corporation may indeed be an "agency" required to comply with the Freedom of Information Law, [Westchester-Rockland Newspapers v. Kimball [50 NYS 2d 575 (1980)], a case involving access to records relating to a lottery conducted by a volunteer fire company, the Court of Appeals found that volunteer fire companies, despite their status as not-for-profit corporations, are "agencies" subject to the Freedom of Information Law. In so holding, the State's highest court stated that:

> "We begin by rejecting respondent's contention that, in applying the Freedom of Information Law, a distinction is to be made between a volunteer organization on which a local government relies for performance of an essential public service, as is true of the fire department here, and on the other hand, an organic arm of government, when that is the channel through which such services are delivered. Key is the Legislature's own unmistakably broad

> declaration that, '[a]s state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (emphasis added; Public Officers Law, §84).
>
> For the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objections cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" (id. at 579].

In the same decision, the Court noted that:

> "...not only are the expanding boundaries of governmental activity increasingly difficult to draw, but in perception, if not in actuality, there is bound to be considerable crossover between governmental and nongovernmental activities, especially where both are carried on by the same person or persons" (id., 581).

In Buffalo News v. Buffalo Enterprise Development Corporation [84 NY 2d 488 (1994)], the Court of Appeals found again that a not-for-profit corporation, based on its relationship to an agency, was itself an agency subject to the Freedom of Information Law. The decision indicates that:

> "The BEDC principally pegs its argument for nondisclosure on the feature that an entity qualifies as an 'agency' only if there is substantial governmental control over its daily operations (see, e.g., Irwin Mem. Blood Bank of San Francisco Med. Socy. v American Natl. Red Cross, 640 F2d 1051; Rocap v Indiek, 519 F2d 174). The Buffalo News counters by arguing that the City of Buffalo is 'inextricably involved in the core planning and execution of the agency's [BEDC] program'; thus, the BEDC is a 'governmental entity' performing a governmental function for the City of Buffalo, within the statutory definition.
>
> "The BEDC's purpose is undeniably governmental. It was created exclusively by and for the City of Buffalo...In sum, the constricted construction urged by appellant BEDC would contradict the expansive public policy dictates underpinning FOIL. Thus, we reject appellant's arguments," (id., 492-493).

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

> "At issue is whether the Kingsborough Community College Foundation, Inc (hereinafter 'Foundation') comes within the definition of an 'agency' as defined in Public Officers Law §86(3) and whether the Foundation's fund collection and expenditure records are 'records' within the meaning and contemplation of Public Officers Law §86(4).
>
> "The Foundation is a not-for-profit corporation that was formed to 'promote interest in and support of the college in the local community and among students, faculty and alumni of the college' (Respondent's Verified Answer at paragraph 17). These purposes are further amplified in the statement of 'principal objectives' in the Foundation's Certificate of Incorporation:
>
> > '1 To promote and encourage among members of the local and college community and alumni or interest in and support of Kingsborough Community College and the various educational, cultural and social activities conducted by it and serve as a medium for encouraging fuller understanding of the aims and functions of the college'.
>
> "Furthermore, the Board of Trustees of the City University, by resolution, authorized the formation of the Foundation. The activities of the Foundation, enumerated in the Verified Petition at paragraph 11, amply demonstrate that the Foundation is providing services that are exclusively in the college's interest and essentially in the name of the College. Indeed, the Foundation would not exist but for its relationship with the College" (Eisenberg v. Goldstein, Supreme Court, Kings County, February 26, 1988).

As in the case of the foundation in Eisenberg, that entity, and, in this instance, the UAS, would not exist but for their relationships with CUNY and SUNY respectively. Due to the similarity between the situation you have described and that presented in Eisenberg, as well as the functions of the UAS and its relationship to the University, I believe that it is subject to the Freedom of Information Law.

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

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

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

By breaking the definition into components, I believe that each condition necessary to a finding that the board of UAS is a "public body" may be met. It is an entity for which a quorum is required pursuant to the provisions of the Not-for-Profit Corporation Law. It consists of more than two members. In view of the degree of governmental control exercised by and its nexus with the University at Albany, I believe that it conducts public business and performs a governmental function for a governmental entity.

In Smith v. City University of New York [92 NY2d 707 (1999)], the Court of Appeals held that a student government association carried out various governmental functions on behalf of CUNY and, therefore, that its governing body is subject to the Open Meetings Law. In its consideration of the matter, the Court found that:

> "in determining whether the entity is a public body, various criteria or benchmarks are material. They include the authority under which the entity is created, the power distribution or sharing model under which it exists, the nature of its role, the power it possesses and under which it purports to act, and a realistic appraisal of its functional relationship to affected parties and constituencies" (id., 713).

