STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13111
OML-AO-3393

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

January 3, 2002

Ms. Traci L. Pena
[redacted]

The staff of the Committee on 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. Pena:

I have received your letter of December 14 in which you raised questions involving the Freedom of Information and Open Meetings Laws in relation to meetings and records of Arts and Culture for Oswego County. According to your letter, Arts and Culture for Oswego County is "a private, non-profit organization, established in 1991 and incorporated in 1993 as an advocate for the arts and cultural community in the County." If that is so, it appears that neither of those statutes would be applicable.

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

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

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

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

Based on the foregoing, both of the statutes at issue generally apply to entities of state and local government. Assuming that the organization of your interest is not a governmental entity, it would not be subject to either.

I note that records transmitted by or pertaining to Arts and Culture for Oswego County that are maintained by a unit of municipal or state government (i.e., Oswego County or the State Council on the Arts) would fall within the coverage of the Freedom of Information Law. If you believe that a governmental entity maintains records relating to Arts and Culture for Oswego County, you might want to request them from the appropriate agency's records access officer. The records access officer is the person designated by an agency to coordinate the agency's response for requests for records.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

OML-AO-3394

From: Robert Freeman
To: Grace Simonds
Date: 1/7/02 10:37AM
Subject: Re: executive session

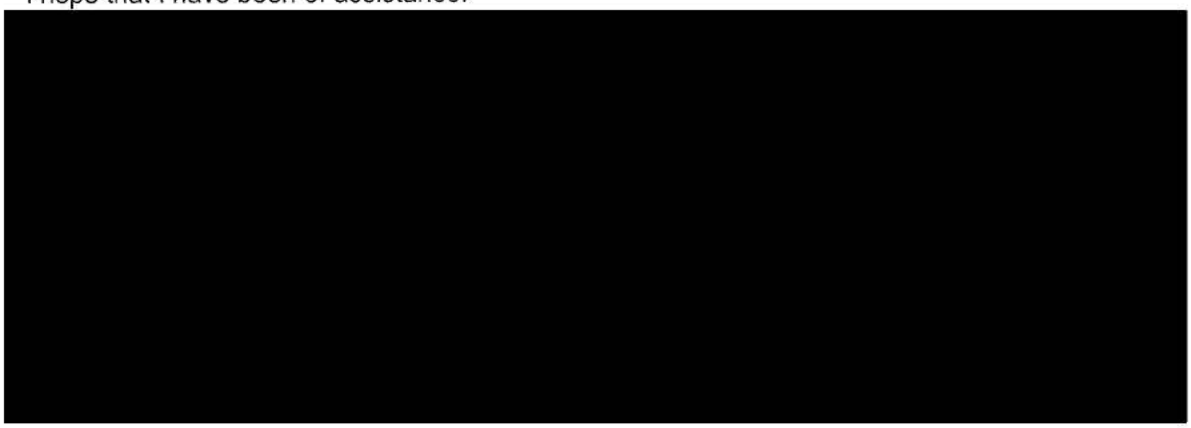
Dear Ms. Simonds:

As I understand the situation, although two grounds for entry into executive session appear to be pertinent, it is unlikely that either would apply.

One of the grounds pertains to discussions of collective bargaining negotiations. In this instance, the matter does not involve negotiations, but rather the interpretation of a provision in the existing collective bargaining agreement.

The other provision of possible relevance permits the Board to enter into executive session to discuss: "the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation..." Based on the foregoing, to be validly asserted, an issue must focus on a "particular person" in conjunction with one or more of the topics indicated in the quoted provision. From my perspective, it appears that the matter at hand involves the interpretation and implementation of a contractual provision, and likely not any particular employee. If that is so, there would be no basis for entry into executive session.

I hope that I have been of assistance.



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STATE OF NEW YORK
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OML-AO-3395

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January 7, 2002

Allen Hershkowitz, Ph.D.
[redacted]

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

Dear Mr. Hershkowitz:

As you are aware, I have received your letters of December 17 and 19, as well as your letter of January 4.

In brief, in the first, you raised issues involving the extent to which the Lewisboro Town Board complied with the Open Meetings Law relative to a "work session" and an executive session held during that gathering. The second pertained to the "firing" by the Town Supervisor of a resident from several positions that she held. When the Supervisor refused to answer questions concerning the dismissal, he stated, according to your letter, that "This is a personnel issue and I am prohibited from discussing personnel issues in public." You also indicated that the "supervisor imposes a three minute limit on speaking during town board public comment periods" and refused to enable you to speak beyond three minutes when another person yielded his three minutes to you. You have questioned the propriety of his actions. In the latest letter, you referred to the absence of any record of a vote taken during "an unspecified executive session", minutes of executive sessions and the absence of notice of work sessions.

In this regard, I offer the following comments.

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

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

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

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

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

Based upon the direction given by the courts, if a majority of a public body gathers to discuss public business, any such gathering, in my opinion, would ordinarily constitute a "meeting" subject to the Open Meetings Law. Since a work session held by a majority of a public body is a "meeting", it would have the same responsibilities in relation to notice and the taking of minutes as in the case of a formal meeting, as well as the same ability to enter into executive sessions.

Since a work session is a "meeting", it must be preceded by notice given pursuant to §104 of the Open Meetings Law. That provision states that:

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

> conspicuously posted in one or more designated public locations at a reasonable time prior thereto.
>
> 3. The public notice provided for by this section shall not be construed to require publication as a legal notice."

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 notice must be given to the news media, I point out that the recipient may choose to publicize a meeting, but is not required to do so.

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 a Westchester County case, Previdi v. Hirsch:

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

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

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

Second, based on the language of the Open Meetings Law and its judicial interpretation, a public body cannot conduct an executive session prior to a meeting, and in a technical sense, it cannot schedule an executive session in advance of a meeting. 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 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. Ct., 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, to comply with the letter of the law, in situations in which it appears that an executive session may properly be held, 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. When there is an intent to be considerate to the public, 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.

Third, despite its frequent use, 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, I believe that the term is overused and is frequently cited in a manner that is misleading or causes unnecessary confusion. To be sure, some issues involving "personnel" may be properly considered in an executive session; others, in my view, cannot. Further, certain matters that have nothing to do with personnel may be discussed in private under the provision that is ordinarily cited to discuss personnel.

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

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

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

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

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

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

When a discussion concerns matters of policy, such as the manner in which public money will be expended or allocated, the functions of a department or perhaps the creation or elimination of positions, I do not believe that §105(1)(f) could be asserted, even though the discussion may relate to "personnel". For example, if a discussion involves staff reductions or layoffs due to budgetary concerns, the issue in my view would involve matters of policy. Similarly, if a discussion of possible layoff relates to positions and whether those positions should be retained or abolished, the discussion would involve the means by which public monies would be allocated. In none of the instances described would the focus involve a "particular person" and how well or poorly an individual has performed his or her duties. To reiterate, in order to enter into an executive session pursuant to §105(1)(f), I believe that the discussion must focus on a particular person (or persons) in relation to a topic listed in that provision. As stated judicially, "it would seem that under the statute matters related to personnel generally or to personnel policy should be discussed in public for such matters do not deal with any particular person" (Doolittle v. Board of Education, Supreme Court, 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.

I note 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)].

Next, it appears that the Supervisor believes that he and perhaps others are prohibited from discussing "personnel issues" in public. In my view, that is inaccurate. Although I do not believe that they can be forced to discuss those issues in public, I do not believe that they are prohibited from doing so.

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

I am unaware of any statute that would generally prohibit a Board member from disclosing the information discussed during an executive session. Further, even when information might have

been obtained during an executive session properly held or from records marked "confidential", I note that the term "confidential" has a narrow and precise technical meaning. For records or information to be validly characterized as confidential, I believe that such a claim must be based upon a statute that specifically confers or requires confidentiality.

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

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

With respect to minutes of executive sessions, §106 of the Open Meetings Law provides that:

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

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

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

I point out that, as a general rule, a public body may take action during a properly convened executive session [see Open Meetings Law, §105(1)]. If action is taken during an executive session, minutes reflective of the action, the date and the vote must be prepared and made available to the extent required by the Freedom of Information Law within one week of the executive session. If no action is taken, there is no requirement that minutes of the executive session be prepared.

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, supra, one of the issues involved access to records, i.e., minutes of executive sessions held under the Open Meetings Law. Although it was assumed by the court that the executive sessions were properly held, it was found that "this was no basis for respondents to avoid publication of minutes pertaining to the 'final determination' of any action, and 'the date and vote thereon'" (id., 646). The court stated that:

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

Therefore, if the Board reaches a "consensus" that is reflective of its final determination of an issue, I believe that minutes must be prepared that indicate its action.

Whether action is taken in public or during an executive session, it has been held that both the Freedom of Information Law and the Open Meetings Law preclude secret ballot voting and require that a record be prepared indicating how each member voted. Since the Freedom of Information Law was enacted in 1974, it has imposed what some have characterized as an "open vote" requirement. Although 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 agency members. Specifically, §87(3) of the Freedom of Information Law has long required that:

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

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

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. Ordinarily, a record of votes of the members will appear in minutes required to be prepared pursuant to §106 of the Open Meetings Law, and in my opinion, so long as minutes indicate how each member cast his or her vote, the requirements of the Freedom of Information Law would be satisfied.

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, 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., Town Law, §63; County Law, §153; 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, Town Law, §63; would be unreasonable.

In my view, if the Town Board has established a rule that is equally applicable to all of those who attend meetings and wish to speak which specifies that speakers cannot yield their time to others, the rule would likely be valid. I note that, according to §63 of the Town Law, "[t]he board may determine the rules of its procedure." Based on that provision, I believe that the ability to make rules involves a power of a town board, rather than an individual member of the board, such as a supervisor.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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January 10, 2002

Mr. Peter Marotta
Hudson Valley Arts Center
P.O. Box 274
Hudson, NY 12534

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

Dear Mr. Marotta:

As you are aware, your letter of December 17 addressed to James P. King, Counsel to the New York State Department of State, has been forwarded to the Committee on Open Government. The Committee, a unit of the Department of State, is authorized to provide advice and opinions concerning the Open Meetings Law.

According to your letter, the Columbia County Board of Supervisors Tourism Subcommittee created an entity known as "Partners in Tourism" ("PIT"), and you wrote that:

> "Members of the business community are selected by the sub-committee to sit on the PIT committee with members of the Columbia Board of Supervisors to discuss the use and expenditures of Columbia County and New York State funds in tourism marketing. 'Minutes of the meetings are kept by Tourism Dept. staff...for a measure of public oversight.'"

It is your view that meetings of PIT should be conducted open to the public, for the members "influence and direct the use of public funds and official policies." You added that PIT "is directly responsible for allocation and expenditure of public funds, which are discussed in meetings closed to the public."

The issue is whether PIT is a "public body" that falls within the coverage of the Open Meetings Law. Section 102(2) of that statute defines the phrase "public body" to mean:

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

Based on the foregoing, a public body is, in my view, an entity required to conduct public business by means of a quorum that performs a governmental function and carries out its duties collectively, as a body. In order to constitute a meeting subject to the Open Meetings Law, a majority of the total membership of a public body, a quorum, must be present for the purpose of conducting public business. I note, too, that the definition refers to committees, subcommittees and similar bodies of a public body. Based on judicial interpretations, if a committee, for example, consists solely of members of a particular public body, it, too, would constitute a public body. For instance, in the case of a legislative body consisting of seven members, four would constitute a quorum, and a gathering of that number or more for the purpose of conducting public business would be a meeting that falls within the scope of the Law. If that body designates a committee consisting of three of its members, the committee would itself be a public body; its quorum would be two, and a gathering of two or more, in their capacities as members of that committee, would be a meeting subject to the Open Meetings Law.

With specific respect to your area of concern, several judicial decisions indicate generally that advisory bodies, other than those consisting of members of a governing body, that have no power to take final action fall outside the scope of the Open Meetings Law. As stated in those decisions: "it has long been held that the mere giving of advice, even about governmental matters is not itself a governmental function" [Goodson-Todman Enterprises, Ltd. v. Town Board of Milan, 542 NYS 2d 373, 374, 151 AD 2d 642 (1989); Poughkeepsie Newspaper v. Mayor's Intergovernmental Task Force, 145 AD 2d 65, 67 (1989); see also New York Public Interest Research Group v. Governor's Advisory Commission, 507 NYS 2d 798, aff'd with no opinion, 135 AD 2d 1149, motion for leave to appeal denied, 71 NY 2d 964 (1988)]. In one of the decisions, Poughkeepsie Newspaper, supra, a task force was designated by then Mayor Koch consisting of representatives of New York City agencies, as well as federal and state agencies and the Westchester County Executive, to review plans and make recommendations concerning the City's long range water supply needs. The Court specified that the Mayor was "free to accept or reject the recommendations" of the Task Force and that "[i]t is clear that the Task Force, which was created by invitation rather than by statute or executive order, has no power, on its own, to implement any of its recommendations" (id., 67). Referring to the other cases cited above, the Court found that "[t]he unifying principle running through these decisions is that groups or entities that do not, in fact, exercise the power of the sovereign are not performing a governmental function, hence they are not 'public bod[ies] subject to the Open Meetings Law..."(id.).

On the other hand, if an entity consisting of two or members that functions as a body has the authority to take action, i.e., through the power to allocate public monies or make determinations, the Court of Appeals, the state's highest court, has held that the entity would constitute a public body subject to the Open Meetings Law. In a case dealing with a student government body at a public

educational institution ("the Association, Inc."), the Court provided guidance concerning the application of the Open Meetings Law, stating that:

> "In determining whether an entity is a public body, various criteria and 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.
>
> "This Court has noted that the powers and functions of an entity should be derived from State law in order to be deemed a public body for Open Meetings Law purposes (*see, Matter of American Socy. for Prevention of Cruelty to Animals v Board of Trustees of State Univ. of N.Y.*, 79 NY2d 927, 929). In the instant case, the parties do not dispute the CUNY derives its powers from State law and it surely is essentially a public body subject to the Open Meetings Law for almost any imaginable purpose. The Association, Inc. contends, on the other hand, that is a separate, distinct, subsidiary entity, and does not perform any governmental function that would render it also a public body.
>
> "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 receive merely perfunctory review or approval...This Association, Inc. possessed and exercised real and effective decision-making power. CUNY, through its by-laws, delegated to the Association, Inc. its statutory power to administer student activity fees (*see*, Education Law §6206[7][a]). The Association, Inc. holds the purse strings and the responsibility of supervising and reviewing the student activity fee budget. (CUNY By-Laws §16.5[a]). CUNY's by-laws also provide that the Association, Inc. 'shall disapprove any allocation or expenditure it finds does not so conform, or is inappropriate, improper, or inequitable,' thus reposing in the Association, Inc. a final decision-making authority... [Smith v. CUNY, 92 NY2d 707; 713-714 (1999)].

In sum, if the functions of the PIT are purely advisory, I do not believe that it is required to comply with the Open Meetings Law. If, however, it has been conferred with decision making authority by the County, it would appear to fall within the coverage of that statute.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Supervisors
Hon. Tod Grenci

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January 10, 2002

Ms. Margaret A. Moses
[redacted]

Mr. David W. Fountaine
Village Administrator
Village of Hamburg
100 Main Street
Hamburg, NY 14075-4988

The staff of the Committee 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 Trustee Moses and Village Administrator Fountaine:

I have received your letters and a variety of related materials in which you raised a series of questions relating to the propriety of discussing various real property transactions during executive sessions and procedures regarding the implementation of the Freedom of Information Law, particularly in relation to the use of a prescribed request form.

I am responding to you concurrently in an effort to be fair, and I reiterate comments offered recently in a conversation with Mr. Fountaine and other Village officials: specifically, that when individuals contact this office, the information that they offer is accepted in good faith and with an assumption that the information is accurate. Nevertheless, it is acknowledged that the truth or the reality relative to a given situation is often based on perception; one person's view of facts or the effects of certain actions may differ from that of another person, even when both have acquired the same information and heard the same presentations. Over the course of years, there have been many instances in which the perceptions of members of a various boards have differed, and absent the ability to conduct investigations, it is impossible to ascertain which version of reality may be more accurate.

According to Ms. Moses, there are several incidents concerning the propriety of executive sessions held by the Board of Trustees. The first relates to a situation in which a developer owns a twenty-two acre parcel, which was the subject of a proposal offered several years ago. The proposal

was dropped and a moratorium, which has since ended, precluded development of the parcel. Adjacent to it is a fifteen acre parcel owned by the Village, and she wrote that the Village Attorney suggested that the Board sell the property to the developer and that the discussions on the matter have occurred in executive sessions. The second apparently involves the same parcel and a dispute over whether the parcel is a park, and that, too, has been considered in executive sessions. The remaining issue relates to a parcel that the Village Administrator would like to purchase from the Town, but the Town, to date, has shown no interest in engaging in that transaction. An offer was made, but again, the issue was discussed in executive session, as are similar matters, such as "the selling of fire halls, which we own."

Ms. Moses indicated that she is "uncomfortable talking about these issues in executive session because of possible litigation."

Mr. Fountaine suggested that I do not have all the information on the subject and referred to the absence of any response from me concerning an email sent to this office on December 24. I was the only person on staff present in the office that day, and I do not recall having received that communication. Further, there is no reference to it in our log of incoming mail. I note, too, that, in an effort to be fair, requests for opinions are answered in the order of receipt. Ms. Moses' communication was received on December 18, and I had not yet prepared a response when Mr. Fountaine telephoned this office. Again, I am considering trustee Moses' comments and those offered by Mr. Fountaine together in an effort to be fair and balanced in this response.

In his email letter of December 24 (faxed to me on January 7), Mr. Fountaine wrote that the Board has conducted executive sessions to discuss "real estate issues" as follows:

> "...a proposed sale of property to include offering price and all details accocitted [sic] with such.
>
> "The village has been discussing the possible sale of a village owned parcel of land to a developer who's land adjoins the village owned property. This sale is being considered as a negotiation with the developer to lower the density of the project he is proposing to build. The village has already been sued by the developer over this project. A neighborhood group is soliciting funds and has hired a lawyer to sue the village in relation to the possible sale of this village owned property. It is under these conditions that the village board was going to discuss this particular piece of village owned property. This appears to me to satisfy item h of section 105 of the open meetings law."

In a second letter addressed to me on January 7, Mr. Fountaine wrote in relevant part that:

> "For the complete record, Clover development has sued the village via an Article 78 over this project. A group of citizens (probably the

> ones who called you have hired an attorney (Mr. Walling). Ms. Moses letter is not totally factual. The Clover Article 78 was filed but dismissed by the Judge before trial...
>
> "You should know that we have on numerous occasions discussed the Clover project in open session. We have only gone into executive session when we are discussing litigation strategy related to the project. As I mentioned above the developer has already sued us once and has said they may resort to legal action should we not be able to reach some type of agreement on this project. Additionally, the citizen group that has raised funds and hired a lawyer also gives the board concern about litigation over the property. In fact Ms. Moses acknowledges such in her letter when she states that the citizen group is going to pursue whether the property is a park or not. To openly discuss this would give Clover information on what the board strategy would be should an agreement over the sale of the property not be concluded with Clover. The Village Attorney's information to the village board about whether this is a part or not is attorney-client information. He should be allowed to discuss this with the board due to the already actual litigation by the developer and their publicly announced intent to litigate as seen on the citizen group flyer and confirmed by Ms. Moses.
>
> "In regard to the other property for which Ms. Moses mentioned my name, here is the rest of the story. The citizens electric committee suggested that we consider generating our own power should we form a municipal utility. I brought this to the village board who discussed this is executive session due to the fact the property is on the open market and the village in the same discussion decided 1 - should we consider making an offer and 2 - how much should we offer. This was the extent of the discussion in executive session about this property. To publically [sic] discuss the consideration and sale price of a piece of real estate should clearly fall within executive session."