In consideration of those criteria and applying them to the matter at hand, the UAS would not exist but for its relationship with the University; it carries out a variety of functions that the University would otherwise perform; the University has substantial control over the UAS board in the terms of membership. Further, one of the actions to which you referred, increasing the cost of the meal plan, involves the assertion of authority that could be exercised only by or on behalf of the University.

Based on the foregoing, I believe that the UAS board is a "public body" required to comply with the Open Meetings Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt
cc: Julia Filippone, Executive Director UAS
Wendy Kowalczyk

OML-AO-3382

From: Robert Freeman
To: [redacted]
Date: 12/7/01 4:42PM
Subject: Dear Mr. McKay:

Dear Mr. McKay:

I have received your inquiry concerning an executive session and your ability to disclosed what occurred during that session.

In this regard, the issue involved "benefits...for the elected council. ." If the discussion involved benefits for all council members or others within a class of officers or employees, I do not believe that there would have been any basis for conducting an executive session. The provision of significance, section 105(1)(f), permits a board 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 matter did not focus on a "particular person" in conjuntion with one of the topics listed in the provision quoted above, that provision would not have served as a basis for conducting an executive session.

Second, in general, I do not believe that a person present during an executive session is prohibited from disclosing what is said or heard during the executive session. Whether it is always good, wise or ethical to do so is a different matter.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
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December 10, 2001

Mr. Jerry J. Mastan, Sr.
[redacted]

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

Dear Mr. Mastan:

As you are aware, I have received your letter concerning the propriety of a meeting held by members of the Watervliet Board of Education, which you serve as president.

You wrote that the Board consists of five members, and as I understand the matter, three members conducted a meeting on October 16; you and another member were absent. During the course of the meeting the Board took action on several issues, but the vote on two matters was two in favor, none opposed, and one abstention. By the same vote, "a special emergency meeting" was scheduled for the next morning at 9 a.m., and you were contacted by phone and informed of the meeting at 7:30 a.m. on that morning. If my recollection is correct, you indicated by phone that the Board adopted Robert's Rules of Procedure.

If I understand the facts correctly, the votes of two in favor, none opposed and one abstention would not have been approved and the result would have been that no action was taken. Further, the meeting at 9 a.m. on October 17 would not have validly been held. In this regard, I offer the following comments.

First, Robert's Rules do not represent the law of this state, and insofar as those rules may be inconsistent with law, I believe that they would be superseded.

Second, 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 Board of Education is clearly a public body, and a quorum must convene for a public body to conduct public business.

Third, the term "quorum" is defined in §41 of the General Construction Law, which has been in effect since 1909. The cited provision states that:

> "Whenever three or more public officers are given any power or authority, or three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of the whole number of such persons or officers, 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 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 five members, three affirmative votes would be needed to approve a motion, even if as few as three 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 validly taken.

In sum, I believe that the Board 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.

Lastly, with respect to notice of the 9 a.m. meeting, I point out that the Education Law, §1606(3), states that "A meeting of the board may be ordered by any member thereof, by giving not less than twenty-four hours' notice of the same." Based on your rendition of the facts, that requirement was not met.

Additionally, while there is nothing in the Open Meetings Law that directly addresses the matter of notice of special meetings, that statute requires that notice be posted and given to the news media prior to every meeting of a public body. Specifically, §104 of that statute provides that:

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

> conspicuously posted in one or more designated public locations at a reasonable time prior thereto.
>
> 3. The public notice provided for by this section shall not be construed to require publication as a legal notice."

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

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

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
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December 11, 2001

Mr. Michael J. Derevlany
[redacted]

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

Dear Mr. Derevlany:

I have received your letter in which you sought guidance "as to access to records and meetings of semi-autonomous governmental agencies such as those set up by statute that may not or do not report to the executive branch or any other (higher) agency or other authority."

In this regard, the coverage of both the Freedom of Information and Open Meetings Law is expansive, and if I understand your inquiry correctly, the entities to which you referred would be subject to those statutes. The former applies 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."

Based on the foregoing, any governmental entity performing a governmental function constitutes an "agency" that falls within the coverage of the Freedom of Information Law.

Similarly, 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 consisting of two or more members is a creation of law and has decision making authority, or if performs a necessary function in the decision making process, I believe that it would constitute a "public body" required to comply with the Open Meetings Law.

Typical of a "semi-autonomous" or what some have characterized as a "quasi-governmental" agency would be an industrial development agency. The provisions concerning industrial development agencies are found in Article 18-A of the General Municipal Law, and §856(2) of the General Municipal Law states in part that an industrial development agency "shall be a corporate governmental agency, constituting a public benefit corporation". A public benefit corporation is a "public corporation" as that term is defined by §66(1) of the General Construction Law. Further, §856(3) of the General Municipal Law states that a majority of the members of an industrial development agency "shall constitute a quorum".

Based upon the foregoing, it is clear in my view that the members of an industrial development agency constitute a "public body" subject to the Open Meetings Law, for they perform a governmental function for a public corporation. Based on the language of the General Municipal Law, an industrial development agency clearly is a governmental entity performing a governmental function that is required to give effect to the Freedom of Information Law.

If you or your client may have questions concerning a particular entity, and if the foregoing does not provide a clear conclusion, please feel free to contact me.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

OML-AO-3385

From: Robert Freeman
To: [redacted]
Date: 12/11/01 8:13AM
Subject: Re: a question

Dear Ms. Dustin:

I have received your inquiry concerning the ability to discuss grievances during executive sessions.

By way of background, section 105(1) of the Open Meetings Law specifies and limits the grounds for conducting executive sessions. Unless one or more of the grounds can properly be asserted, there would be no basis for entry into executive session.

The term "grievance" appears nowhere in the Open Meetings Law, and the subject of the grievance is the factor that determines whether or the extent to which an executive session may properly be held. Typically, the only ground for entry into executive session that is pertinent to consideration of grievances is section 105(1)(f), which permits a public body, such as the school board, to conduct an executive session to discuss: "the medical, financial, credit or employment history of a particular person or corporation or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation." If, for example, the grievance involves air quality in a classroom and a teacher's asthmatic condition, the matter would pertain to "the medical history of a particular person", and, to that extent, there clearly would be basis for conducting an executive session. On the other hand, if the grievance involves the bells going off two minutes after the period should have ended, there would be no basis for conducting an executive session.

It is suggested that you might review materials available on our website (the address is below), which include the Open Meetings Law, frequently asked questions, advisory opinions, a general guide to the Law entitled "Your Right to Know" and a variety of other information.

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

Bob Freeman

[redacted]

Robert J. Freeman
Executive Director
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December 19, 2001

Mr. Michael McGuire
[redacted]

The staff of the Committee on Open 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 in which you raised questions concerning the implementation of the Freedom of Information and Open Meetings Laws in the Village of Tuckahoe.

The initial area of inquiry involves a member of the Board of Trustees "actively participating" in a meeting of the Planning Board. The same question was recently raised by a Trustee, and my response to you reiterates that given to the Trustee. Specifically, there is nothing in the Open Meetings Law or any other statute of which I am aware that addresses the matter. However, I note that the Board of Trustees, the Zoning Board of Appeals and the Planning Board are each distinct public bodies with distinct membership, and a member of one such board does not serve as a member of the others.

On occasion, a governing body, such as a board of trustees, designates one of its members to serve as liaison with other entities within the municipality. In that circumstance, it would not be unusual for the liaison to "sit" with the board. Nevertheless, I believe that a determination of the matter falls within the jurisdiction, in this instance, of the Board of Trustees. If there is currently no rule or policy regarding the issue, you might consider offering a recommendation to clarify any controversy that might now exist.

The next question relates to a limitation on the hours during which records are available for inspection. In this regard, it has been advised by this office and held judicially that an agency cannot limit the ability of the public to inspect records to a period less than its regular business hours. 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 implementation of the Law (see 21 NYCRR Part 1401). In turn, §87 (1) requires agencies to adopt rules and regulations consistent with the Law and the Committee's regulations.

Section 1401.2 of the regulations, provides in relevant part that:

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

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

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

Relevant to the matter is a decision rendered by the Appellate Division, Second Department. Among the issues was the validity of a limitation regarding the time permitted to inspect records established by a village pursuant to regulation. The Court held that the village was required to enable the public to inspect records during its regular business hours, stating in part that:

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

Based on the foregoing, the Village, in my view, cannot limit the ability to inspect records to a period less than its regular business hours. I do not believe, however, that a member of the public may designate the date or dates on which he or she seeks to review records. If, for instance, records will be in use by staff on a particular date or during a particular period of time, an agency would not, in my view, be required to alter its schedule or work plan. In that instance, the agency could offer a series of dates to the person seeking to inspect the records in order that he or she could choose a date suitable to both parties. Similarly, if a request involves a variety of items, while the applicant may ask that certain records be made available sooner than others, I do not believe that he or she can require an agency to make records available in a certain order.