He added in a second letter of January 7 that:

> "...the discussion concerning the particular piece of real estate was already in litigation and we were discussing the potential sales price of several other village owned parcels that we planned on placing on the market. To discuss potential sales prices of property in open session before listing them for sale is ridiculous."

Notwithstanding the foregoing, Mr. Fountaine also wrote that "we have on numerous occasions discussed the Clover project in open session."

In this regard, 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). Consequently, a public body, such as a village board of trustees, cannot enter into an executive session to discuss the subject of its choice.

From my perspective, the grounds for entry into executive session are based on the need to avoid some sort of harm that would arise by means of public discussion, and that is so with respect to the grounds for entry into executive session that appear to be relevant in relation to the matters that you described.

First, with respect to real property transactions, §105(1)(h) of the Open Meetings Law permits a public body to enter into executive session to discuss:

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

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

A key question, in my view, involves the extent to which information relating to possible real property transactions has become known to the public. The more that is known, the less likely it is that publicity would have an impact on the value of a parcel or would in some way damage the interests of Village taxpayers. I note that the language of §105(1)(h) does not refer to negotiations *per se* or the impact of publicity upon negotiations relating to a parcel; rather its proper assertion is limited to situations in which publicity would have a *substantial* effect on the *value* of the property. It has been advised, for example, that when a municipality is seeking to purchase a parcel and the public is unaware of the location or locations under consideration, it is possible if not likely that premature disclosure or publicity would indeed substantially affect the value of the property. In that kind of situation, publicity might result in speculation or offers from others, thereby precluding the municipality from reaching an optimal price on behalf of the taxpayers. However, when details concerning a potential real property transaction, such as the location and potential uses of the property, are known to the public, publicity would have a lesser effect or impact on the value of the parcel. Again, the more that is known to the public, the less likely it is that publicity would affect the value of a parcel.

In short, the language of §105(1)(h) is limited and precise, for it focuses solely on the impact of publicity on the value of a parcel. I do not have specific knowledge regarding the extent to which

information pertaining to the transactions to which you made reference have become known by or available to the public. Nevertheless, based on the terms of that provision, only in those instances in which "publicity would *substantially affect the value*" of a parcel of real property could an executive session properly be held.

The other ground for entry into executive session of relevance to the matters considered would be §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 by expressing the fear that litigation may result from actions taken therein. Such a view would be contrary to both the letter and the spirit of the exception" [Weatherwax v. Town of Stony Point, 97 AD d. 840, 841 (1983)].

In view of the foregoing, the exception is intended to permit a public body to discuss its litigation strategy behind closed doors, so as not to divulge its strategy to its adversary, who may be present with other members of the public at the meeting. I note, too, that the Concerned Citizens decision cited in Weatherwax involved a situation in which a town board involved in litigation met with its adversary in an executive session to discuss a settlement. The court determined that there was no basis for entry into executive session; the ability of the board to conduct a closed session ended when the adversary was permitted to attend.

Based on the judicial construction of §105(1)(d), that exception would not apply if a party with whom the Village is negotiating is present or if the discussion deals with the substance of an issue that might result in litigation. In my view, only to the extent that a public body discusses its litigation strategy may that exception be properly invoked.

A second vehicle that might permit a meeting to be held in private involves "exemptions", and §108 of the Open Meetings Law contains three exemptions. When an exemption applies, the Open Meetings Law does not, and the requirements that would operate with respect to executive sessions are not in effect. Stated differently, to discuss a matter exempted from the Open Meetings Law, a public body need not follow the procedure imposed by §105(1) that relates to entry into an executive session. Further, although executive sessions may be held only for particular purposes,

there is no such limitation that relates to matters that are exempt from the coverage of the Open Meetings Law.

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

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

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

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

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

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

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

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

The remaining issue relates to the use of a form prescribed by the Village to be used by those requesting records under the Freedom of Information Law. As indicated by phone, it has consistently been advised that a person seeking records cannot be compelled to complete a form devised by an agency. Mr. Fountaine questioned the basis for that advice.

By way of background, §89(1) of the Freedom of Information Law requires the Committee on Open Government to promulgate rules and regulations governing the procedural implementation of the law, and the Committee has done so (see 21 NYCRR Part 1401). In turn, §87(1)(a) requires the "governing body of each public corporation" to promulgate rules and regulations "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", "this article" being the Freedom of Information Law.

That statute in §89(3) and 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. The regulations indicate that "an agency may require that a request be made in writing or may make records available upon oral request" [§1401.5(a)]. Neither the Law nor the regulations refers to, requires or authorizes the use of standard forms. Accordingly, it has consistently been advised that any written request that reasonably describes the records sought should suffice and 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. It has been advised that an agency may ask that a standard form 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 but, in my view, cannot be required to complete the standard form as his or her written request.

I agree that the Village's form is similar with respect to the sample request letter in the Committee on Open Government's publication, "Your Right to Know." The sample letter is intended to enable the public to submit an appropriate request by letter and to avoid the necessity of seeking or using a form prescribed by an agency.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

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January 17, 2002

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

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

Dear Mr. Sohmer:

I have received your letter of December 19 in which you requested an advisory opinion concerning the status of the Research Foundation of the City University of New York ("the Foundation") under the Freedom of Information and Open Meetings Laws. You wrote that "[i]t appears that the Research Foundation regards itself as a private corporation under contract to City University to provide general services related to the University's grant operations", but added that some Foundation employees "are physically housed at the University's central headquarters and report directly to CUNY administrators."

In an effort to learn more about the Foundation, its functions and its relationship with CUNY, I obtained a copy of its Absolute Charter, the document in which the Board of Regents designated the Foundation as an educational corporation, as well as material appearing on the Foundation's website.

The Charter describes the purposes of the Foundation as follows:

> "a. To assist in developing and increasing the facilities of The City University of New York to provide more extensive educational opportunities and service to its constituent colleges, students, faculties, staffs and alumni, and to the general public by making and encouraging gifts, grants, contributions and donations of real and personal property to of for the benefit of The City University of New York;

> "b. To receive, hold and administer gifts or grants, and to act without profit as trustee of educational or charitable trusts of benefit to and in keeping with the educational purposes and objects of The City University of New York; and
>
> "c. To finance the conduct of studies and research in any and all fields of intellectual inquiry of benefits to and in keeping with the educational purposes and objects of The City University of New York and/or its constituent colleges, and to enter into contractual relationships appropriate to the purposes of the Corporation."

The website indicates that the Foundation is "legally and financially separate from the University" and is "a private not-for-profit educational corporation with 501(c)(3) status", and that pursuant to an agreement with the University approved by the State Division of the Budget, it "undertakes post-award administration of all grants and contracts awarded to CUNY faculty and staff for research, training, education and services." The website also describes the composition of the Foundation's 17 member Board of Directors, which consists of:

> "...the Chancellor of the University as Chairperson, the President of the Graduate School as Vice Chairperson, two senior and two community college Presidents selected by the college Presidents, the Chairperson of the Faculty Advisory Council (FAC) to the Foundation and three other FAC members chosen by the FAC (a faculty advisory body chosen the University Faculty Senate), one full-time graduate student selected by the Doctoral Student Council, two individuals appointed by the Chancellor, and four at-large members."

From my perspective, based on the language of the law and its judicial interpretation, the records of the Foundation fall within the coverage of the Freedom of Information Law, and the meetings of its Board of Directors must be held in accordance with the Open Meetings Law. In this regard, I offer the following comments.

First, even if the Foundation 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 the Foundation as an "agency" has not been determined judicially, it is clear that the City University is an "agency" required to comply with the Freedom of Information Law.

Pertinent with respect to rights of access is §86(4), which 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 a not-for-profit corporation providing services for a 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 question that you raised, irrespective of whether the Foundation is an "agency", its records appear to be maintained for the City University. If that is so, the records 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 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 Foundation, would not exist but for their relationships with CUNY. Due to the similarity between the situation you have described and that presented in Eisenberg, as well as the functions of the Foundation and its relationship to the University, I believe that it is subject to the Freedom of Information Law.

Third, 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 the Foundation 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 City University, 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 Foundation 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 Foundation board in the terms of membership, for the description of the composition of the Board indicates that a majority of its seventeen members are officials of or chosen by CUNY or CUNY organizations.

Based on the foregoing, I believe that the Board of the Foundation is a "public body" required to comply with the Open Meetings Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm
cc: Executive Director

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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January 24, 2002

Hon. James Manley, Jr.
Councilman
Town of Newburgh
[redacted]

The staff of the Committee on 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 Manley:

I have received your letter of January 7 and the materials attached to it. In your capacity as a member of the Newburgh Town Board, you have questioned the propriety of executive sessions held by the Planning Board to discuss "personnel matters."

In this regard, I offer the following comments.

First, as you are aware, 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.

Second, despite its frequent use, 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..."

Based on 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).

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

As you pointed out, 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)].

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Planning Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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January 24, 2002

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 correspondence in which you sought advice concerning your efforts in obtaining records from the Honeoye Central School District. You also indicated that it is "impossible to hear" substantial portions of meetings of the Board of Education.

In this regard, I offer the following comments.

First, it is emphasized that the Freedom of Information Law pertains to existing records, and that §89(3) of that statute states in part that an agency, such as a school district, is not required to create or prepare a record in response to a request. Therefore, insofar as the District does not maintain records containing the information sought, it would not be obliged to prepare new records on your behalf to satisfy a request.

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

Second, 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 of the receipt of your request 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, if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, or if the acknowledgement of the receipt of a request fails to include an estimated date for granting or denying access, 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)].

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

Since you sought records reflective of teachers' certifications, assuming that such records exist and are maintained by the District, the only ground for denial significant to an analysis of rights of access is §87(2)(b), which permits an agency to withhold records to the extent that disclosure would result in "an unwarranted invasion of personal privacy." Although the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public employees. It is clear that public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public employees are required to be more accountable than others. Further, the courts have found that, as a general rule, records that are relevant to the performance of a public employee's official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

In conjunction with the principles described in the preceding paragraph, it would appear that the most important document regarding the qualifications of a teacher, administrator or supervisor, is a certification. As I understand it, the issuance of a certification, which I believe is the equivalent of a license, is based upon findings by the State Education Department that a particular individual has met the qualifications to engage in a particular area or areas of teaching or education. As such, the certification is likely the best and most accurate source of determining a teacher's qualifications. Further, I believe that it is clearly relevant to the performance of the employee's official duties.

In short, it is my view that records indicating the certification or certification status of teachers and other District employees are available under the Freedom of Information Law, for disclosure would constitute a permissible rather than an unwarranted invasion of personal privacy.

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

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

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

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Kathy Hoertz

STATE OF NEW YORK
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January 24, 2002

E-Mail

TO: Robert Meller <bmeller@adelphia.net>

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Mr. Meller:

I have received your letter of January 3, as well as a variety of materials relating to it.

According to your letter:

> "Several Eden Central School District students faced felony charges for plotting a 'Columbine style' attack on faculty and public safety personnel. Charges against one of the students were recently dropped by the Erie County District Attorney. All of this information, including the students' names, has been reported by the local media several times in the past several months.
>
> "The school board adopted a "zero-tolerance" policy, which the superintendent presumably enforced by ruling that this student could not return to school and would continue to receive tutoring at home, at district expense. The student's parents appealed the superintendent's decision to the school board, which discussed the matter at a special meeting, called for this purpose on December 19, 2001. The board in executive session, attended by all seven members, declared to have sufficient votes in favor of reversing the superintendent's decision and allowing the student to return to school."

The Board of Education, in a written statement issued on December 20, indicated that it "reached a decision regarding a certain student disciplinary matter." Additionally, the Buffalo News reported that the Board "modified" the Superintendent's "earlier decision." That article included the student's name and photograph, which appears to have been obtained not from the school district, but rather in relation to the student's arrest.

In consideration of the requirements imposed by the Family Educational Rights and Privacy Act (20 U.S.C. §1232g; "FERPA"), you have asked whether that statute would "prohibit the school board from disclosing the vote of each of its members on this particular issue."

From my perspective, it would not; on the contrary, I believe that the Freedom of Information Law requires the preparation of a record indicating how each member of the Board cast his or her vote. In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law requires that agency records, i.e., those of a school district, be disclosed, unless there is a basis for denial appearing in the Law that can be properly asserted. Similarly, the Open Meetings Law generally requires that meetings of public bodies, i.e., boards of education, be conducted in public, unless there is a basis for closing the meeting. I point out that there are two vehicles that may authorize a public body to discuss public business in private. One involves entry into an executive session. 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. 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 applicable. Pertinent to the issue you raised is §108(3), which exempts from the Open Meetings Law:

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

Relevant with respect to both records and meetings concerning the incident that you described and similar or related matters are FERPA and the regulations promulgated pursuant to FERPA by the U.S. Department of Education. In brief, FERPA applies to all educational agencies or institutions that participate in grant programs administered by the United States Department of Education. As such, it includes within its scope virtually all public educational institutions and many private educational institutions. The focal point of the Act is the protection of privacy of students. It provides, in general, that any "education record," a term that is broadly defined, that is personally identifiable to a particular student or students is confidential, unless the parents of students under the age of eighteen waive their right to confidentiality, or unless a student eighteen years or over similarly waives his or her right to confidentiality. The regulations promulgated under FERPA define the phrase "personally identifiable information" to include:

> "(a) The student's name;
> (b) The name of the student's parents or other family member;
> (c) The address of the student or student's family;

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

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

I note that the term disclosure is defined in the regulations to mean:

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

In consideration of FERPA, if the Board discusses an issue involving personally identifiable information derived from a record concerning a student, I believe that the discussion would deal with a matter made confidential by federal law that would be exempt from the Open Meetings Law.

Notwithstanding the FERPA, I believe that the Board would have the ability to discuss the discipline of specific students in executive session. Section 105(1)(f) of the Open Meetings Law permits a public 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..."

Therefore, when the Board discusses a disciplinary matter that focuses upon a particular student or students, the discussion could in my opinion validly be held in an executive session.

With respect to the Freedom of Information Law, the initial ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is the FERPA, and insofar as education records would if disclosed identify a particular student or students, I believe that they would be exempted from disclosure.

While the District may not disclose information personally identifiable to a student, as indicated earlier, the student's identity became known through disclosures by other governmental entities, and the substance of the Board's decision was made public. Indicating the votes of board members would not result in any additional disclosure of information regarding the student; on the contrary, a failure to do so in my view would diminish the accountability of and essentially insulate Board members.

Although the Freedom of Information Law generally provides that an agency is not required to create or prepare records [see §89(3)], an exception to that rule pertains to records of votes by members of public bodies. Specifically, §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", such as a school board, a record must be prepared that indicates the manner in which each member who voted cast his or her vote.

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)].

Because the record of votes of each member would not involve the disclosure of additional information regarding the student, I do not believe that FERPA would prohibit disclosure. Rather, for the reasons expressed in the preceding commentary, I believe that the Freedom of Information Law requires that such a record be "maintained" and made available.

I hope that I have been of assistance.

RJF:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
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OML-AO-3402

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January 31, 2002

Mr. Dennis V. Tobolski
Cattaraugus County Attorney
303 Court Street
Little Valley, NY 14755

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

Dear Mr. Tobolski:

I have received your letter of December 31 in which you sought an advisory opinion relating to the Open Meetings Law.

According to your letter:

> "Since January 1, 2000, the Cattaraugus County Legislature has consisted of twenty-one members, of which fifteen are Republicans and six are Democrats. On December 6, 2001, the Board of Elections received a change of enrollment form from one of the Democratic members of the County Legislature. He made a public announcement that he had changed his enrollment from the Democratic Party to the Republican Party."

You asked whether "the County Legislator who has changed his enrollment may attend and participate in the Republican caucuses" or whether that person "can be considered a 'guest' in the Republican caucus."

In this regard, subdivision (3) of §5-304 of the Election Law states that:

> "A change of enrollment received by the board of elections not later than the twenty-fifth day before the general election shall be deposited in a sealed enrollment box, which shall not be opened until the first Tuesday following such general election. Such change shall be then removed and entered as provided in this article."

Since I am not an expert with respect to the Election Law, I contacted an attorney for the State Board of Elections, and it was confirmed that person who seeks to change his or her registration on the date specified in your letter, December 6, is not deemed to be a member of the political party in which that person desires to enroll until the Tuesday after the next general election. Stated differently, the democrat member who sought to change his enrollment will not be deemed to be a registered republican until November 12, 2002; for purposes of political party registration, he will remain a democrat until that date.

If that is so, I do not believe that the majority party members may conduct a closed political caucus to discuss public business if the legislator in question is authorized to attend. In that circumstance, based on the following commentary, I believe that such a gathering would constitute a "meeting" subject to the Open Meetings Law.

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 County Legislature is present to discuss County business, such a gathering, in my opinion, would ordinarily constitute a "meeting" subject to the Open Meetings Law, unless the meeting or a portion thereof is exempt from the Law.

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

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

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

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

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

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

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

If the gatherings described in your letter are attended by legislators who are members of two political parties, I do not believe that a democrat legislator could be characterized as a "guest" or that they can be described as political caucuses exempt from the Open Meetings Law. Again, they would appear to be "meetings" that fall within the coverage of that statute.

In Buffalo News v. Buffalo Common Council [585 NYS 2d 275 (1992), which involved the interpretation of the exemption regarding political caucuses, the court concentrated on the expressed legislative intent appearing in §100 of the Open Meetings Law, stating that: "In view of the overall importance of Article 7, any exemption must be narrowly construed so that it will not render Section 100 meaningless" (id., 278).

I believe that the thrust of the decision indicates that, in view of the intent of the Open Meetings Law, exceptions to the right to attend meetings should be construed narrowly. Based on its intent, if a member registered to a political party different from that of the majority joins the majority to discuss public business, again, it is my view that the gathering is no longer a political caucus, but rather a "meeting." The decision continually referred to the term "meeting" and the deliberative process, and the language of the decision in many ways is analogous to that of the Appellate Division in Orange County Publications, supra. Specifically, it was stated in Buffalo News that:

> "The Court of Appeals in *Orange County* (supra) also declared: 'The purpose and intention of the State Legislature in the present context are interpreted as expressed in the language of the statute and its preamble.' The legislative intent, therefore, expressed in Section 108, must be read in conjunction with the Declaration of Legislative Policy of Article 7 as set forth in its preamble, Section 100.
>
> > "It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the

> making of public policy. The people must be able to remain informed if they are to retain control over those who are their public servants. It is the only climate under which the commonwealth will prosper and enable the governmental process to operate for the benefit of those who created it" (id., 277).