Lastly, having requested copies of records, you were informed that the Village "is not required to search for records." You noted that the request involved permits relating to a "driveway located at the corner of Lake Avenue and Cedar Street." By way of historical background, when the

Freedom of Information Law 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.

While I am unfamiliar with the record keeping systems of the Village, to the 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. In Ruberti, Girvin & Ferlazzo v. Division of State Police [218 AD2d 494, 641 NYS2d 411 (1996)], one element of the decision pertained to a request for a certain group of personnel records, and the agency argued that it was not required to search its files for those requested "because such records do not exist in a 'central file' and, further, that FOIL does not require that it review every litigation or personnel file in search of such information" (id., 415). Nevertheless, citing Konigsberg, the court determined that:

> "Although the record before this court contains conflicting proof regarding the nature of the files actually maintained by respondent in this regard, an agency seeking to avoid disclosure cannot, as respondent essentially has done here, evade the broad disclosure

> provisions FOIL by merely asserting that compliance could potentially require the review of hundreds of records" (id.).

If the Village can locate the records sought with a reasonable effort analogous to that described above, i.e., even if a search involves the review of hundreds of records, it apparently would be obliged to do so. As indicated in Konigsberg, only if it can be established that the Village maintains its records in a manner that renders its staff unable to locate and identify the records would the request have failed to meet the standard of reasonably describing the records.

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
Village Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 20, 2001

E-Mail

TO: John Solak

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. Solak:

I have received your letter in which you asked whether gatherings of "focus groups conducted by paid consultants for school boards and local government [are] public meetings."

From my perspective, the Open Meetings Law would not be applicable to the events of your interest. 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, in general, the Open Meetings Law applies to entities consisting of two or more members who are elected or designated by law to carry out a governmental function collectively, as a body. Examples would be boards of education, town boards, village boards of trustees, city councils and the like. Focus groups consisting of members of the public who have no authority take final and binding action would not constitute public bodies, and the Open Meetings Law would not be implicated.

Notwithstanding the foregoing, it is possible that records relating to focus groups would be subject to the Freedom of Information Law, which deals with public access to government records. That law applies 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."

Therefore, if, for example, records are prepared by a consultant *for* an agency, such as a school district or a municipality, they would constitute agency records that fall within the coverage of the Freedom of Information Law.

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. It is noted that statistical or factual information prepared by an agency or for an agency by a consultant would typically be available.

The text of the Freedom of Information and Open Meetings Laws, as well as a variety of related material, is available on our website.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
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December 26, 2001

EMAIL

TO: Angela Marshall [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 Ms. Marshall:

As you are aware, I have received your letter in which you raised questions concerning the ability of the Board of the Rockville Centre Housing Authority to enter into executive session to consider "an architect/engineer's report on renovations for the authority." You also questioned the ability of the Board to restrict the public's opportunity to speak at meetings.

In this regard, I offer the following comments.

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

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

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

As the foregoing pertains to your question, it is possible that some, but not all, elements of the discussion could validly be considered behind closed doors; only to the extent that a discussion falls within one or more of the grounds for conducting an executive session may an executive session be properly held.

Second, in consideration of the subject of the discussion, I note that while certain matters relating to contracts or contract negotiations may be conducted or discussed in executive session, not all such matters fall within the grounds for entry into executive session. The only provision that pertains specifically to contract negotiations, §105(1)(e), deals with collective bargaining negotiations between a public employer and a public employee union under Article 14 of the Civil Service Law. Based on your description of the subject, §105(1)(e) would not serve as a basis for entry into executive session.

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

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

In some instances, a public body's discussion might focus on the kinds of topics described in the provision quoted above in relation to a particular corporation. To the extent that a discussion involves such matters, I believe that an executive session could properly be held. Conversely, if the discussion does not involve the topics described in §105(1)(f) or any other ground for entry into executive session, I believe that the Board's discussion should occur in public.

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

RJF:tt

cc: Rockville Centre Housing Authority

STATE OF NEW YORK
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December 26, 2001

E-MAIL

TO: Kimberly Wilder <[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 Ms. Wilder:

I have received your letter in which you raised issues relating to the adoption of a budget by the Babylon Town Board. You contend that the Open Meetings Law "was probably violated" and asked that I "fix the situation" and nullify the budget.