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-3403

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February 1, 2002

Mr. Jerry Di Virgilio
[redacted]

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

Dear Mr. Di Virgilio:

I have received your letter of January 10 in which you sought an opinion concerning the implementation of the Open Meetings Law by the City of North Tonawanda Common Council. You wrote that the Council conducts its meetings in two locations, one of which is not large enough to accommodate those who might want to attend. You also questioned the status of "work sessions" and the Council's practice of rescheduling meetings on short notice.

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 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."

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 to comply with the Open Meetings Law.

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 Council 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.

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

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

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

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

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

Based upon the direction given by the courts, if a majority of a public body gathers to discuss public business, any such gathering, in my opinion, would ordinarily constitute a "meeting" subject to the Open Meetings Law. Since a workshop or work session held by a majority of a public body is a "meeting", it would have the same responsibilities in relation to openness, 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.

Lastly, with respect to notice of meetings and the capacity to conduct meetings with minimal notice, §104 of the Open Meetings Law provides that:

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

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: City Council

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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February 4, 2002

E-Mail

TO: Carole Nasra <[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. Nasra:

I have received your letter in which you sought an opinion pertaining to the Open Meetings Law. You wrote that it is your belief that your school district's shared decision making committee is subject to that statute and that minutes of its meetings must be accessible to the public within two weeks of its meetings.

I believe that your understanding is accurate, and in this regard, I offer the following comments.

First, as you are aware, several opinions rendered by this office have advised that shared decision making committees constitute "public bodies" required to comply with the Open Meetings Law. In brief, 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."

According to the regulations promulgated by the Commissioner, §100.11, those committees perform a necessary and integral function in the development of shared decision making plans, for the regulations specify that a district plan "shall be developed in collaboration with a committee." Therefore, a shared decision making 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 consideration of the Commissioner's regulations, which have the force and effect of law, a plan cannot be adopted absent "collaboration" and participation by a shared decision making committee. Since a shared decision making committee carries out necessary functions in the development of a shared decision making plan, I believe it performs a governmental function and, therefore, constitutes 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 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.

If it can be concluded that a shared decision-making committee is subject to the Open Meetings Law, it follows, based on the direction given in that statute, that it must prepare and disclose minutes of its meetings within two weeks of a meeting. 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."

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, 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.

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

I hope that I have been of assistance.

RJF:jm

cc: Marc Nelson
Harris Hill PTA Board of Directors

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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February 8, 2002

[redacted]

The staff of the Committee 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 [redacted]

As you are aware, I have received your letter of January 22 in which you requested an advisory opinion concerning the propriety of certain actions taken by the Chatham School District Board of Education. You indicated that you were prohibited from addressing the Board in public and informed that you could do so only during an executive session. I have also reviewed the statement that you sought to make to the Board.

More specifically, you wrote that:

> "I wanted to address the Board because there was a problem at school which the school would not resolve to my satisfaction and I took my son out of school and put him in private school. The environment was unsafe. As soon as I referred to the student who assaulted my son as 'Child A' they went into executive session citing concerns about protecting the child (Child A). Allegedly Child A has sexually abused another student in my son's former class and I think they thought I was going to talk about that but I was not. I asked them to cite the provision of the Open Meetings Law which they were relying upon to take such action and they did not reply. I asked for the school attorney to speak to this but none was present."

In this regard, I offer the following comments.

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

public participation. Consequently, by means of example, if a public body does not want to answer questions or permit the public to speak or otherwise participate at its meetings, I do not believe that it would be obliged to do so. On the other hand, a public body may choose to answer questions and permit public participation, and many do so. When a public body does permit the public to speak, I believe that it should do so based upon reasonable rules that treat members of the public equally.

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

I note that there are federal court decisions indicating that if commentary is permitted within a certain subject area, negative commentary in the same area cannot be prohibited. It has been held by the United States Supreme Court that a school board meeting in which the public may speak is a "limited" public forum, and that limited public fora involve "public property which the State has opened for use by the public as a place for expressive activity" [Perry Education Association v. Perry Local Educators' Association, 460 US 37, 103. S.Ct. 954 (1939); also see Baca v. Moreno Valley Unified School District, 936 F. Supp. 719 (1996)]. In Baca, a federal court invalidated a bylaw that "allows expression of two points of view (laudatory and neutral) while prohibiting a different point of view (negatively critical) on a particular subject matter (District employees' conduct or performance)" (id., 730). That prohibition "engenders discussion artificially geared toward praising (and maintaining) the status quo, thereby foreclosing meaningful public dialogue and ultimately, dynamic political change" [Leventhal v. Vista Unified School District, 973 F.Supp. 951, 960 (1997)]. In a decision rendered by the United States District Court, Eastern District of New York (1997 WL588876 E.D.N.Y.), Schuloff, v. Murphy, it was stated that:

> "In a traditional public forum, like a street or park, the government may enforce a content-based exclusion only if it is necessary to serve a compelling state interest and is narrowly drawn to achieve that end. Perry Educ. Ass'n., 460 U.S. at 45. A designated or 'limited' public forum is public property 'that the state has opened for use by the public as a place for expressive activity.' Id. So long as the government retains the facility open for speech, it is bound by the same standards that apply to a traditional public forum. Thus, any content-based prohibition must be narrowly drawn to effectuate a compelling state interest. Id. at 46."

The court in Schuloff determined that a "compelling state interest" involved the ability to protect students' privacy in an effort to comply with the Family Educational Rights Privacy Act, but that expressions of opinions concerning "the shortcomings" of a law school professor could not be restrained.

Second, the Open Meetings Law requires that meetings of public bodies be conducted in public, unless there is a basis for closing a meeting. I point out that there are two vehicles that may authorize a public body to discuss public business in private. One involves entry into an executive session, and §102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. Paragraphs (a) through (h) of §105(1) specify and limit the subjects that may properly be considered in an executive session. The other vehicle for excluding the public from a meeting involves "exemptions." Section 108 of the Open Meetings Law contains three exemptions. When an exemption applies, the Open Meetings Law does not, and the requirements that would operate with respect to executive sessions are not applicable. Pertinent to the issues you raised is §108(3), which exempts from the Open Meetings Law:

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

With respect to the subject that you described and similar or related matters, most relevant are the federal Family Educational Rights and Privacy Act ("FERPA", 20 USC §1232g) and the regulations promulgated pursuant to FERPA by the U.S. Department of Education. In brief, FERPA applies to all educational agencies or institutions that participate in grant programs administered by the United States Department of Education. As such, it includes within its scope virtually all public educational institutions and many private educational institutions. The focal point of the Act is the protection of privacy of students. It provides, in general, that any "education record," a term that is broadly defined, that is personally identifiable to a particular student or students is confidential, unless the parents of students under the age of eighteen waive their right to confidentiality, or unless a student eighteen years or over similarly waives his or her right to confidentiality.

The regulations promulgated under FERPA define the phrase "personally identifiable information" to include:

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

Based upon the foregoing, disclosure of students' names or other aspects of records that would make a student's identity easily traceable must in my view be withheld by an educational agency or institution in order to comply with federal law.

I note that the term disclosure is defined in the regulations to mean:

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

In consideration of FERPA, if the Board discusses an issue involving personally identifiable information derived from a record concerning a student, I believe that the discussion would involve a matter made confidential by federal law that would be exempt from the Open Meetings Law.

In the context of the situation as you described it, and based on a conversation with a member of the Board, the Board's concern was that your reference to "Child A", in consideration of the number of children in kindergarten at the school and the size of the community, could make that child's identity either known or "easily traceable." Assuming that to be so, and because there is no right to speak, but rather a limited privilege to do so, it appears that Board could justifiably have asked you refrain from discussing the matter in public. I recognize that neither the Board nor any officer or employee of the District would have been involved in making a disclosure, and that FERPA, therefore, would not have been directly implicated by your presentation. However, in consideration of what the court in Schuloff described as a "compelling state interest", in this instance, an assurance that students' privacy is protected and that your comments would not render a student's identity easily traceable, it appears that the Board could reasonably restrict your ability to offer commentary in public.

From there, if you sought to discuss the matter of Child A with the Board, it appears that any such comments or discussion could occur in private, not necessarily based on any ground for entry into executive session, but rather based on §108(3), which would exempt matters made confidential by law from the coverage of the Open Meetings Law. Further, insofar as a discussion focuses on the performance of a particular teacher or other employee, an executive session might properly be held [see §105(1)(f)].

I note that the foregoing has no bearing on your capacity to speak or disclose information outside the context of a meeting held under the Open Meetings Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

OML-AO-3406

From: Robert Freeman
To: [redacted]
Date: 2/11/02 10:11AM
Subject: Dear Mr. Rausch:

Dear Mr. Rausch:

I have received your questions and can offer brief responses.

First, if more than one subject will be discussed in executive session, a motion should include reference to each subject. If one subject is identified and the Board wants to discuss a new subject during executive session, the law requires that the Board return to an open meeting and approve a new motion for entry into executive session, citing the second subject.

Second, in general, what is said and heard during an executive session is not confidential. Whether it is good or wise or ethical to disclose what transpired in executive session is separate from whether it is illegal to do so. In my view, the only instances in which a person present at an executive session could not disclose would involve a situation in which a statute (an act of Congress or the State Legislature) prohibits disclosure. For example, if the Board reviews the educational program of a student, as you may be aware, the federal Family Educational Rights and Privacy Act (FERPA) prohibits disclosure of information identifiable to the student absent the consent of a parent. In that instance, the information would be confidential by statute and could not be divulged. In most instances, however, there is no statutory prohibition.

For a detailed analysis of that issue, you can go to our website and the index to opinions rendered under the Open Meetings Law, click on to "E" and scroll down to "Executive session, disclosure of discussion after". Number 2581 deals with the question and was also raised by a member of a school board.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
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February 20, 2002

Ms. Kate Dunham
[redacted]

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. Dunham:

I have received your letter in which you criticized the Town of Chatham in relation to its process of filling a vacancy on the Town Board. When you expressed "disappointment in the closed process", the Town Supervisor indicated that " it would have been 'illegal' to make public any information about applicants for vacant board position because it is 'illegal' to make public any information about 'town employees'."

You have raised a series of questions pertaining to the matter, and I will address those that relate to the statutes within the advisory jurisdiction of the Committee on Open Government, the Freedom of Information Law and the Open Meetings Law.

If you accurately represented the Supervisor's remarks, I believe that has misconstrued both laws cited above. In this regard, I offer the following comments.

First, there is a distinction in my view concerning access to information concerning those who run for elective office or those who have applied to fill a vacancy in an elective office, and those who seek to be appointed as employees of a government agency. Section 89(7) of the Freedom of Information Law specifies that the identities of persons who apply for appointment to public employment need not be disclosed. However, it has been held judicially that a public body, such as the Town Board, cannot conduct an executive session when considering filling a vacancy in an elective office.

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

In my view, the only provision that might justify the holding of an executive session to discuss filling a vacancy in an elective office would be §105(1)(f) 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. That being so, it is clear that the names of those seeking to fill a vacancy in an elective office would not be secret. On the contrary, the court suggested that their identities must be made public.

With respect to public rights of access to records pertaining to public officers and employees, I note that there is nothing in the Freedom of Information Law that focuses specifically on "personnel records." The extent to which the records must be disclosed or may be withheld is dependent on their content and the effects of disclosure (Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, October 30, 1980).

Further, based on the judicial interpretation of the Freedom of Information Law, it is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that those individuals are required to be more accountable than others. The courts have found that, as a general rule, records that are relevant to the performance of the official

duties of a public officer or employee are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that items relating to public officers or employees are irrelevant to the performance of their official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977, dealing with membership in a union; Minerva v. Village of Valley Stream, Sup. Ct., Nassau Cty., May 20, 1981, involving the back of a check payable to a municipal attorney that could indicate how that person spends his/her money; Selig v. Sielaff, 200 AD 2d 298 (1994), concerning disclosure of social security numbers].

I note that it has been held that disclosure of a public employee's educational background would not constitute an unwarranted invasion of personal privacy and must be disclosed [see Ruberti, Girvin & Ferlazzo v. NYS Division of State Police, 641 NYS 2d 411, 218 AD 2d 494 (1996)].

Additionally, in Kwasnik v. City of New York (Supreme Court, New York County, September 26, 1997), the court quoted from and relied upon an opinion rendered by this office and held that those portions of resumes, including information detailing one's public employment must be disclosed. The Committee's opinion stated that:

> "If, for example, an individual must have certain types of experience, educational accomplishments or certifications as a condition precedent to serving in [a] particular position, those aspects of a resume or application would in my view be relevant to the performance of the official duties of not only the individual to whom the record pertains, but also the appointing agency or officers ... to the extent that records sought contain information pertaining to the requirements that must have been met to hold the position, they should be disclosed, for I believe that disclosure of those aspects of documents would result in a permissible rather than an unwarranted invasion [of] personal privacy. Disclosure represents the only means by which the public can be aware of whether the incumbent of the position has met the requisite criteria for serving in that position.

"The Opinion further stated that:

> "Although some aspects of one's employment history may be withheld, the fact of a person's public employment is a matter of public record, for records identifying public employees, their titles

> and salaries must be prepared and made available under the Freedom of Information Law [see §87(3)(b)]."

In short, many aspects of personnel records must be disclosed, while others may be withheld to protect against an unwarranted invasion of personal privacy.

I point out that when records are "confidential", they cannot be disclosed, for a statute would forbid disclosure. In those instances, the first ground for denial, §87(2)(a), would apply, that provision pertains to records that " are specifically exempted from disclosure by state or federal statute." In contrast, there are other situations in which records *may* be withheld, but where there is nothing that would prohibit disclosure. As stated by the Court of Appeals, the state's highest court: "...while an agency is permitted to restrict access to those records falling within the statutory exemptions, the language of the exemption provision contains permissive rather than mandatory language, and it is within the agency's discretion to disclose such records, with or without identifying details, if sis so chooses" [Capitol Newspapers v. Burns, 67 NY2d 562, 567 (1986)].

In the case of most personnel records, the Town may choose to disclose, even when the law authorizes a denial of access. In those cases, the records, in my view, could not be characterized as "confidential."

Lastly, the Open Meetings Law provides the public with the right to attend meetings of public bodies, to listen to their deliberations and to observe the performance of public officials. However, the law is silent with respect to public participation. Therefore, a public body may prohibit the public from speaking at meetings. Nevertheless, many public bodies have opted to permit the public to speak. When they authorize public participation, it has been suggested that they do so based on reasonable rules that treat members of the public equally.

In an effort to enhance compliance with and understanding of open government laws, a copy of this opinion will be forwarded to the Town Board

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board

OML-AO-3408

From: Robert Freeman
To: [redacted]
Date: 3/4/02 5:07PM
Subject: Dear Supervisor Ottalagano:

Dear Supervisor Ottalagano:

I have received your letter, as well as other inquiries on the same subject. You wrote that supervisors in the Fulton County Legislature who represent cities within the County "would like to get together informally to have a social exchange", but you added there is a possibility that "some county plans or business may be discussed. You added that the members who would like to get together do not represent a quorum of the Board, but you were informed that such a gathering would constitute "an illegal meeting."

In my view, the information given to you is inaccurate. The application of the Open Meetings Law is not triggered until a quorum of a public body, such as the Board of Supervisors, convenes for the purpose of conducting public business. If there is less than a quorum, the Open Meetings Law, in my view, would not apply.

I hope that I have been of assistance.

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March 4, 2002

E-Mail

TO: Carol Thompson [redacted]

FROM: Robert J. Freeman, Executive Director

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

Dear Ms. Thompson:

I have received your letter of February 7. You raised a series of questions relating to the Open Meetings Law, particularly in relation to executive sessions held by a committee of the Oswego County Legislature.

In this regard, I offer the following comments.

First, when a committee consists solely of members of a public body, such as a county legislature, I believe that the Open Meetings Law is applicable, 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 legislative body, would fall within the requirements of the Open Meetings Law, assuming that a committee discusses or conducts public business collectively as a body [see Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984 (1981)]. Further, as a general matter, I believe that a quorum consists of a majority of the total membership of a body (see 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)].

Second, the phrase "executive session" is defined in §102(3) of the Open Meetings Law to mean a portion of an open meeting during which the public may be excluded. As such, an executive session is not separate and distinct from a meeting, but rather is a portion of an open meeting. The Law 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.

If more than one subject is to be discussed during an executive session, each subject should be identified in a motion. Further, if a public body has identified only one subject for consideration in executive session but has begun discussion of a new subject, I believe that it would be required to return to an open meetings.

It has been consistently advised and held that a public body cannot schedule or conduct an executive session in advance of or following 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.

Third, 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 the subject falls within the grounds for entry into an executive session. Further, paragraphs (a) through (h) of §105(1) specify and limit the subjects that may properly be considered in executive session.

Since you referred to the executive sessions held to discuss personnel matters, 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, policy concerning the use of government vehicles, the functions of a department or perhaps the creation or elimination of positions, I do not believe that §105(1)(f) could be asserted, even though the discussion may relate to "personnel". Similarly, if a discussion involves staff reductions or layoffs due to budgetary concerns, the issue in my view would involve matters of policy. If a discussion of possible layoff relates to positions and whether those positions should be retained or abolished, the discussion would involve the means by which public monies would be allocated. In none of the instances described would the focus involve a "particular person" and how well or poorly an individual has performed his or her duties. To reiterate, in order to enter into an executive session pursuant to §105(1)(f), I believe that the discussion must focus on a particular person (or persons) in relation to a topic listed in that provision. As stated judicially, "it would seem that under the statute matters related to personnel generally or to personnel policy should be discussed in public for such matters do not deal with any particular person" (<u>Doolittle v. Board of Education</u>, Supreme Court, Chemung County, October 20, 1981).

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

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

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

Next, when action is taken by a public body, minutes must be prepared. Here 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, if a discussion during an executive session can be overheard, and if the subject is different from that cited in the motion for entry into executive session, you asked whether you can "walk into the room." In that circumstance, I would suggest that you knock on the door and express your belief that the subject of the initial discussion appears to have ended and that you believe that the public has the right to be present to observe the discussion of the subject now under consideration.

I hope that I have been of assistance.

RJF:jm

cc: Chair, Oswego County Legislature

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

OML-AO-3410

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March 6, 2002

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 31 in which you referred to a column written by the Chili Town Supervisor, Stephen W. Henderschott. You focused on a portion of the column in which the Supervisor wrote that "the Planning Board was scheduled to discuss [a] proposal informally." You have requested my opinion concerning "the word 'informally'."

In this regard, I am unaware of the Supervisor's intent as it relates to the use of that term. It is noted, however, that the word "formal" was considered in first critical judicial decision involving the scope of the Open Meetings Law.

Section 102(1) of the Open Meetings Law defines the term "meeting" to mean, the "formal convening" of a public body, such as a planning board, for the purpose of conducting public business.

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

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, irrespective of its characterization.

In consideration of the foregoing and Supervisor's commentary, I would conjecture that he was describing a meeting of the Planning Board during which a proposal would be discussed but no action would be taken.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Hon. Stephen W. Henderschott

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March 6, 2002

Mr. Christopher W. Ryan
[redacted]

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. Ryan:

I have received your letter "concerning the need for a public vote of [y]our school board on a proposal to re-district [y]our two elementary schools."

You wrote that:

> "At a school board meeting on 23 January 2002, several parents asked the superintendent and the board to explain the decision-making process that they will follow to reach a conclusion. I asked specifically whether the board will, in the end, conduct a vote among its members at a public meeting. Both the superintendent and the board president told me that they did not think a vote would be conducted. I felt their explanations were rather nebulous, but they seemed to indicate that after further deliberation (both public and private), the board would reach a consensus (I'm still not clear at to how) and then present its decision to the public."

In this regard, it is noted at the outset that the Committee on Open Government is authorized to advise with respect to issues relating to the Open Meetings and Freedom of Information Laws. You specific question appears to involve the powers and duties of a board of education, and whether the kind of action to be taken may only be taken by a board of education. Based on my understanding of the Education Law (see e.g., §1709), only the board would have the authority to determine the boundary lines within a school district regarding attendance at elementary schools. If that is so, I do not believe that action could be taken by "consensus"; on the contrary, I believe that action of that nature could be taken only by means of a vote by the Board.

In the regard, I offer the following comments.

First, the Open Meetings Law is applicable to meetings of public bodies. Section 102(1) 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."

Section 102(1) 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, it is clear that a board of education, the governing body of public corporation, constitutes a "public body."

Second, since the definition of "public body" refers to entities that are required to conduct public business by means of a quorum, I note that 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 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 during which a quorum has physically convened or by means of videoconferencing.

Third, when action is taken by a public body, it must be memorialized in minutes, for §106 of the Open Meetings Law provides that:

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

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

In view of the foregoing, it is clear in my opinion that minutes must include reference to action taken by a public body.

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

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

Therefore, if the Board reaches a "consensus" that is reflective of its final determination of an issue, I believe that minutes must be prepared that indicate its action, as well as the manner in which each member voted. I note that §87(3)(a) of the Freedom of Information Law states that: "Each agency shall maintain...a record of the final vote of each member in every agency proceeding in which the member votes." As such, any time final action is taken by a board of education, a record must be prepared indicating the manner in which each member cast his or her vote.

Lastly, you suggested that the Board's deliberations on the subject would be conducted in "public and private." Here I point out that the Open Meetings Law is based on a presumption of openness. Stated differently, meetings of the Board must be conducted open to the public, except to the extent that an executive session may properly be held. Section 102(3) defines the term "executive session" to mean a portion of an open meeting during which the public may be excluded, and paragraphs (a) through (h) of §105(1) specify and limit the subjects that may validly be considered during an executive session. From my perspective, none of the grounds for entry into executive session could properly be asserted to discuss the redistricting proposal.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Education

OML-AO-3412

From: Robert Freeman
To: [redacted]
Date: 3/12/02 8:22AM
Subject: Re: (no subject)

Hi - -

Thanks for your kind words.

Your gut feeling is correct. There is no obligation to include a person's statement in whole or in part in the minutes. If the Board, by means of a motion carried by a majority vote, approves inclusion of the statement in the minutes, it must be included. If not, there is no requirement that the statement be included.

At a minimum, under section 106 of the Open Meetings Law, minutes must consist of a record or summary of all motions, proposals, resolutions, action taken, and the vote of each member. More information may be included, but is not required to be included.

For a more expansive explanation, you can go to the Open Meetings Law advisory opinion index on our website, click on to "M" and scroll down to "minutes, contents of." Several opinions accessible there may be of value to you.

All the best.

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

[redacted]

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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March 12, 2002

Ms. Margaret C. Menzies
[redacted]

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

Dear Ms. Menzies:

I have received your letter of February 8 and the materials attached to it. In brief, you have sought assistance in relation to your efforts in gaining access to records of the Village of Fleischmanns in a timely manner. In this regard, I offer the following comments.

First, you referred to a request to obtain copies of records that had been read aloud at a meeting of the Board of Trustees. From my perspective, insofar as records as records are read aloud at an open meeting, they must be made available, for their disclosure would constitute a waiver of the ability to deny access to the public. While it has been held that an erroneous or inadvertent disclosure does not create a right of access on the part of the public [see McGraw-Edison v. Williams, 509 NYS 2d 285 (1986)], the disclosure, as you described it, was purposeful and intentional rather than inadvertent. If that is so, a public reading of records in my view precludes the Village from withholding any portion of the documentation that was disclosed.

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. In my view, building permits and related records must be made available, for none of the grounds for denial would be pertinent or applicable.

Third, 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.

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.

In my opinion, if as a matter of practice or policy, an agency acknowledges the receipt of requests and indicates in every instance that it will determine to grant or deny access to records within the same particular period following the date of acknowledgement, such a practice or policy would be contrary to the thrust of the Freedom of Information Law. If a request is voluminous and a significant amount of time is needed to locate records and review them to determine rights of access, a substantial period, in view of those and perhaps the other kinds of factors mentioned earlier, might be reasonable. On the other hand, if a record or report is clearly public and can be found easily, there would appear to be no rational basis for a lengthy delay in disclosure. I would conjecture that building permits and similar records can be found readily.

A recent judicial decision cited and confirmed the advice rendered by this office. In Linz v. The Police Department of the City of New York (Supreme Court, New York County, NYLJ, December 17, 2001), it was held that:

> "In the absence of a specific statutory period, this Court concludes that respondents should be given a 'reasonable' period to comply with a FOIL request. The determination of whether a period is reasonable must be made on a case by case basis taking into account the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure. Such a standard is consistent with some of the language in the opinions, submitted by petitioners in this case, of the Committee on Open Government, the agency charged with issuing advisory opinions on FOIL."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, or if the acknowledgement of the receipt of a request fails to include an estimated date for granting or denying access, 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)].

Lastly, there are separate provisions which specify the time within which minutes of meetings must be prepared and made available. Section 106 of the Open Meetings Law states that:

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

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

In an effort to enhance compliance with and understanding of the statutes referenced above, 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:tt

cc: Board of Trustees
Lorraine De Marfio, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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OML-AO-3414

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March 18, 2002

E-Mail

TO: Anne C. Fullam [redacted]

FROM: Robert J. Freeman, Executive Director

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

Dear Ms. Fullam:

As you are aware, I have received your letter of February 12 in which you raised a series of issues relating to the Open Meetings and Freedom of Information Laws, as well as other matters. In addition, you asked by phone whether a member of a board of education may be excluded from an executive session and indicated that matters of your concern pertain to the Averill Park School District.

In this regard, it is noted at the outset the advisory jurisdiction of the Committee on Open Government involves issues relating to the statutes cited above. Some of the issues that you raised (i.e., the manner in which the budget is presented) are not relevant to those statutes, and no comment will be made. With respect to those that are within the jurisdiction of this office, I offer the following remarks.

First, you wrote that "[e]xecutive sessions are held before every meeting." 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. Rather than scheduling an executive session, a public body on its agenda or notice of a meeting could refer to or schedule a motion to enter into executive session to discuss certain subjects. Reference to a motion to conduct an executive session would not represent an assurance that an executive session would ensue, but rather that there is an intent to enter into an executive session by means of a vote to be taken during a meeting. When the intent is to be considerate to the public, 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.

Second, you referred to executive sessions held to discuss "personnel matters." 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" (<u>Doolittle v. Board of Education</u>, Supreme Court, Chemung County, October 20, 1981).

It has been advised that a motion describing the subject to be discussed as "personnel" or "specific personnel matters" is inadequate, and that the motion should be based upon the specific language of §105(1)(f). For instance, a proper motion might be: "I move to enter into an executive

session to discuss the employment history of a particular person (or persons)". Such a motion would not in my opinion have to identify the person or persons who may be the subject of a discussion. By means of the kind of motion suggested above, members of a public body and others in attendance would have the ability to know that there is a proper basis for entry into an executive session. Absent such detail, neither the members nor others may be able to determine whether the subject may properly be considered behind closed doors.

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, I point out that an executive session serves as one of two vehicles that might be employed as a means of closing a meeting. Section 108 of the Open Meetings Law pertains to "exemptions", and if an exemption is applicable, the Open Meetings Law is not; it is as if the Open

Meetings Law does not exist. That provision is pertinent in my view in relation to two of your areas of inquiry.

You referred to discussions relating to students being characterized as "privileged." Relevant is §108(3), which exempts from the Open Meetings Law:

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

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

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

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

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

In consideration of FERPA, if the Board discusses an issue involving personally identifiable information derived from a record concerning a student, I believe that the discussion would deal with a matter made confidential by federal law that would be exempt from the Open Meetings Law.

The other situation relates to the alleged exclusion of a member of the Board of Education from an executive session. From my perspective, a member of a public body, such as a board of

education, clearly has the right to attend an executive session. Section 105(2) of the Open Meetings Law states that: "Attendance at an executive session shall be permitted to any member of the public body and any other persons authorized by the public body." Based on the foregoing, I believe that the only persons who have the right to attend executive sessions of the Board are members of the Board.

Of possible relevance is the same provision as that cited above, §108(3) concerning matters made confidential by law. When an attorney-client relationship has been invoked, the communications made pursuant to that relationship are considered confidential under §4503 of the Civil Practice Law and Rules. Consequently, if an attorney and a 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 (1989); Pennock v. Lane, 231 NYS 2d 897, 898 (1962)]. However, such a relationship is in my opinion operable only when a municipal board or official seeks the legal advice of an attorney acting in his or her capacity as an attorney, and where there is no waiver of the privilege by the client.

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

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

Therefore, insofar as a public body or members of a public body seek legal advice from their attorney and the attorney offers legal advice, the communications would, in my opinion, be confidential and outside the coverage of the Open Meetings Law. Further, it has been advised that when a member of a public body is a litigant or potential litigant who has initiated or may initiate a lawsuit against the public body, those other members of the public body may engage in attorney-client communications in private, and outside the coverage of the Open Meetings Law. While a member of a public body has the right to attend an executive session, in the context of the situation described in the preceding sentence, I do not believe that that person, as a litigant or potential litigant, would enjoy the same right to attend a gathering of the other members with their attorney during which the communications are subject to the attorney-client privilege.

The foregoing in my view is consistent with the judicial interpretations of the Open Meetings Law covering discussions regarding litigation. Section §105(1)(d) of the Open Meetings Law permits a public body to enter into an executive session to discuss "proposed, pending or current litigation". In construing the language quoted above, it has been held that:

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

Based upon the passage quoted above, I believe that the exception is intended to permit a public body to discuss its litigation strategy behind closed doors.

When a member of a public body has sued or is likely to sue that body and is its legal adversary, I believe he or she could validly be excluded from a gathering between the other members and their attorney in which the attorney-client privilege is properly invoked. The member-adversary in that instance would not be the client, and that person's exclusion would, in my view, be consistent with the thrust of case law concerning the intent of §105(1)(d), the litigation exception for litigation. In that situation, the gathering would be exempted from the Open Meetings Law insofar as the attorney-client privilege applies. However, if a member of a public body is not an adversarial or potential adversarial party in litigation (but perhaps a dissenter or person with a minority view), I believe that he or she would have the right under §105(2) of the Open Meetings Law to attend an executive session.

Next, you referred to the release of "internal memos." In this instance, the governing statute is 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.

Most pertinent with respect to the records in question is §87(2)(g). Although that provision potentially serves as a basis for a denial of access, due to its structure, it may require substantial disclosure. Specifically, §87(2)(g) states that an agency may withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

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

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

I point out, too, that the Freedom of Information Law is generally permissive. Although an agency *may* withhold records in accordance with the grounds for denial, there is no obligation to do so, unless a different statute (i.e., FERPA) prohibits disclosure. If, for example, §87(2)(g) is the only basis for a denial of access, there would be no prohibition against the disclosure of the entirety of the record.

In a related vein, you wrote that "Board members are forbidden to discuss board matters w/anyone, esp. the press." In short, I do not believe that any such prohibition, if indeed there is one, would be enforceable.

Lastly, you indicated that you "doubt that minutes are taken at all the executive sessions." In this regard, if the Board is acting in a manner consistent with judicial decisions, rarely would there be minutes of executive sessions.

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."

As suggested above, 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 is derived from a record that is personally identifiable to a student, FERPA 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, those records, insofar as they are identifiable to students, may in my opinion, be withheld.

I hope that I have been of assistance.

RJF:jm

cc: Board of Education

From: Robert Freeman
To: [redacted]
Date: 3/18/02 4:11PM
Subject: Dear Mr. Clark:

Dear Mr. Clark:

I have received your letter, but I am not sure that I understand the facts.

The phrase "nunc pro tunc" is Latin and means "now for then." In the context of the situation that you described, it appears that the Town Board took action after rehiring the individual, rather than at the time of his rehiring. You have questioned whether the person was legally hired and whether the contract is valid.

In this regard, the Open Meetings Law does not deal directly with the validity of a contract. In short, if action was taken by the Town Board, it remains valid unless and until a court determines to the contrary. I note that a town board cannot appropriate public monies during an executive session; it can only do so in public. If in fact an appropriation was made in private, and if a lawsuit is intiated, a court would have discretionary authority, "upon good cause shown", to nullify the action taken in violation of the Open Meetings Law.

Since the issue appears to involve use of public monies, it is suggested that you contact the Office of the State Comptroller, which has a regional office in Buffalo. It can be reached at (716)847-7122.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
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STATE OF NEW YORK
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March 20, 2002

Ms. Dione Goldin
[redacted]

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

Dear Ms. Goldin:

I have received your letter in which you raised a series of issues concerning "Open Meetings Law Notification Requirements."

In this regard, §104 of the Open Meetings Law pertains to notice of meetings of public bodies and states that:

> "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before such meeting.
>
> 2. Public notice of the time and place of every other meeting shall be given to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.
>
> 3. The public notice provided for by this section shall not be construed to require publication as a legal notice.
>
> 4. If videoconferencing is used to conduct a meeting, the public notice for the meeting shall inform the public that videoconferencing will be used, identify the locations for the meeting, and state that the public has the right to attend the meeting at any of the locations."

In consideration of the foregoing, first, I point out that a public body is required only to provide notice of the time and place of a meeting. There is nothing in the Open Meetings Law that

requires that notice of a meeting include reference to the subjects to be discussed. Similarly, there is nothing in that statute that pertains to or requires the preparation of an agenda.

Second, §104 imposes a dual requirement, for notice must be posted in one or more conspicuous, public locations, and in addition, notice must be given to the news media. That notice of a meeting is faxed to various locations or offices does not necessarily suggest or indicate that a public body has complied with law. Again, the law requires that notice of a meeting be "posted"in one or more "designated" locations. The term "designated" in my opinion involves a requirement that a public body, by resolution or through the adoption of policy or a directive, must select one or more specific locations where notice of meetings will consistently and regularly be posted. If, for instance, a bulletin board located at the entrance of a school district's administrative offices has been designated as a location for posting notices of meetings, the public has the ability to know where to ascertain whether and when meetings of a school board will be held.

With respect to notice to the news media, subdivision (3) of §104 specifies that the notice given pursuant to the Open Meetings Law need not be legal notice. That being so, a public body is not required to pay to place a legal notice prior to a meeting; it must merely "give" notice of the time and place of a meeting to the news media. Moreover, when in receipt of notice of a meeting, there is no obligation imposed on the news media to publish the notice.

Lastly, I believe that every law, including the Open Meetings Law, must be implemented in a manner that gives reasonable effect to its intent. In that vein, to give effect to intent of the Open Meetings Law, I believe that notice of meetings should be given to news media organizations that would be most likely to make contact with those who may be interested in attending. Similarly, for notice to be "conspicuously" posted, I believe that it must be posted at a location or locations where those who may be interested in attending meetings have a reasonable opportunity to see the notice.

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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March 20, 2002

Ms. Dione Goldin
[redacted]

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

Dear Ms. Goldin:

I have received your letter of February 14 labeled "Confidentiality" in which you raised a series of questions concerning plans by the Wappingers Central School District "to redistrict the school district." You indicated that information concerning the plan "has been kept confidential and was 'sprung' on the community..." You have raised the following questions in relation to the foregoing.

> "1. May this information (for example, a map of the proposed new school districts; a detailed plan for implementation; schedules, etc. regarding the plan) be labeled 'Confidential'"?
>
> 2. May the subject of redistricting be discussed in an executive session, to which the public has been excluded?
>
> 3. May the superintendent of the school district talk about the redistricting plan to members of the board of education in executive session if he is the doing the talking, the board is doing the listening, and there is no 'discussion'?
>
> 4. May the superintendent tell members of the board of education to keep the information 'quiet' until the plan is finalized?"

In this regard, first, labeling or marking a record as "confidential" is all but meaningless. 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 Court of Appeals, the state's highest court, has held on many occasions that records may be withheld only to the extent that one or more of the grounds for denial of access may clearly be asserted [see e.g., Doolan v. BOCES, 48 NY 2d 341, 347, Gould v. New York City, 89 NY 2d 267 (1996), Matter of Fink v. Lefkowitz, 47 N.Y. 2d, 567 (1979)].

From my perspective, only one of the exceptions to rights of access would be pertinent to an analysis of rights of access to the kinds of records described in your letter. However, due to the structure of that provision, it often requires substantial disclosure. Specifically, §87(2)(g) 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.

One of the contentions offered by the New York City Police Department in a decision rendered 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 of Appeals 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][111]). 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, supra, 276).

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

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).]

In my view, insofar as the records at issue consist of recommendations, advice or opinions, for example, they may be withheld; insofar as they consist of statistical or factual information, I believe that they must be disclosed.

I point out that the Court in Gould repeatedly specified that a categorical denial of access to records is inconsistent with the requirements of the Freedom of Information Law. In that case, the agency contended that complaint follow up reports, also known as "DD5's", could be withheld in their entirety on the ground that they fall within the exception regarding intra-agency materials, §87(2)(g). The Court, however, wrote that: "Petitioners contend that because the complaint follow-up reports contain factual data, the exemption does not justify complete nondisclosure of the reports. We agree" (id., 276). The Court then stated as a general principle that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government" (id., 275). The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, directing that:

> "...to invoke one of the exemptions of section 87(2), the agency must articulate 'particularized and specific justification' for not disclosing

> requested documents (*Matter of Fink v. Lefkowitz, supra*, 47 N.Y.2d, at 571, 419 N.Y.S.2d 467, 393 N.E.2d 463). If the court is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an in camera inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material (*see, Matter of Xerox Corp. v. Town of Webster*, 65 N.Y.2d 131, 133, 490 N.Y.S. 2d, 488, 480 N.E.2d 74; *Matter of Farbman & Sons v. New York City Health & Hosps. Corp., supra*, 62 N.Y.2d, at 83, 476 N.Y.S.2d 69, 464 N.E.2d 437)" (id.).