It is emphasized at the outset that the Committee on Open Government is authorized to provide advice and opinions concerning the Open Meetings Law. Neither the Committee nor its staff is empowered to render a final and binding determination, nullify action taken by a governmental entity or compel an entity to comply with law.

In brief, the matter involves the replacement of a budget proposal with a new proposal in a short period of time, and the quick adoption of that proposal by the Board. You wrote that "[s]ince the real budget was laid on council people's desks sometime after 4:00 PM the day before the 10:00 AM vote", three named Board members voted with only a few hours to review it, they had "an illegal meeting" to consult on the budget without input from the loan Republican" member, or the three "blindly voted 'yes' on the budget."

In this regard, while I am unaware of the reality of the matter, I offer the following general comments concerning the application of the Open Meetings Law.

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

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

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

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

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

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

Second, the Open Meetings Law provides two vehicles under which members of 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.

Lastly, while I agree that the matter as you presented it does not "bode well for democracy in the town of Babylon", the Open Meetings Law does not appear to provide a mechanism for nullifying the action to which you referred.

I regret that I cannot be of greater assistance.

RJF:tt

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

OML-AO-3390

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December 26, 2001

Ms. Muriel Hill Albright
[redacted]

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. Albright:

I have received your letter of November 28 in which you sought an advisory opinion concerning the status of the "Soccer Complex Advisory Committee" ("SCAC"), which you described as "a government-chartered and taxpayer-funded organization."

More specifically, you wrote that the SCAC:

> "...consisted of elected officials including members of the County Legislature, soccer officials, representatives of the Rochester-area soccer community, County staff (who were, upon information and belief, paid by taxpayers to attend as part of their regular taxpayers funded duties) and other interested parties. The members of the County Legislature included five members of the Monroe County Legislature, the director of the County's Youth Bureau and a Town Supervisor. The SCAC was staffed by employees of the County, who were paid by taxpayers for the services rendered to the SCAC."

Based on several judicial decisions, it appears that the SCAC would not be required to comply with the Open Meetings Law. In this regard, I offer the following comments.

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

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

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

Based on the foregoing, a public body is, in my view, an entity required to conduct public business by means of a quorum that performs a governmental function and carries out its duties collectively, as a body. In order to constitute a "meeting" subject to the Open Meetings Law, a majority of the total membership of a public body, a quorum, must be present for the purpose of conducting public business. I note, too, that the definition refers to committees, subcommittees and similar bodies of a public body. Based on judicial interpretations, if a committee, for example, consists *solely* of members of a particular public body, it, too, would constitute a public body. For instance, in the case of a county legislature consisting of seventeen members, nine 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 entity designates a committee consisting of five of its members, the committee would itself be a public body; its quorum would be three, and a gathering of three or more, in their capacities as members of that committee, would constitute 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 SCAC includes 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 the County. If those assumptions are accurate, the SCAC, in my view, would not constitute a public body and, therefore, would not be obliged to comply with the Open Meetings Law.

It is also noted that the earliest decision cited above, New York Public Interest Research Group, supra, involved a commission created by means of a gubernatorial executive order that involved funding and the resources of state agencies. Notwithstanding the support of or reliance on

government resources, the court held that the commission did not constitute a "public body" because it had no authority to take action on behalf of the state or an agency of the state.

The foregoing is not intended to suggest that an advisory body 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:tt

cc: Hon. John D. Doyle

STATE OF NEW YORK
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December 26, 2001

Hon. David H. Knight
Town Councilman
Town of Lockport
[redacted]

The staff of the Committee on 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 Knight:

I have received your letter and the documentation attached to it. You have questioned the propriety of executive sessions recommended by your town attorney "for the purpose of counciling [sic], regarding procedural issues requiring attorney/client confidentiality with the board", as well as the ability of the Zoning Board of Appeals to deliberate in private. You also referred to minutes of an executive session held at the end of October that had not been "filed" as of the date of your letter to this office.

In this regard, I offer the following comments.

First, I do not believe that an executive session may be held to enable the attorney to counsel the Board. However, there is another means by which legal advice may be given to the Board in private.