Lastly, in my view, although the official information privilege or its equivalent might be properly asserted in other contexts, it does not exist with respect to the ability to withhold records under the Freedom of Information Law. As stated by the Court of Appeals in 1979: "[T]he common-law interest privilege cannot protect from disclosure materials which that law requires to be disclosed" [see Doolan v. BOCES, supra, 347]. In short, either records or portions thereof fall within the grounds for denial appearing in §87(2) of the Freedom of Information Law or they do not; if they do not, there would be no basis for denial, notwithstanding a claim of privilege or an assertion of "confidentiality."

Second, assuming that the plans are discussed at meetings of the Board of Education, even though portions might justifiably be withheld under the Freedom of Information Law, it is likely that those portions would be discussed in public if the Board is complying with the Open Meetings Law. Like the Freedom of Information Law, that statute is based on a presumption of openness. Meetings of public bodies, such as boards of education, must be conducted open to the public, unless there is a basis for entry into executive session. Paragraphs (a) through (h) of §105(1) specify and limit the subjects that may properly considered in executive session. Based on a review of those provisions, I do not believe that any could validly be asserted to enter into executive session to discuss redistricting.

Third, in my view, if the Board gathers to "listen" to the Superintendent, that would not change or enlarge the grounds for entry into executive session, in short, the subject matter under consideration serves as the critical factor in determining whether the extent to which an executive session may properly be held; who "is doing the talking" in my opinion has no bearing on the authority to enter into executive session.

Lastly, I know of no law that would preclude a superintendent from "tell[ing] members of the board of education to keep information 'quiet'..." However, there is no law of which I am aware that would require board members to do so or that would prohibit them from discussing the matter with district residents or others.

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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March 20, 2002

Mr. Egidio J. Sementelli
[redacted]

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. Sementelli:

As you are aware, I have received your letter of February 14 in which you sought an advisory opinion concerning "the requirement of pre registration" in order to speak at meetings of Community School Boards in the Bronx. You attached an agenda relating to a meeting held on February 13 that includes the following statement of policy and procedure pertaining to the ability of the public to speak at a meeting:

> "All persons wishing speaking time must call the Community School Board Office at (718) 409-8801 before 12:00 noon on Wednesday, February 13, 2002. And must identify the parameters of the topic they wish to speak on."

In this regard, I offer the following comments.

First, §104 of the Open Meetings Law requires that a public body, such as a school, give notice of the time and place of its meetings. There is nothing in the law that requires the preparation of an agenda or that an agenda be included as part of the notice of a meeting. A public body may choose to prepare and distribute an agenda in advance of a meeting, but there is not an obligation to do so.

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

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

A public body's rules pertaining to public participation typically indicate when, during a meeting (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).

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.

Further, federal court decisions indicate 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 consideration of the policy expressed on the Board's agenda, since it treats members of the public equally, it appears to be consistent with law and to represent a valid exercise of the Board's authority.

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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March 20, 2002

Ms. Anita Broast
[redacted]

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. Broast:

I have received your letter of February 15. You indicated that you serve as a member of the Germantown School Board, and you raised questions concerning three "situations."

You wrote that the first situation involved:

> "...a negotiations meeting which was held at Castleton Questar III for the Germantown Board to work on an agreement with the school administrators. The members were informed by a letter from the superintendent dated January 18. The meeting was to be held less than a week from that date on January 23. (Copy of the letter is enclosed.)
>
> "I received the letter in the mail on Tuesday, January 22. There wasn't any mail delivery on Monday because of Martin Luther King holiday. The meeting was held at 10 a.m. during a work day. Three members of the board have full-time jobs and could not attend the meeting. The four other board members attended the meeting. At this meeting the four board members signed a memorandum of agreement with the administrators. The three of us who could not attend the meeting weren't given a chance to comment on this agreement before it was signed... The three not in attendance were opposed to a large raise for the group at a previous meeting."

In this regard, because a majority of Board gathered to conduct public business, I believe that the gathering clearly constituted a "meeting" [see Open Meetings Law §102(2)] required to have been held in accordance with the Open Meetings Law. That being so, I believe that notice was required to have been given pursuant to§104 of that statute. That provision states that:

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

> conspicuously posted in one or more designated public locations at a reasonable time prior thereto.
>
> 3. The public notice provided for by this section shall not be construed to require publication as a legal notice."

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

Separate from the duties imposed by the Open Meetings Law but perhaps pertinent in consideration of the facts as you described them is §41 of the General Construction Law, which deals with quorum requirements. That statute, which is 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 duty."

Based on the foregoing, before a public body, such as a board of education, may conduct a valid meeting, reasonable notice must be given to all the members. From my perspective, in consideration of the date that notice of the meeting was mailed and the fact there would be no mail delivery on either Sunday or the following Monday due to the Martin Luther King holiday, it is questionable whether "reasonable notice" was given to Board members. Under the circumstances, it appears that reasonable notice would have involved not only the mailing of notice, but perhaps also notice given by phone or email to members having the capacity to receive email.

The second situation pertained to:

> "...the reading of a letter to the board during the general session. The letter was sent by parents of a kindergartner who wasn't happy with the way a faculty member was dealing with their child. The board clerk stated, 'It is required by law that I read the letter out loud.'"

I know of no requirement that letters received by or addressed to a board of education must be read aloud at a meeting. Moreover, in this instance, it appears that the Board may have been prohibited from disclosing or having the letter read in public without the consent of the parents of the student. When 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, or in the situation that you described), 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)]. I note that "disclosure" in defined in federal negotiations to include the verbal disclosure of information contained in a record identifiable to a student (see 34 CFR §99.3). 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.

With respect to the third situation, you wrote that it:

> "...involves the legality of statements that can and cannot be made by board members. I wanted to make some comments why I was not in favor of the administrators contract during the open session. I started to talk about a specific job position. The superintendent informed me, 'This cannot be discussed because it could get us in trouble.' I wanted to talk about the amount of the raise for the head custodian specifically. She informed me that the amount of money could not be discussed until the contact was signed by both sides."

Whether it is wise or appropriate to make statements, offer comments or otherwise disclose information regarding the matters described is separate, in my opinion, from whether it is legal to do so, or whether you or others may be prohibited from doing so.

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

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

An example of a situation in confidentiality may be required would involve the kind of matter discussed earlier in which federal law prohibits disclosure .

Although there may be no prohibition against disclosure of the information acquired during executive sessions or records that could be withheld, the foregoing is not intended to suggest such disclosures would be uniformly appropriate or ethical. Obviously, the purpose of an executive

session is to enable members of public bodies to deliberate, to speak freely and to develop strategies in situations in which some degree of secrecy is permitted. Similarly, the grounds for withholding records under the Freedom of Information Law relate in most instances to the ability to prevent some sort of harm. In both cases, inappropriate disclosures could work against the interests of a public body as a whole and the public generally. Further, a unilateral disclosure by a member of a public body might serve to defeat or circumvent the principles under which those bodies are intended to operate.

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

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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March 25, 2002

Ms. Ann Adams
[redacted]

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

Dear Ms. Adams:

I have received your letter and the materials attached to it. You have requested an advisory opinion concerning the use of "such vague phrases as 'particular personnel issues', 'contractual matters', and 'litigation matters'" as justification for entry into executive sessions by the Sharon Springs Board of Education.

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.

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

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

> "...the public body must identify the subject matter to be discussed (See, Public Officers Law § 105 [1]), and it is apparent that this must be accomplished with some degree of particularity, i.e., merely reciting the statutory language is insufficient (see, Daily Gazette Co. v Town Bd., Town of Cobleskill, 111 Misc 2d 303, 304-305). Additionally, the topics discussed during the executive session must remain within the exceptions enumerated in the statute (see generally, Matter of Plattsburgh Publ. Co., Div. of Ottaway Newspapers v City of Plattsburgh, 185 AD2d §18), and these exceptions, in turn, 'must be narrowly scrutinized, lest the article's clear mandate be thwarted by thinly veiled references to the areas delineated thereunder' (Weatherwax v Town of Stony Point, 97 AD2d 840, 841, quoting Daily Gazette Co. v Town Bd., Town of Cobleskill, supra, at 304; see, Matter of Orange County Publs., Div. of Ottaway Newspapers v County of Orange, 120 AD2d 596, lv dismissed 68 NY 2d 807).
>
> "Applying these principles to the matter before us, it is apparent that the Board's stated purpose for entering into executive session, to wit, the discussion of a 'personnel issue', does not satisfy the requirements of Public Officers Law § 105 (1) (f). The statute itself requires, with respect to personnel matters, that the discussion involve the 'employment history of a particular person" (id. [emphasis supplied]). Although this does not mandate that the individual in question be identified by name, it does require that any motion to enter into executive session describe with some detail the nature of the proposed discussion (see, State Comm on Open Govt Adv Opn dated Apr. 6, 1993), and we reject respondents' assertion that the Board's reference to a 'personnel issue' is the functional equivalent of identifying 'a particular person'" [Gordon v. Village of Monticello, 620 NY 2d 573, 575; 209 AD 2d 55, 58 (1994)].

In short, the characterization of an issue as a "specific personnel issues" is inadequate, for it fails to enable the public or even members of the Board to know whether subject at hand may properly be considered during an executive session.

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

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

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

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

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

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

With respect to "contractual matters", the only ground for entry into executive session that refers directly to contract 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."

As you requested and in an effort to enhance compliance with and understanding of the Open Meetings Law, a copy of this opinion will be sent 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]
Date: 3/25/02 12:55PM
Subject: Dear Ms. Fullam:

Dear Ms. Fullam:

I have received your letter regarding the propriety of an executive session to discuss the "dismissal/reassignment of a tenured faculty member". You questioned whether when "the reasoning behind the faculty change is budgetary", that "override[s]....the tenured provision."

From my perspective, the issue relates to the provision upon which the earlier opinion focused, section 105(1)(f), the so-called "personnel" exception. To reiterate, that provision authorizes a public body to enter into executive session to discuss: "the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation."

In my view, if the discussion relates to money, the allocation of public funds, the needs of the students and the like, there would be no basis for entry into executive session. On the other hand, insofar as the discussion focuses on a specific individual and his or her performance, it would likely involve the "employment history of a particular person" that could be conducted during an executive session.

You mentioned a decision by Judge Canfield. If a written opinion was issued, I would appreciate having a copy.

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

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
Albany, NY 12231
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From: Robert Freeman
To: Janet Mercer
Date: 3/25/02 4:26PM
Subject: Re: Fwd: Open Meeting Question

As you are aware, for purposes of the Open Meetings Law, a "meeting" is a gathering of a majority of a public body for the purpose of conducting public business, collectively, as a body. Therefore, if indeed the gathering in question is purely social, and if the members present will not be discussing or conducting public business as a body, I do not believe that the Open Meetings Law would apply.

Robert J. Freeman
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STATE OF NEW YORK
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March 26, 2002

Ms. Margaret A. Cole, RMC
Town Clerk
Town of Schroeppel
69 County Route 57A
Phoenix, New York 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 facts presented in your correspondence.

Dear Ms. Cole:

I have received your letter of February 21 and the materials attached to it. You have raised questions in relation to a gathering described in a newspaper article as an "informational session" concerning the Oswego River Road Water District scheduled by Schroeppel Town Engineer Mark Parrish. The article indicates that the Town Board "allowed Parrish to use the kitchen of the municipal building", that the Board members "were not assembled as a government body, but rather as audience members", that you were told that the gathering was not a Town Board meeting and that it would not be necessary for you to record the session. Although the article states that Mr. Parrish "did not want [the session] recorded in the interest of uninhibited communication", you recorded the session nonetheless.

In an effort to respond to your questions, I offer the following comments.

First, when it is not inappropriate to do so, there is no reason to keep secret or confidential the fact that I have been contacted by a government official who has sought an opinion.

Second, as you are likely aware, the Open Meetings Law applies to meetings of public bodies, and the term "meeting" is defined to mean the official convening of a public body, such as a town board, "for the purpose of conducting public business", collectively, as a body. If five board members are in a room, sitting separately, merely as part of an audience that is present to hear a presentation, I do not believe that their presence could be equated with a meeting of a public body. If that is so, in my view, there would have been no obligation on your part as Clerk to attend the event in question, and similarly, there would have been no requirement that a legal notice be published regarding the event or that minutes be prepared. I note, too, that §104(3) of the Open Meetings Law specifies that notice of meetings given pursuant to that statute need not be legal notices.

This is not to suggest that you (or anyone else) should not have attended. Based on the notice, anyone with an interest in the subject matter was invited to attend. As a citizen of the community, I believe that you would have had the same right to attend as others.

Next, you asked whether the use of a "sign in sheet" was "against the law." I know of no law that deals with the issue. However, meetings held pursuant to the Open Meetings Law are open, according to that statute, "to the general public." That being so, a person cannot be required, in my opinion, to indicate his or her status or interest in attending a meeting of a public body or to provide his or her name on a sign in sheet. Further, there is nothing in any provision of law that states that minutes of a meeting of a public body must or should include the names of members of the public who attend. In short, I see no necessity for having a sign sheet of any kind.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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OML-AO-3424

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March 27, 2002

Mr. Elliot Bernstein
[redacted]

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. Bernstein:

I have received your letters of February 22 and March 16. In brief, you have asked whether "records compiled during the quasi-judicial executive sessions" by officials of the Village of Scarsdale during a certain hearing should be disclosed. In response to your request for those records, the Deputy Village Manager wrote that your request was "overly broad", that you must "identify specifically what memorandum you wish to inspect", and that "the FOI Law was not intended for and can not be used as a discovery device."

In this regard, I offer the following comments.

First, irrespective of how or where records are compiled, they are subject to rights conferred by the Freedom of Information Law. That statute pertains to all records of an agency, such as a village, and defines the term "record" expansively to include:

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

Based on the foregoing, notes taken by Village officials in relation to the performance of their duties, whether taken during sessions open to the public or closed, would, in my view, clearly constitute "records" that fall within the coverage of the Freedom of the Freedom of Information Law.

Second, I do not believe that you can be required to "identify specifically" the records of your interest. By way of background, when the Freedom of Information Law was initially enacted in 1974, it required that an applicant seek "identifiable" records. That standard often resulted in the kind of problem that you encountered, i.e., that you may be unaware of the particular records that exist and therefore cannot identify them. Nonetheless, 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, and it has been held that a request reasonably describes the records when the agency can locate and identify the records based on the terms of a request, and 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)].

From my perspective, it is likely that a request for notes pertaining to a specific subject during a session held at specific time would "reasonably describe" the records.

Third, there is nothing in the Freedom of Information Law that forbids its use as a substitute for discovery. As stated by the Court of Appeals, the state's highest court, in a case involving a request made under the Freedom of Information Law by a person involved in litigation against an agency: "Access to records of a government agency under the Freedom of Information Law (FOIL) (Public Officers Law, Article 6) is not affected by the fact that there is pending or potential litigation between the person making the request and the agency" [Farbman v. NYC Health and Hospitals Corporation, 62 NY 2d 75, 78 (1984)]. Similarly, in an earlier decision, the Court of Appeals determined that "the standing of one who seeks access to records under the Freedom of Information Law is as a member of the public, and is neither enhanced...nor restricted...because he is also a litigant or potential litigant" [Matter of John P. v. Whalen, 54 NY 2d 89, 99 (1980)]. The Court in Farbman, supra, discussed the distinction between the use of the Freedom of Information Law as opposed to the use of discovery in Article 31 of the CPLR. Specifically, it was found that:

> "FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose; while its purpose may be to shed light on governmental decision-making, its ambit is not confined to records actually used in the decision-making process (Matter of Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581.) Full disclosure by public agencies is, under FOIL, a public right and in the public interest, irrespective of the status or need of the person making the request.
>
> "CPLR article 31 proceeds under a different premise, and serves quite different concerns. While speaking also of 'full disclosure' article 31 is plainly more restrictive than FOIL. Access to records under CPLR depends on status and need. With goals of promoting both the ascertainment of truth at trial and the prompt disposition of actions (Allen v. Crowell-Collier Pub. Co., 21 NY 2d 403, 407), discovery is at the outset limited to that which is 'material and necessary in the prosecution or defense of an action'" [see Farbman, supra, at 80].

Based upon the foregoing, the pendency of litigation would not, in my opinion, affect either the rights of the public or a litigant under the Freedom of Information Law, or the ability of an agency to withhold records sought under the Freedom of Information Law in accordance with the grounds for denial appearing in §87(2) of that statute.

Next, with respect to rights of access, 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 good faith, I direct your attention to Kline v. County of Hamilton [235 AD2d 44, 663 NYS 2d 339 (1997)], which involved a request made under the Freedom of Information Law for tape recordings and transcripts of executive sessions. 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).

With due respect to the Appellate Division, 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 a 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.

The foregoing is not intended to suggest that the records of your interest must be disclosed, for it appears that one of the grounds for denial of access is particularly relevant to the matter. 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.

In short, insofar as §87(2)(g) or any other exception to rights of access may properly be asserted, I believe that the Village may deny access to the records sought.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Trustees
John N. Crary

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March 28, 2002

Ms. Lena Bishop
[redacted]

The staff of the Committee on 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. Bishop:

I have received your letters in which you raised questions concerning access to records of the Village of Endicott and its implementation of the Open Meetings Law.

The initial issue relates to access to bills to be approved by the Board of Trustees. Although the public had in the past been given the opportunity to review the bills prior to meetings of the Board, you wrote that the Village Attorney issued a "directive", prohibiting review of the bills until they are approved. From my perspective, the bills are accessible under the Freedom of Information Law when they come into the possession of the Village. In this regard, I offer the following comments.

First, the Freedom of Information Law is applicable to records of an agency, such as a village, and §86(4) defines the term "record" expansively to mean:

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

Based on the foregoing, as soon as bills or other documents are prepared by the Village or come into the possession of the Village, I believe that they constitute "records" that fall within the coverage of the Freedom of Information Law.

Second, 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, none of the

grounds for denial could properly be asserted to withhold the bills from the public, irrespective of whether the bills have been approved.

As your inquiry relates to the Open Meetings Law, you referred to a meeting of the Board of Trustees held on February 26 and a motion made to go into executive session to discuss "contracts". You wrote that no vote was taken on the motion, but that the Board entered into executive session nonetheless. Following adjournment of the meeting, the Mayor (a republican) and three trustees (all democrats) met in the Mayor's office, and "the door was shut."

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

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

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

Although some issues relating to "contracts" might qualify for consideration in executive session, I point out that the only provision that deals directly with contract negotiations, §105(1)(e), pertains to collective bargaining negotiations between a public employer and a public employee union under Article 14 of the Civil Service Law, which is commonly known as the Taylor Law. A different ground for entry into executive session that may, depending upon the nature of the discussion, be asserted to discuss certain matters pertaining to contract negotiations. Section 105(1)(f) authorizes a public body to enter into executive session to discuss:

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

In some instances, a public body's discussion might focus on the financial or credit history of a particular corporation. To the extent that a discussion involves such matters, I believe that an executive session could properly be held. However, it is emphasized that the ability to discuss "contracts" in executive session is limited.

Lastly, with respect to the gathering in the Mayor's office, I note that §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 Village 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.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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March 28, 2002

E-Mail

TO: Pamela Stiegman <[redacted]

FROM: Robert J. Freeman, Executive Director

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

Dear Ms. Stiegman:

I have received your communication in which you asked whether a school board may "limit a person to 5 minutes of public comment."

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.

RJF:jm
cc: Board of Education

STATE OF NEW YORK
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April 1, 2002

Mr. David Baker
[redacted]

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. Baker:

I have received your letter in which you sought my views concerning a response to request for minutes of a meeting of the City of Rensselaer Board of Public Safety.

You wrote that meeting in question was held on February 6, that the Board entered into executive session, and that a statement was given to the news media following the meeting indicating that the Chief of Police had been place on administrative leave and that the decision to do so was "by majority vote of the board." The minutes that you received were "heavily censored" and they do not "show how each member voted."

In this regard, first, §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, 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)].

In this instance, since the matter involved a police officer, I do not believe that details concerning the matter would have been required to have been disclosed. As you may be aware, §50-a of the Civil Rights Law prohibits the disclosure of personnel records pertaining to police officers that are used to evaluate performance toward continued employment or promotion. That being so, the Board in my view was justified in deleting information from the minutes involving the action taken regarding the Chief.

Second, notwithstanding the foregoing, I point out that since the Freedom of Information Law was enacted in 1974, it has imposed what some have characterized as an "open vote" requirement. Although that statute generally pertains to existing records and ordinarily does not require that a record be created or prepared [see Freedom of Information Law, §89(3)], an exception to that rule involves voting by agency members. Specifically, §87(3) of the Freedom of Information Law has long required that:

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

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

To comply with the Freedom of Information Law, I believe that a record must be prepared and maintained indicating how each member cast his or her vote. From my perspective, disclosure of the record of votes of members of public bodies, such as the Board of Public Safety in this instance, represents a means by which the public can know how their representatives asserted their authority. Ordinarily, a record of votes of the members appear in minutes required to be prepared pursuant to §106 of the Open Meetings Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Public Safety

OML-AO-3427A

From: Robert Freeman
To: [redacted]
Subject: Re: Workshop meeting minutes

Dear Ms. Zajac:

I will not be able to prepare a detailed opinion by April 8. However, other opinions have been prepared in the past that include information responsive to your questions, and they are available on our website.

As you may be aware, there is an index to advisory opinions rendered under the Open Meetings Law on the website, and the higher numbered opinions are available in full text. I will briefly respond to your questions and indicate the "key phrase" in the index that will include one or more opinions that you can download or use as you see fit.

1. Reference to comments made by the public need not be included in minutes of meetings. There are opinions under "minutes, contents of" that advise that minutes need not be a verbatim account of what is said, nor must they include reference to comments made by the public or board members.

2. A workshop is a meeting, and the same provisions dealing with minutes apply to workshops as "regular" meetings. In short, section 106 of the Open Meetings Law requires that, at a minimum, minutes must consist of a record or summary of motions, proposals, resolutions, action taken and the vote of the members. Insofar as any of those events occurs at any meeting (including a workshop), minutes must be prepared. If none of those events occurs, technically, there is no requirement that minutes be prepared. In the index, see "minutes of 'work sessions'".

3. There is nothing in the Open Meetings Law or any other law of which I am aware that addresses the ability of the public to speak at meetings. That being so, a board is not required to permit the public to speak. However, if it chooses to do so, it has been advised that reasonable rules be developed that treat members of the public equally. In the index, see "public participation."

I hope that I have been of assistance. Please let me know if you continue to want or a detailed written opinion.

[redacted]

STATE OF NEW YORK
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April 2, 2002

E-Mail

TO: Richard Vogan [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. Vogan:

I have received your letter in which you raised a series of questions relating to a survey in which you are attempting to ascertain how well or poorly school districts are complying with and implementing the Freedom of Information Law. I will attempt to deal with each of them.

First, under §89(3) of the Freedom of Information Law, an agency may require that a request be made in writing. From my perspective, any request made in writing, irrespective of the means by which it is transmitted, should ordinarily be accepted. On occasion, particularly in the case of law enforcement agencies, a fax machine may be dedicated to a particular use (i.e., use in emergencies or to communicate only with other law enforcement agencies), and it has been suggested in that kind of circumstance that requests made by fax may be prohibited.

It has been advised that a member of the public cannot be required to use a form prescribed by an agency. The Freedom of Information Law, §89(3), as well as the regulations promulgated by the Committee on Open Government (21 NYCRR §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.

Second, you asked whether records must be made available "in electronic format." In this regard, the Freedom of Information Law pertains to agency records, and §86(4) of the Law defines the term "record" expansively to include:

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

Based upon the language quoted above, if information is maintained in some physical form, it would constitute a "record" subject to rights of access conferred by the Law. Further, the definition of "record" includes specific reference to computer tapes and discs, and it was held more than twenty years ago that "[i]nformation is increasingly being stored in computers and access to such data should not be restricted merely because it is not in printed form" [Babigian v. Evans, 427 NYS 2d 688, 691 (1980); aff'd 97 AD 2d 992 (1983); see also, Szikszay v. Buelow, 436 NYS 2d 558 (1981)].

When information is maintained electronically, it has been advised that if the information sought is available under the Freedom of Information Law and may be retrieved by means of existing computer programs, an agency is required to disclose the information. In that kind of situation, the agency would merely be retrieving data that it has the capacity to retrieve. Disclosure may be accomplished either by printing out the data on paper or perhaps by duplicating the data on another storage mechanism, such as a computer tape or disc. On the other hand, if information sought can be generated only through the use of new programs, so doing would in my opinion represent the equivalent of creating a new record.

Questions and issues have arisen in relation to information maintained electronically concerning §89(3) of the Freedom of Information Law, which states in part that an agency is not required to create or prepare a record in response to a request. Often information stored electronically can be extracted by means of keystrokes or queries entered on a keyboard. While some have contended that those kinds of minimal steps involve programming or reprogramming, and, therefore, creating a new record, so narrow a construction would tend to defeat the purposes of the Freedom of Information Law, particularly as information is increasingly being stored electronically. If electronic information can be extracted or generated with reasonable effort, if that effort involves less time and cost to the agency than engaging in manual deletions, it would seem that an agency should follow the more reasonable and less costly and labor intensive course of action.

Illustrative of that principle is a case in which an applicant sought a database in a particular format, and even though the agency had the ability to generate the information in that format, it refused to make the database available in the format requested and offered to make available a

printout. Transferring the data from one electronic storage medium to another involved relatively little effort and cost; preparation of a printout, however, involved approximately a million pages and a cost of ten thousand dollars for paper alone. In holding that the agency was required to make the data available in the format requested and upon payment of the actual cost of reproduction, the Court in Brownstone Publishers, Inc. v. New York City Department of Buildings unanimously held that:

> "Public Officers Law [section] 87(2) provides that, 'Each agency shall...make available for public inspection and copying all records...' Section 86(4) includes in its definition of 'record', computer tapes or discs. The policy underlying the FOIL is 'to insure maximum public access to government records' (Matter of Scott, Sardano & Pomerantz v. Records Access Officer, 65 N.Y.2d 294, 296-297, 491 N.Y.S.2d 289, 480 N.E.2d 1071). Under the circumstances presented herein, it is clear that both the statute and its underlying policy require that the DOB comply with Brownstone's reasonable request to have the information, presently maintained in computer language, transferred onto computer tapes" [166 Ad 2d, 294, 295 (1990)].

In another decision which cited Brownstone, it was held that: "[a]n agency which maintains in a computer format information sought by a F.O.I.L. request may be compelled to comply with the request to transfer information to computer disks or tape" (Samuel v. Mace, Supreme Court, Monroe County, December 11, 1992).

Perhaps most pertinent is a decision concerning a request for records, data and reports maintained by the New York City Department of Health regarding "childhood blood-level screening levels" (New York Public Interest Research Group v. Cohen and the New York City Department of Health, Supreme Court, New York County, July 16, 2001; hereafter "NYPIRG"). The agency maintained much of the information in its "LeadQuest" database, and the principles enunciated in that decision would likely be applicable with respect to information maintained electronically in the context of your requests.

In NYPIRG, the Court described the facts, in brief, as follows:

> "...the request for information in electronic format was denied on the following grounds:
>
> > '[S]uch records cannot be prepared in an electronic format with individual identifying information redacted, without the Department creating a unique computer program, which the Department is not required to prepare pursuant to Public Officer's Law §89(3).'
>
> "Instead, the agency agreed to print out the information at a cost of twenty-five cents per page, and redact the relevant confidential information by hand. Since the records consisted of approximately 50,000 pages, this would result in a charge to petitioner of $12,500."

It was conceded by an agency scientist that:

> "...several months would be required to prepare a printed paper record with hand redaction of confidential information, while it would take only a few hours to program the computer to compile the

> same data. He also confirmed that computer redaction is less prone to error than manual redaction."

In consideration of the facts, the Court wrote that:

> "The witnesses at the hearing established that DOH would only be performing queries within LeadQuest, utilizing existing programs and software. It is undisputed that providing the requested information in electronic format would save time, money, labor and other resources - maximizing the potential of the computer age.
>
> "It makes little sense to implement computer systems that are faster and have massive capacity for storage, yet limit access to and dissemination of the material by emphasizing the physical format of a record. FOIL declares that the public is entitled to maximum access to public records [Fink v. Lefkowitz, 47 NY2d 567, 571 (1979)]. Denying petitioner's request based on such little inconvenience to the agency would violate this policy."

Based on the foregoing, it was concluded that:

> "To sustain respondents' positions would mean that any time the computer is programmed to provide less than all the information stored therein, a new record would have been prepared. Here all that is involved is that DOH is being asked to provide less than all of the available information. I find that in providing such limited information DOH is providing data from records 'possessed or maintained' by it. There is no reason to differentiate between data redacted by a computer and data redacted manually insofar as whether or not the redacted information is a record 'possessed or maintained' by the agency.
>
> "Moreover, rationality is lacking for a policy that denies a FOIL request for data in electronic form when to redact the confidential information would require only a few hours, whereas to perform the redaction manually would take weeks or months (depending on the number of employees engaged), and probably would not be as accurate as computer generated redactions."

Assuming that requests involve similar considerations, in my opinion, responses to those requests, based on the precedent offered in NYPIRG, must involve the disclosure of data stored electronically for which there is no basis for a denial of access.

Third, a request to have records e-mailed or perhaps faxed does not involve the format in which the records are or may be kept. If a record can be made available on a computer disk, and an applicant pays a fee based on the actual cost of reproduction [see §87(1)(b)(iii)], I believe that an agency would be required to make the record available in that kind of information storage medium. However, your third area of inquiry does not involve a request that records be made available in a particular information storage medium; rather, it relates to the means by which records would be *transmitted.* In my view, there is nothing in the Freedom of Information Law that requires that records be transmitted via fax or e-mail. An agency may choose to make records available via those methods of transmission, but there is no *obligation* to do so. An agency's responsibility under §§87(2) and 89(3) involves making records available for inspection and copying, and to make copies of records available upon payment of the appropriate fee.

Fourth, with respect to the use of a personal photocopier or scanner, as a general matter, an agency has the ability to adopt rules to implement and govern the manner in which it carries out its duties. So long as those rules are reasonable and not inconsistent with law, I believe that they would be valid. In a decision concerning a situation in which a village adopted rules prohibiting requesters from using their own photocopiers, it was held that the rules "constitute a valid and rational exercise of the Village's authority under Public Officers Law §87(1)(b)" [Murtha v. Leonard, 620 NYS 2d 101,102; 210 AD2d 411 (1994)]. In my opinion, the decision was based upon the reasonableness of the rules in view of attendant facts and circumstances. In situations in which an agency does not have sufficient resources or cannot carry out its duties effectively due to the use or presence of a personal scanner or copier without disruption, it might be found, as indicated in Murtha that a prohibition against the use of personal photocopiers or scanners would be valid.

There may be circumstances in which, due to the nature of the records sought, their volume, their location, the workload of agency staff and similar factors, the use of one's own photocopier or scanner may be disruptive. In that instance, it is likely in my view that an agency could validly prohibit an individual from using his or her own scanner or photocopier. There may be other instances, however, in which the attendant facts suggest that the use of those devices might not be disruptive. In those cases, it may be unreasonable to prohibit their use.

Fifth, it appears that you are referring to the records retention and disposal schedules developed by the State Archives, a unit of the State Education Department. I believe that they are accessible via the Department's website, which is <www.nysed.gov>.

With regard to the disclosure of minutes of meetings, §106(3) of the Open Meetings Law specifies minutes of meetings of public bodies be prepared and made available within two weeks of meetings. 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, 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.

Next, I believe that materials shown during an open meeting by means of an overhead projection or a powerpoint presentation must be made available. In short, an agency would have effectively waived its capacity to withhold them. Further and more importantly, that a budget has not been adopted does not give an agency the ability to withhold all records prior to the adoption of a budget.

Based on the definition of the term "record" cited earlier, 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. With regard to materials relating to the development of a budget, two of the grounds for denial may be pertinent.

Section 87(2)(g) of the Freedom of Information Law permits an agency to withhold records that:

"are inter-agency or intra-agency materials which are not:

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

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

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

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.

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 though 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 remaining provision of possible significance, §87(2)(c), states that an agency may withhold records to the extent that disclosure "would impair present or imminent contract awards or collective bargaining negotiations. If a proposed expenditure refers to services that must be negotiated with contractors or that are subject to bidding requirements, disclosure of those figures might enable contractors to tailor their bids accordingly, to the potential detriment of the District and its taxpayers. To the extent that disclosure would "impair" the process of awarding contracts or collective bargaining negotiations, it would appear that those portions of the records could be withheld.

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

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

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

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

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

Further, in my opinion, if, as a matter of practice or policy, an agency acknowledges the receipt of requests and indicates in every instance that it will determine to grant or deny access to records within some particular period following the date of acknowledgement, such a practice or policy would be contrary to the thrust of the Freedom of Information Law. If a request is voluminous and a significant amount of time is needed to locate records and review them to determine rights of access, a delay, in view of those and perhaps the other kinds of factors mentioned earlier, might be reasonable. On the other hand, if a record or report is clearly public and can be found easily, there would appear to be no rational basis for delaying disclosure. In a case in which it was found that an agency's "actions demonstrate an utter disregard for compliance set by FOIL", it was held that "[t]he records finally produced were not so voluminous as to justify any extension of time, much less an extension beyond that allowed by statute, or no response to appeals at all" (Inner City Press/Community on the Move, Inc. v. New York City Department of Housing Preservation and Development, Supreme Court, New York County, November 9, 1993).

Lastly, while there is no requirement that a request for records refer to or cite the Freedom of Information Law, I believe that it is wise to do so.

I hope that I have been of assistance.

RJF:jm

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April 2, 2002

Hon. Richard W. Waldron
Deerfield Town Clerk
[redacted]

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

Dear Mr. Waldron:

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

> "Can audible testimony in open forum by a member of a Town board (ZBA) during a legally convened public hearing be kept out of the minutes because the board member asked beforehand that the remarks be kept 'off the record'?"

In this regard, I offer the following comments.

First, while the Open Meetings Law provides direction concerning the contents of minutes of *meetings*, there is nothing in that statute or any other of which I am aware that deals with or requires minutes of *hearings* in the context that you described. As the Open Meetings Law pertains to minutes, it prescribes minimum requirements concerning the contents of minutes, and subdivision (1) states that:

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

Based on the foregoing, comments made during meetings by members of a board or the public *may but need not be included* in minutes of the meeting. Again, however, I know of no statutory guidance concerning the preparation of a record or minutes of a hearing held by a municipality.

Second, in my view, a person's preference in terms of inclusion of his or her comments in a record of a public proceeding is irrelevant. I believe that the clerk or whoever prepares the record of a hearing or meeting should treat the comments of the person expressing a preference in the same manner as he or she treats all other comments.

Lastly, the phrase "off the record" is not a term of art and, in my view, has no legal weight. Further, if a public official speaks during a public proceeding, I would contend that his or her comment is always on the record.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

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April 2, 2002

E-Mail

TO: Dianne DiMeo [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. DiMeo:

I have received your letter in which you raised questions relating to the Open Meetings Law in your capacity as President of the Utica Board of Education.

First, you asked whether it is "appropriate for the school board to enter into executive session to discuss a matter with its attorney." You indicated that the New York State School Boards Association has advised that it is proper to do so. In this regard, in a technical sense, I believe that the advice given by the Association may be inaccurate. However, I emphasize that the inaccuracy may involve the use of terminology, rather than the ability to confer in private.

I point out that there are two vehicles that may authorize a public body, such as a board of education, to discuss public business in private. One involves entry into an executive session. As you may be aware, §102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded, and §105(1) of that statute requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. In short, prior to conducting an executive session, a motion must be made that includes reference to the subject or subjects to be discussed, and it must be carried by majority vote of a public body's membership. Further, paragraphs (a) through (h) of §105(1) specify and limit the subjects that may be considered during an executive session.

The other vehicle for excluding the public from a meeting involves "exemptions." Section 108 of the Open Meetings Law contains three exemptions. When an exemption applies, the Open Meetings Law does not, and the requirements that would operate with respect to executive sessions are not in effect. Stated differently, to discuss a matter exempted from the Open Meetings Law, a public body need not follow the procedure imposed by §105(1) that relates to entry into an executive session. 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 your question is §108(3), which exempts from the Open Meetings Law:

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

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

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

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

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

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

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

Although it is not my intent to be overly technical, as suggested earlier, the procedural methods of entering into an executive session and asserting the attorney-client privilege differ. In the case of the former, the Open Meetings Law applies; in the case of the latter, because the matter is exempted from the Open Meetings Law, the procedural steps associated with conducting executive sessions do not apply. It is suggested that when a meeting is closed due to the exemption under consideration, a public body should inform the public that it is seeking the legal advice of its attorney, which is a matter made confidential by law, rather than referring to an executive session.

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

Inherent in the definition and its judicial interpretation is the notion of intent. If there is an intent that a majority of a public body convene for the purpose of conducting public business, such a gathering would, in my opinion, constitute a meeting subject to the requirements of the Open Meetings Law. However, if there is no intent that a majority of public body will gather for purpose of conducting public business, collectively, as a body, but rather for the purpose of gaining education, training, or to listen to speakers as part of an audience or group, I do not believe that the Open Meetings Law would be applicable.

I point out that similar questions have arisen at workshops and seminars during which I have spoken and which were attended by many, including perhaps a majority of the membership of several public bodies. Some of those persons have asked whether their presence at those gatherings fell within the scope of the Open Meetings Law. In brief, I have responded that, since the members of those entities did not attend for the purpose of conducting public business as a body, the Open Meetings Law, in my opinion, did not apply.

I hope that I have been of assistance.

RJF:jm

cc: Jay Worona

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April 2, 2002

E-Mail

TO: Carmen B. Rue <[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. Rue:

I have received your inquiry in which you sought clarification concerning the ability of members of the Monticello Village Board of Trustees with the same political party affiliation to meet in a closed political caucus.