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

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

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

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

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

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

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

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

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

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

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

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

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

> "While there is no question that Executive Sessions can be conducted for proper reasons and that an exception exists under the Open Meetings Law for attorney-client privileged communications, the scope of that privilege is limited. Once the legal advice is offered, discussions with regard to substance (e.g.) the closing date of a bus system, do not fall within the privilege of the exception. See Exhibit C, April 8, 1996 Open Meetings Law Advisory Opinion #2595, Robert J. Freeman, Executive Director of Committee on Open government at page 4:
>
> > "I note that the mere presence of an attorney does not signify the existence of an attorney-client relationship; in order to assert the attorney-client privilege, the attorney must in my view be providing services in which the expertise of an attorney is needed and sought. Further, if at some point in a discussion, the attorney stops giving legal advice and a public body may begin discussing or deliberating independent of the attorney. When that point is reached, I believe

> that the attorney-client privilege has ended and that the body should return to an open meeting."

Second, in general, the deliberations of a zoning board of appeals must be conducted in public. By way of background, numerous problems and conflicting interpretations arose under the Open Meetings Law as originally enacted with respect to the deliberations of zoning boards of appeals. In §108(1), the Law had exempted from its coverage "quasi-judicial proceedings". When a zoning board of appeals deliberated toward a decision, its deliberations were often considered "quasi-judicial" and, therefore, outside the requirements of the Open Meetings Law. As such, those deliberations could be conducted in private. Nevertheless, in 1983, the Open Meetings Law was amended. In brief, the amendment to the Law indicates that the exemption regarding quasi-judicial proceedings may not be asserted by a zoning board of appeals. As a consequence, zoning boards of appeals are required to conduct their meetings pursuant to the same requirements as other public bodies subject to the Open Meetings Law.

Due to the amendment, a zoning board of appeals must deliberate in public, except to the extent that a topic may justifiably be considered during an executive session or in conjunction with an exemption other than §108(1). As indicated earlier, paragraphs (a) through (h) of §105(1) of the Open Meetings Law specify and limit the grounds for entry into an executive session, and unless one or more of those topics arises, a zoning board of appeals must conduct its business in public.

Lastly, minutes of open meetings must be prepared and made available within two weeks of meetings, and minutes indicating action taken during executive session must be prepared and disclosed to the extent required by the Freedom of Information Law within one week. 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."

In view of 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.

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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December 28, 2001

William M. Casolara, Ph.D.
Computer Applications Program Chair
State University of New York
Tompkins Cortland Community College
170 North Street
Dryden, NY 13053

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

Dear Mr. Casolara:

I have received your letter of December 12, as well as the minutes of a meeting held by the Dryden Town Board on June 6.

You referred to a segment of the minutes during which the Board discussed property that you own. Following a somewhat detailed discussion relating to that parcel, a motion was made to conduct an executive session to consider "the relinquishment of an interest in real property." You wrote that it is your understanding that the executive session was improperly held, and you asked how you may "get a ruling on this issue." Additionally, you raised a question as to the "possible remedies...available" to you as the owner of the property at that time.

In this regard, it is emphasized out the outset that the Committee on Open Government is authorized to offer advice and opinions concerning the Open Meetings Law. The Committee is not empowered to issue a "ruling" or otherwise compel an entity to comply with law.

With respect to the propriety of the executive session, by way of background, the Open Meetings Law is based on a presumption of openness. Stated differently, all meetings of a public body, such as a town board, must be conducted open to the public, except to the extent that the subject matter may be considered during an executive session. Section 105(1) of the law specifies and limits the grounds for entry into executive session. Therefore, a public body cannot enter into executive session to discuss the subject of its choice.

From my perspective, the only ground for entry into executive session that might have been applicable would have been §105(1)(h). That provision permits a public body to enter into executive

session to discuss "the proposed acquisition, sale or lease of real property....but only when publicity would substantially affect the value thereof." In consideration of the nature of the discussion that preceded the executive session and the disclosures made in public, it is doubtful in my view that publicity would have had a "substantial" effect on the value of the property. If that is so, I do not believe that there would have been a basis for holding an executive session.

The most common means of seeking judicial review of a possible violation of the Open Meetings Law involves the initiation of a proceeding under Article 78 of the Civil Practice Law and Rules. That kind of proceeding is brought against a government officer or body, and the person bringing the proceeding has the burden of demonstrating that the government officer or body acted unreasonably or failed to carry out a duty required to be performed. I note that the statute of limitations regarding the commencement of an Article 78 proceeding is four months from the date of a final determination made by the government officer or body. Since the meeting in question was held in June, more than four months have passed. That being so, I do not believe that the Open Meetings Law would provide a viable remedy.

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