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

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

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

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

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

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

Based upon the direction given by the courts, when a majority of the Board is present to discuss Village business, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law, unless the meeting or a portion thereof is exempt from the Law. I note that if a majority is present during a social gathering or attends a conference, for example, in which those in attendance are part of a large audience, the majority would not have gathered for the purpose of conducting the business of the Village collectively, as a body, and in my view, in those situations, the presence of a majority would not constitute a "meeting" for purposes of the Open Meetings Law.

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

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

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

> "for purposes of this section, the deliberations of political committees, conferences and caucuses means a private meeting of

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

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

Many local legislative bodies, recognizing the potential effects of the 1985 amendment, have taken action to reject their authority to hold closed caucuses and to continue to conduct their business open to the public as they had prior to the amendment. I am unaware of whether the Village of Monticello has taken action of that nature. If it has not, you and others might want to encourage the Board to do so.

Lastly, you asked whether I am available to "provide training to public officials and citizens." I am, and there is no cost involved. You (or anyone) can contact me to arrange a time.

I hope that I have been of assistance.

RJF:jm

cc: Board of Trustees

STATE OF NEW YORK
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April 3, 2002

Mr. Jeffrey J. Greenfield
[redacted]

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

Dear Mr. Greenfield:

I have received your letter in which you referred to the Rockville Centre Board of Education and "their practice of not commencing their monthly public meetings until 8:30 pm and scheduling their agenda in such a manner that the Opportunity for Visitors to have the privilege of the floor does not come on till [sic] the late hour of 10:30 pm and last month at 11:15."

In this regard, first, there is nothing in the Open Meetings Law that specifies when meetings should be held. 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 8:30 p.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).

I believe that similar factors would be present with respect to the ability of District residents to attend meetings at 8:30 p.m. In the case cited above, many were unable to attend because they have small children, because of work schedules, commuting, and other matters that might effectively

have precluded them from attending meetings held so early in the morning. I would conjecture that meetings of the Board are scheduled as you indicated to accommodate Board members and others who return to Rockville Centre after a lengthy commute from work and for whom a starting time of 8:30 p.m. is convenient. If that is so, it is likely in my view that the scheduling of the Board's meetings would be found to be reasonable.

Second, while the Open Meetings Law clearly provides the public with the right "to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy" (see Open Meetings Law, §100), that statute is silent with respect to the issue of public participation. Consequently, if a public body, such as a board of education, 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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Education

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April 4, 2002

Mr. Frederic C. Guile
[redacted]

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

Dear Mr. Guile:

I have received your letter of March 1 in which you sought assistance in obtaining records relating to the Slate Valley Museum and the Slate Valley Museum Foundation. You indicated that the Museum "is owned by the Village of Granville and the Foundation was set up by the Village 'to support' the Museum."

Based on the assumption that your statement is accurate, I offer the following comments.

First, 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 the Foundation as an "agency" has not been determined judicially, it is clear that the Village is an "agency" required to comply with the Freedom of Information Law.

Pertinent with respect to rights of access is §86(4), which 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 a not-for-profit corporation providing services for a 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 issue that you raised, irrespective of whether the Foundation is an "agency", its records appear to be maintained for the Village. If that is so, the records 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 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 an institution of the City University of New York 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 Foundation, would not exist but for its relationship with the Village. Due to the similarity between the situation you have described and that presented in Eisenberg, it appears to be subject to the Freedom of Information Law.

Third, 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, it appears that each condition necessary to a finding that the Board of the Foundation 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 Village, it appears to conduct public business and perform 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).

Lastly, with respect to minutes of meetings, 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 I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees, Village of Granville
Board of Directors, Slate Valley Museum Foundation

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3434

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April 4, 2002

Hon. Richard L. Bedell
Supervisor
City of Gloversville
[redacted]

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

Dear Supervisor Bedell:

I have received your letter of March 4 in which you requested an advisory opinion concerning the application of the Open Meetings Law.

In brief you wrote that the Fulton County Board of Supervisors consists of 20 members, and that the "total weighted vote for the entire board is 551." You then referred to a group of 7 supervisors having a weighted vote of 168 who met to discuss issues of common interest, and indicated that 4 are members of a seven member committee. Following that gathering, it was suggested that it was an "illegal meeting."

From my perspective, unless the four members of the committee met in their capacities as members of that committee to discuss the business of the committee, the Open Meetings Law would not have applied. In this regard, I offer the following comments.

First, the Open Meetings Law pertains to meetings of public bodies, and a "meeting" is a convening of a quorum of a public body for the purpose of conducting public business [see §102(1)]. Absent a quorum, the Open Meetings Law does not apply [see e.g., Mobil Oil Corp. v. City of Syracuse Industrial Development Agency, 224 AD2d 15, motion for leave to appeal denied, 89 NY2d 811 (1997)]. In the context of the situation that you described, until a quorum of the Board has convened, which would presumably involve a gathering of members representing 276 weighted votes, a gathering would not constitute a meeting of the Board, and the Open Meetings Law, in my opinion, would not apply.

Second, however, when a committee consists solely of members of a public body, such as the Board of Supervisors, 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 county legislature, would fall within the requirements of the Open Meetings Law, assuming that a committee discusses or conducts public business collectively as a body [see Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984 (1981)]. Further, as a general matter, I believe that a quorum consists of a majority of the total membership of a body (see General Construction Law, §41). Therefore, leaving aside the matter of weighted votes, if, for example, the Board consists of twenty, its quorum would be eleven; in the case of a committee consisting of seven, its quorum would be four.

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)].

If the seven members met, but not due to their membership on a particular committee, again, I do not believe that the Open Meetings Law would have applied. However, if four of the seven gathered in their capacities as members of a particular committee for the purpose of discussing the business of that committee, and other members joined them, since four of seven would constitute a quorum of the committee, a gathering of that nature, would, in my view, have been a meeting of the committee that would have fallen within the coverage of the Open Meetings Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Supervisors

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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April 4, 2002

E-Mail

TO: Craig Greenfield [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. Greenfield:

I have received your letter of March 7 in which you asked whether certain conduct by the Half Hollow Hills School District Board of Education "would violate" the Open Meetings Law.

In this regard, it is emphasized that the Committee on Open Government is authorized to provide advisory opinions; it is not empowered to render determinations that are binding or find that a person or entity may have engaged in a violation of law. In consideration of the role of this office, I offer the following comments in response to the issues that you raised.

First, I point out that every meeting of a public body, such as a board of education, 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.

From my perspective, the subject of redistricting would not fall within any of the grounds for entry into executive session. Even if an aspect of the discussion relates to moving a teacher from one school to another and public discussion would enable the public to identify that person, I do not believe that there would be a basis for conducting an executive session.

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

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

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

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

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

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

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

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

Second, with respect to minutes of meetings, §106 of the Open Meetings Law states that:

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

Based on the foregoing, it is clear that minutes of meetings need not consist of a verbatim account of what is said or that reference must be made to each comment. However, I believe that the Law requires that minutes accurately reflect the nature of action taken by a public body.

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.

It is emphasized, too, 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 §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, I believe that a public body may take action 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) 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.

In the only decision dealing with a vote taken by phone, the court found the vote to be a nullity. In Cheevers v. Town of Union (Supreme Court, Broome County, September 3, 1998), which cited and relied upon an opinion rendered by this office, the court stated that:

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

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

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

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

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

I hope that I have been of assistance.

RJF:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3436

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April 15, 2002

Councilwoman Roberta Sue Moore
Town of Chemung
[redacted]

The staff of the Committee on 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 Moore:

I have received your letter in which you sought my views concerning your right, as a member of the Chemung Town Board, to attend executive sessions of the Board. You indicated that you were asked to leave an executive session held to discuss collective bargaining negotiations because your husband works for the Highway Department.

In this regard, I believe that a member of a public body, such as a town board, clearly has the right to attend an executive session. Section 105(2) of the Open Meetings Law states that: "Attendance at an executive session shall be permitted to any member of the public body and any other persons authorized by the public body." Based on the foregoing, I believe that the only persons who have the right to attend executive sessions of the Board are members of the Board.

It is noted that an executive session serves as one of two vehicles that might be employed as a means of closing a meeting. Section 108 of the Open Meetings Law pertains to "exemptions", and if an exemption is applicable, the Open Meetings Law is not; it is as if the Open Meetings Law does not exist.

Relevant in some circumstances is §108(3) concerning matters made confidential by law. When an attorney-client relationship has been invoked, the communications made pursuant to that relationship are considered confidential under §4503 of the Civil Practice Law and Rules. Consequently, if an attorney and a 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 (1989);

Pennock v. Lane, 231 NYS 2d 897, 898 (1962)]. However, such a relationship is in my opinion operable only when a municipal board or official seeks the legal advice of an attorney acting in his or her capacity as an attorney, and where there is no waiver of the privilege by the client.

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

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

Therefore, insofar as a public body or members of a public body seek legal advice from their attorney and the attorney offers legal advice, the communications would, in my opinion, be confidential and outside the coverage of the Open Meetings Law. Further, it has been advised that when a member of a public body is a litigant or potential litigant who has initiated or may initiate a lawsuit against the public body, those other members of the public body may engage in attorney-client communications in private, and outside the coverage of the Open Meetings Law. While a member of a public body has the right to attend an executive session, in the context of the situation described in the preceding sentence, I do not believe that that person, as a litigant or potential litigant, would enjoy the same right to attend a gathering of the other members with their attorney during which the communications are subject to the attorney-client privilege.

The foregoing in my view is consistent with the judicial interpretations of the Open Meetings Law covering discussions regarding litigation. Section §105(1)(d) of the Open Meetings Law permits a public body to enter into an executive session to discuss "proposed, pending or current litigation". In construing the language quoted above, it has been held that:

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

> both the letter and the spirit of the exception" [Weatherwax v. Town of Stony Point, 97 AD 2d 840, 841 (1983)].

Based upon the passage quoted above, I believe that the exception is intended to permit a public body to discuss its litigation strategy behind closed doors.

When a member of a public body has sued or is likely to sue that body and is its legal adversary, I believe he or she could validly be excluded from a gathering between the other members and their attorney in which the attorney-client privilege is properly invoked. The member-adversary in that instance would not be the client, and that person's exclusion would, in my view, be consistent with the thrust of case law concerning the intent of §105(1)(d), the litigation exception for litigation. In that situation, the gathering would be exempted from the Open Meetings Law insofar as the attorney-client privilege applies. However, if a member of a public body is not an adversarial or potential adversarial party in litigation (but perhaps a dissenter or person with a minority view), I believe that he or she would have the right under §105(2) of the Open Meetings Law to attend 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

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April 15, 2002

Councilman Gordon R. Wackett
[redacted]

The staff of the Committee on 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 Wackett:

I have received your letter in which you questioned the propriety of motions to enter into executive sessions made during meetings of the Binghamton-Johnson City Joint Sewage Board.

Having reviewed the motions, I offer the following comments.

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

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

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

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

> "The purpose of paragraph d is "to enable is to enable a public body to discuss pending litigation privately, without baring its strategy to its adversary through mandatory public meetings' (Matter of Concerned Citizens to Review Jefferson Val. Mall v. Town Bd. Of Town of Yorktown, 83 AD 2d 612, 613, 441 NYS 2d 292). The belief

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> identified by name, it does require that any motion to enter into executive session describe with some detail the nature of the proposed discussion (see, State Comm on Open Govt Adv Opn dated Apr. 6, 1993), and we reject respondents' assertion that the Board's reference to a 'personnel issue' is the functional equivalent of identifying 'a particular person'" [Gordon v. Village of Monticello, 620 NY 2d 573, 575; 207 AD 2d 55 (1994)].

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

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

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

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

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

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-3138

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April 15, 2002

Mr. Ray Hall
James Broadcasting Company, Inc.
2 Orchard Road
P.O. Box 1139
Jamestown, NY 14702

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

Dear Mr. Hall:

I have received your letter in which you sought an advisory opinion concerning the status of a "strategic planning session" held by the City of Jamestown Board of Public Utilities. You wrote that the session was "intended to plan strategies, with the help of facilitators, for the future of the organization", and that "[i]mplicit in the stated purpose for the session to develop a strategic plan for the future of the organization is the acknowledgment that board members must vote on the fruits of such gatherings in future board meetings." You added that the session was held at a hotel in Rochester, "a three hour drive from Jamestown."

In this regard, first, the Open Meetings Law applies to meetings of public bodies, and I believe that the entity at issue clearly constitutes a public body required to comply with that statute. Section 102(1) of the Open Meetings Law defines the term "meeting" to mean "the official convening of a public body for the purpose of conducting public business". It is emphasized that the definition of "meeting" has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be convened open to the public, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

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

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

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

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

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

Based upon the direction given by the courts, when a majority of a public body gathers to discuss public business, in their capacities as members of the body, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law. However, if there is no intent that a majority of public body will gather for purpose of conducting public business, but rather for the purpose of gaining education, training, to develop or improve team building or communication skills, or to consider interpersonal relations, I do not believe that the Open Meetings Law would be applicable.

In that event, if the gathering is to be held solely for purposes other than conducting public business, and if the members in fact do not conduct or intend to conduct public business collectively as a body, the activities occurring during that event would not in my view constitute a meeting of a public body subject to the Open Meetings Law. If that is so, I know of no restriction or limitation concerning the location of the gathering.

Second, there is nothing in the Open Meetings Law or any other provision of law of which I am aware that specifies where meetings of public bodies must be held. 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 municipal body must be held at a location where members of the public who might want to attend could reasonably do so. Since you referred to a site three hours away, I believe that such an amount of travel time would be unreasonable.

Lastly, while a member of the public may seek to compel compliance with the Open Meetings Law by initiating a judicial proceeding, it is my hope that the preceding comments are educational and persuasive, and that they will encourage compliance with law. In an effort to achieve that goal, a copy of this opinion will be forwarded to the Board.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Public Utilities

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13309
OML-AO-3439

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April 15, 2002

Hon. Carole A. Clearwater
Town Clerk
Town of Hyde Park
P.O. Box 311
Hyde Park, NY 12538

The staff of the Committee on 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. Clearwater:

I have received your letter of March 11 in which you sought an advisory opinion concerning your role as Town Clerk and the responsibilities of the Hyde Park Town Board.

As I understand the matter, the Board entered into an executive session, and you were not permitted to attend. Although a vote was a taken during the executive session, you wrote that "they did not want to tell [you] what they voted on or what the vote was."

In this regard, as you are aware, §30(1) of the Town Law states in relevant part that the town clerk:

> "Shall have the custody of all the records, books and papers of the town. He shall attend all meetings of the town board, act as clerk thereof, and keep a complete and accurate record of the proceedings of each meeting..."

In my view, §30 was likely intended to require the presence of a clerk to take minutes in situations in which motions and resolutions are introduced and in which action is taken. When action is taken, I believe that minutes must be prepared in accordance with §106 of the Open Meetings Law. That provision states that:

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

You also asked what your role should be in a situation in which the Board might want to take action during an executive session. As you may be aware, §105(2) of the Open Meetings Law permits the Board to enable you to be present during an executive session. However, you have no right to attend, because you are not a member of the Board.

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

Lastly, since its enactment in 1974, three years prior to the effective date of the Open Meetings Law, the Freedom of Information Law has included what some have characterized as an "open vote" requirement. Specifically, section 87(3)(a) of that statute requires that any time a final vote is taken, a record must be prepared indicating the manner in which each member cast his or her vote. I note, too, that an indication of each member's vote must be prepared, whether the vote is taken in public or during an executive session [see Smithson v. Ilion Housing Authority, 130 AD2d 965 (1987); affirmed 72 NY2d 1034 (1988)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
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OML-AO-3440

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April 18, 2002

Mr. Richard Jannaccio
[redacted]

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

Dear Mr. Jannaccio:

I have received your letter of March 15 in which you questioned the status of meetings of a district service cabinet under the Open Meetings Law.

In this regard, by way of background, it is my understanding that district service cabinets were created by §2705 of the New York City Charter. Although that provision states that certain officials serve as members of the cabinet, others are representatives of City agencies who might participate, comment or provide information on an as needed basis. For instance, if an issue arises that might be dealt with by the Department of Sanitation, that agency might send one or more representatives. Those same representatives, however, might not attend future meetings. Stated differently, the "membership" is flexible and dependent upon the nature of the issues that might arise in a community.

In consideration of the foregoing and discussions of the matter with various City officials over the course of years, I do not believe that a district service cabinet is subject to the requirements of the Open Meetings Law. That statute is applicable to meetings of public bodies, and the phrase "public body" is defined in §102(2) to mean:

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

Based on the foregoing, a public body is, in my view, an entity that carries out its duties collectively, as a body. It is my understanding that no motions are made and that no votes or actions are taken

at meetings of a district service cabinet. Commentary offered to me indicated that various reports and comments are made concerning a given community within New York City during meetings of a district service cabinet, but that it does not function as a body.

If my assumptions are accurate, a district service cabinet does not have a specific membership, nor would those in attendance function collectively as a body. If that is so, it would not constitute a "public body" subject to the Open Meetings Law.

This is not to suggest that a district service cabinet *could* not hold meetings open to the public, but rather that I do not believe that it is *required* to do so.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Tony Avella
District Manager, Community Board 7

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3441

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April 19, 2002

Mr. Philip Christe
[redacted]

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

Dear Mr. Christe:

I have received your letter in which you sought an advisory opinion concerning a meeting of the Finance Subcommittee of the Bedford Central School District Board of Education. You indicated that the meeting "was not publicly announced" and that other members of the Board who are not members of the Subcommittee attended. It is your view that those other members attended as members of the Board, not as members of the public, and that, therefore, the gathering constituted what you characterized as an "illegal regular meeting of the Board of Education..."

In this regard, I offer the following comments.

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

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

By way of background, when the Open Meetings Law went into effect in 1977, questions consistently arose with respect to the status of committees, subcommittees and similar bodies that

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

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

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

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

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

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

When a committee or subcommittee 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)].

Lastly, whether the gathering constituted a meeting of the Board, in my view, involves the intent of its members. A "meeting" is defined in §102(1) of the Open Meetings Law to mean a gathering of a majority of a public body for the purpose of conducting public business. Inherent in the definition is the notion of intent. If there was no intent on the part of a majority of the Board to gather, I do not believe that the gathering would have been a meeting of the Board, even if a majority happened to have been present, or that the meeting of the Subcommittee would have been transformed into a meeting of the Board. On the other hand, if there was an intent on the part of a majority of the Board to gather, in their capacities as Board members, for the purpose of conducting public business, collectively, as a body, it would, in my opinion, in that circumstance, have been a Board meeting.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Education

3442

From: David Treacy
To: Kenny, Judith
Date: 4/19/02 3:47PM
Subject: Re: Fwd: Open Meetings Law

Given this set of facts, in my opinion, OML would not apply. OML is only applicable when a quorum of a public body gathers for the purpose of conducting public business. If all of the planning board members attend the event as members of the public, and are not attending for the purpose of discussing business of the board, the Open Meetings Law would not be triggered. In these situations, it is often suggested that board members sit in the same area as other members of the public to avoid the appearance that they are meeting as a board.

David Treacy
Assistant Director
NYS Committee on Open Government
41 State Street
Albany, NY 12231
(518) 474-2518

[redacted]

OML-AO - 3443

From: David Treacy
To: Willis, Harry
Date: 4/23/02 4:26PM
Subject: Re: Special Board

The opinion of this office is that a committee created by law, such as a "special board" created pursuant to Town Law 272-a, would be subject to OML, as would committtees consisting solely of town board members, committees that have final decision making authority, or committees performing a function that is a necessary step in the decision making process (i.e, where the body with final decision making power is not authorized to make a determination prior to receiving a recommendation from a committee). If an advisory board or committee does not meet any of the above criteria and is "created solely to advise the town board", in my view, it would not be subject to OML.

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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3444

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

April 23, 2002

Mr. Arthur Springer
[redacted]

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

Dear Mr. Springer:

I have received your letter in which you complained with respect to the inability to hear the deliberations of the Board of Directors of the New York Health and Hospitals Corporation. You wrote that the room in which the meetings are held has a sound system requiring that "people press a button to turn on the microphone in front of each chair at the board table", but that the members and other participants "ignore the microphone button and ...conduct business as if they were in a private, social conversation or in an internal staff meeting."

From my perspective, every law, including the Open Meetings Law, must be implemented in a manner that gives reasonable effect to its intent. With respect to the capacity to hear what is said at meetings, I direct your attention to §100 of the Open Meetings Law, its legislative declaration. That provision states that:

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

Based upon the foregoing, it is clear in my view that public bodies must conduct meetings in a manner that guarantees the public the ability to "be fully aware of" and "listen to" the deliberative process. While I do not believe that a public body could be compelled to purchase a sound system, when a system exists, in my view, it would be unreasonable to avoid using it if those in attendance cannot hear the public body's discussions and deliberations. In this instance, if the sound system

is operational, I believe that the Board must use it or situate itself and conduct its meetings in a manner in which those in attendance can observe and hear the proceedings. To do otherwise would in my opinion be unreasonable and fail to comply with a basic requirement of the Open Meetings Law.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Directors

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3445

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

April 24, 2002

E-Mail

TO: Christopher J. Farrell <[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. Farrell:

I have received your note in which you questioned whether a board of education could validly vote to suspend a superintendent during an executive session.

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

One of the circumstances in which there is a requirement that a board of education vote during an executive session involves the situation in which action is taken to initiate charges against a tenured person under §3020-a of the Education Law. Unless the vote to which you referred involved a decision by the board to initiate charges against a tenured person, I believe that the vote should have been taken in public.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-13339
OML-AO-3416

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April 26, 2002

Ms. Helen Bunt
[redacted]

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. Bunt:

I have received your letter in which you sought assistance concerning your efforts in gaining access to records and meetings in the Town of Cornwall. In consideration of your remarks, 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.

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.

A recent judicial decision cited and confirmed the advice rendered by this office. In Linz v. The Police Department of the City of New York (Supreme Court, New York County, NYLJ, December 17, 2001), it was held that:

> "In the absence of a specific statutory period, this Court concludes that respondents should be given a 'reasonable' period to comply with a FOIL request. The determination of whether a period is reasonable must be made on a case by case basis taking into account the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure. Such a standard is consistent with some of the language in the opinions, submitted by petitioners in this case, of the Committee on Open Government, the agency charged with issuing advisory opinions on FOIL."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, or if the acknowledgement of the receipt of a request fails to include an estimated date for granting or denying access, 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)].

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 that you are seeking should be accessible, for none of the grounds for denial would apply.

Further, it appears that the records in question may be the same in substance as those required to be maintained and made available pursuant to §29(4) of the Town Law. That provision states that the 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 addition, subdivision (1) of §119 of the Town Law states in part that:

> "When a claim has been audited by the town board of the town clerk shall file the same in numerical order as a public record in his office and prepare an abstract of the audited claims specifying the number of the claim, the name of the claimant, the amount allowed and the fund and appropriation account chargeable therewith and such other information as may be deemed necessary and essential, directed to the supervisor of the town, authorizing and directing him to pay to the claimant the amount allowed upon his claim."

That provision also states that "The claims shall be available for public inspection at all times during office hours."

Lastly, you referred to gatherings held by "three or more board members without formally announcing meetings." By way of background, §102(1) of the Open Meetings Law defines the term "meeting" to mean "the official convening of a public body for the purpose of conducting public business". It is emphasized that the definition of "meeting" has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals, 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 ordinarily constitute a "meeting" subject to the Open Meetings Law.

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

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

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

In an effort to enhance compliance with and understanding of the statutes discussed in the preceding paragraphs, copies of this opinion will be sent to Town officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board
Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3417

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April 29, 2002

Mr. Anthony J. Tozzi
City of Schenectady
City Hall, Room 14
105 Jay Street,
Schenectady, NY 12305

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

Dear Mr. Tozzi:

I have received your letter of April 4 in which you indicated that the City of Schenectady has recently amended its zoning ordinance to require site plan review when there is a change in tenancy in commercial space. In an effort to enhance the efficiency of the site plan review process, you wrote that the City Planning Commission is "considering use of the internet to begin the site plan review process earlier, to provide another medium for the public, applicants and Commission members to transmit dialogue, review site plan drawings and to reduce the overall time constraints to applicants." You noted, however, that you "want to ensure that [y]our actions adhere to open meetings requirements."

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 or vote held by means of a telephone conference, 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 Commission, 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, if a majority of the members of the Commission engage in "instant e-mail" or communicate in a chat room in which the communications are equivalent to a conversation, it is likely that a court would determine that communications of that nature would run afoul of the Open Meetings Law. In essence, the majority in that case would be conducting a meeting without the public's knowledge and without the ability of the public to "observe the performance of public officials" as required by the Open Meetings Law (see §100).

In contrast, if e-mail communications are made via a listserve or other means through which the members receive them at different times, and there is no instantaneous or simultaneous communication, that circumstance would be equivalent to the transmission of inter-office memoranda. In that kind of situation, the recipients open their mail at different times and, in my view, the Open Meetings Law would not be implicated.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3148

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April 30, 2002

Ms. Dione Goldin
[redacted]

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

Dear Ms. Goldin:

I have received your correspondence of April 5. You referred to "prescheduled executive sessions" held by the Wappingers Central School District Board of Education and asked whether the "process for selection of superintendent" qualifies for consideration in executive session.

In this regard, 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..."

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. 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.

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

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

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

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

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

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

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

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

When a discussion concerns matters of policy, such as the manner in which public money will be expended or allocated, the functions of a department or perhaps the creation or elimination of positions, I do not believe that §105(1)(f) could be asserted, even though the discussion may relate to "personnel". Similarly, when a discussion relates to the procedural issues involved in selecting a superintendent (i.e., criteria in relation to experience, where to advertise, salary range, etc.), it must, in my view, be conducted in public. 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" (id.,).

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

cc: Board of Education

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April 30, 2002

Ms. Jolie Dunham
[redacted]

The staff of the Committee on 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. Dunham:

I have received your note of April 12 and the materials attached to it. You indicated that you are "being 'threatened' for breaking 'confidentiality'" by disclosing information that you acquire during executive sessions in your role as a member of the City of Kingston School District Board of Education. Attached to your correspondence is a memorandum addressed to the Board and the acting superintendent by the District's attorney, Michael K. Lambert, in which he offered an opinion concerning a requirement that Board members "maintain the confidentiality of matters discussed in executive session" and the "consequences [that] may flow to an individual Board of Education member who wrongfully discloses confidential information."

In his opinion, Mr. Lambert cited §805-a(1)(b) of the General Municipal Law, which prohibits a municipal official from disclosing "confidential information acquired by him in the course of his official duties or use such information to further his personal interests." In consideration of that provision, he expressed the belief that "matters that are properly discussed in an executive session that are not otherwise public knowledge are 'confidential' within the meaning of" that statute. He also referred to an opinion that I prepared that offered a different opinion. The issue has arisen since the issuance of that opinion, and I believe that several judicial decisions, both state and federal, support my view. In this regard, I offer the following comments.

For purposes of considering the issue of "confidentiality", reference will be made to the Open Meetings Law, as well as the Freedom of Information Law. Both of those statutes are based on a presumption of openness. In brief, the former requires that meetings of public bodies, such as boards of education, be conducted open to the public, except when an executive session may properly be held under §105(1) or when a matter is exempt from its coverage; the latter requires that agency records be made available to the public, except to the extent that one or more grounds for denial access appearing in §87(2) may properly be asserted. The first ground for denial in the Freedom of Information Law, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." 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 state's highest court, 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 Freedom of Information 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 has 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 v. Burns, 67 NY2d 562, 567 (1986)].

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, when a governmental entity may choose to disclose or withhold records or to discuss in issue in public or in private, I do not believe that the records or the discussion may be considered "confidential"; only when the government has no discretion and must withhold records or discuss a matter in private could the records or information be so considered.

Viewing the matter from a different vantage point, there are federal decisions indicating that general prohibitions against disclosure by government employees are unconstitutional. Although you are not an employee, but rather an elected member of the governing body of a public corporation, I believe that the thrust of case law is pertinent.

In Harman v. City of New York [140 F.3d 111 (2nd Cir. 1998)], 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).

Again, you are not an employee, but rather an elected official. In my view, one of the responsibilities of elected officials involves speaking out on issues of concern to the public.

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).

In my opinion, in the context of school district business, matters would be "confidential" only on rare occasions. Those situations might involve information that is derived from student records or perhaps 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.

The general prohibition suggested by Mr. Lambert 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.

What if, after an executive session, a member of the Board 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 law? I note, too, that Mr. Lambert referred to matters "properly discussed in executive session." Frequently executive sessions are convened for "proper" reasons, but the public body drifts into a new subject. My hope is that there will always 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?

Lastly, while there may be no prohibition against disclosure of most of the information discussed in an executive session, to reiterate a pointed offered in other opinions rendered by this office, 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.

Copies of this opinion will be forwarded to the Board of Education and Mr. Lambert.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Michael K. Lambert

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May 3, 2002

Mr. R.A. Vogan
[redacted]

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. Vogan:

I have received your letter and the materials attached to it. You referred to an advisory opinion prepared on April 2 in which I addressed a series of issues, and you have sought my views concerning a variety of other matters as they relate to the Lake Shore Central School District and its Board of Education.

First, you wrote that policies considered by the Board are not available to the public until they have been approved. In this regard, I dealt indirectly with that issue in the response of April 2. The provision dealing with the matter, §87(2)(g) of the Freedom of Information Law, permits an agency to withhold records that:

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

As indicated earlier, those portions of intra-agency materials that consist of recommendations, advice, or opinions, for example, need not be disclosed. From my perspective, a proposed policy is essentially a recommendation that may be withheld. This is not to suggest that a record of that nature must be withheld, for the Board and the District have discretionary authority to disclose it. Further, there are many instances in which proposed policies and similar records are disclosed prior

to their adoption as a means of enhancing the public's understanding of an issue policies and to elicit the views of interested persons.

Second, you contended that the descriptions of the subjects to be discussed during executive sessions are inadequate and that the Board conducts "inappropriate business" during executive sessions. By means of example, you referred to executive sessions held to discuss "personnel issues" and "negotiations" and numerous topics that have been considered in executive session, including ain appropriation for emergency repairs, setting the date for high school graduation, approval of a resolution for the "support of safe homes" and contracts for administrators, support for "libraries legislation", creation of a school monitor position, etc. In addition, you referred to a discussion of a new position at a "retreat."

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

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

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

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

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

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

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

In my view, insofar as a retreat dealt with the creation of positions or other items of Board business, the gathering constituted a "meeting" that should have been conducted open to the public in accordance with the Open Meetings Law and preceded by notice given pursuant to §104 of that statute.

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

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

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

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 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 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 issues" is inadequate, and that the motion should be based upon the specific language of §105(1)(f). For instance, a proper motion might be: "I move to enter into an executive session to discuss the employment history of a particular person (or persons)". Such a motion would not in my opinion have to identify the person or persons who may be the subject of a discussion. By means of the kind of motion suggested above, members of a public body and others in attendance would have the

ability to know that there is a proper basis for entry into an executive session. Absent such detail, neither the members nor others may be able to determine whether the subject may properly be considered behind closed doors.

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

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

Next, with respect to "negotiations", the only provision of the Open Meetings Law in which that term appears, §105(1)(e), pertains to collective bargaining negotiations involving a public employee union. Not all negotiations involve collective bargaining, and the application of that provision as a basis for conducting an executive session is limited. Further, it has been held that motion under §105(1)(e) should identify *the* negotiations that are the subject of the discussion, i.e.,

"I move to enter into executive session to discuss the collective bargaining negotiations with the teachers' union."

Lastly, it appears that the Board has routinely taken action during executive sessions. Based on judicial decisions, 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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Education
Carter Brown

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3451

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May 6, 2002

Mr. Charles H. Goris
[redacted]

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

Dear Mr. Goris:

I have received your letter of April 7 in which you sought an advisory opinion concerning the Open Meetings Law.

According to your letter, an application was made to the Town of Grand Island for a special use permit "to construct a private airport in an area zoned residential." At a meeting held by the Town Board, several residents expressed opposition, and a petition was signed by 241 in opposition to the proposal. You wrote, however, that when the Board sought to discuss the issue, the following motion was approved:

> "The Town Board will adjourn into a brief executive session in order to consider the comments made at the beginning of the meeting regarding the Mesmer airstrip."

The meeting resumed in a half hour, and you indicated that the Board resolved to approve the special use permit for the airstrip. You added that it is your understanding that "the Town Board with some regularity uses executive sessions in their 'workshop' sessions."

It is your view that there was no basis for entry into an executive session. Based on the information that you provided, I concur. In this regard, I offer the following comments.

First, by way of background, it is noted that there is no distinction between a "workshop" and a meeting, and 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, such as a town board, gathers to discuss public business, any such gathering, in my opinion, would ordinarily constitute a "meeting" subject to the Open Meetings Law. Since a workshop held by a majority of a public body is a "meeting", it would have the same responsibilities in relation to notice, openness, and the taking of minutes as in the case of a formal meeting, as well as the same ability to enter into executive sessions.

Second, as a general matter, the Open Meetings Law is based on a presumption of openness. Stated differently, the Law requires that meetings of public bodies be conducted in public, except to the extent that a closed or executive session may properly be held. Paragraphs (a) through (h) of §105(1) of the Law specify and limit the subjects that may be considered in an executive session. Therefore, a public body cannot enter into executive session to discuss the subject of its choice. It is clear in my view that those provisions are generally intended to enable public bodies to exclude the public from their meetings only to the extent that public discussion would result in some sort of harm, perhaps to an individual in terms of the protection of his or her privacy, or to a government in terms of its ability to perform its duties in the best interests of the public.

From my perspective, based on a review of the grounds for entry into executive session, it is doubtful that any could justifiably have been asserted.

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

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

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3452

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May 6, 2002

Michael K. Lambert, Esq.
Shaw & Perelson, LLP
2-4 Austin Court
Poughkeepsie, NY 12605

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

Dear Mr. Lambert:

I have received your letter of April 8 in which you sought an advisory opinion relating to the application of the Open Meetings Law.

The matter involves a school district with a nine member board of education. You wrote that during the past several years:

> "... the district has engaged in a practice whereby several (no more than 3) Board members at a time would meet privately with the Superintendent, the business official and/or other administrative staff to address questions that they had concerning the status of the tentative budget that would, thereafter be presented by the Superintendent at a public meeting. These meetings would take place over the course of several days, ultimately leading to all Board members attending one or more of such meetings. There is [sic] no Board-determined established committees. Rather, the composition of these groups of Board members would be determined by their availability to attend the scheduled meetings."

Your question is whether the gatherings in question would be subject to the Open Meetings Law, and in this regard, I offer the following comments.

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

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

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.

Based on the foregoing, I believe that any entity consisting of two or more members of a public body, such a committee of a school board consisting of two or more of its members, 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)]. 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)].

From my perspective, there is a distinction between standing committees and the situation that precipitated your question. A standing committee is an "entity" that carries out a duty in a particular area, collectively, as a body. The situation that you described in my view does not involve an "entity" or the designation of members to carry out a continuing duty, as in the case of a standing committee. The members are apparently not designated as a committee nor would they function in the manner of a committee.

Second, I do not believe that the Open Meetings Law applies unless a quorum of a public body is present. 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 duty. For the purpose of this provision the words 'whole number' shall be construed to mean the total number which the board, commission, body or other group of persons or officers would have were there no vacancies and were one of the persons or officers disqualified from acting."

The issue in the context of your inquiry involves the application of the Open Meetings Law to a situation in which the gatherings include less than a quorum of the board. I note that 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.

Unless there is or has been an intent to circumvent the Open Meetings Law in the context of the situation of your concern, a court in my opinion would not find that the Open Meetings Law would be applicable.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3453

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May 6, 2002

Mr. Michelangelo Carbone
[redacted]

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

Dear Mr. Carbone:

I have received your letter in which you sought assistance concerning your ability to speak at meetings of the Board of Education of the Bedford Central School District.

You indicated that the President of the Board will not allow you to address the Board at its meetings, but that other citizens "are allowed to approach the mike and voice their opinions on the matters before the board."

In this regard, 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, such as yourself, 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, a federal law that prohibits the disclosure of personal information identifiable to students. However, it was also found 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.

A copy of this opinion will be forwarded to the Board of Education.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Board of Education

OML-AO-3454

From: Robert Freeman
To: Steve Orr
Date: 5/8/02 3:24PM
Subject: Re:

Hi Steve:

Unless you are referring to a board of education, a public body may vote during a proper executive session if the the vote is not to appropriate public moneys. If a vote is taken during the executive session, section 106 of the Open Meetings Law requires that minutes indicating the nature of the action taken and the vote of the members be made available, to the extent required by the Freedom of Information Law, within one week of the executive session.

If the vote was taken by a school board, and it is not a vote to initiate charges under section 3020-a of the Education Law, numerous court decisions that the vote by the board must be taken in public.

You might want to go the Open Meetings Law opinions on our website under "minutes of executive session" or, if pertinent, "school board voting."

I hope that this helps.

Bob

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-3455

From: Robert Freeman
To: [redacted]
Date: 5/8/02 9:25AM
Subject: To whom it may concern:

To whom it may concern:

I have received your inquiry concerning access to minutes of a meeting of a board concerning a decision to grant or deny an application for a license for a "package store."

In this regard, I do not know where you are, but I do not believe that there are "package stores" in New York. If your question involves a jurisdiction outside of New York, I cannot offer guidance.

Assuming that the board functions in New York, I note that the Open Meetings Law contains what might be characterized as minimum requirements concerning the contents of minutes. At a minimum, they must consist of a record or summary of motions, proposals, resolutions, action taken and the vote of the members. That being so, while a board may prepare expansive minutes, it is possible the minutes of your interest might include only the board's determination and the vote of its members. The preparation of minutes of that nature, despite their brevity, would be consistent with law.

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-13355
OML-AO-3456

Committee Members

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May 14, 2002

Ms. Katy Odell
Editor
North Creek News-Enterprise
P.O. Box 85
North Creek, NY 12853

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

Dear Ms. Odell

As you are aware, I have received your letter of April 11 in which you sought an advisory opinion concerning "how much information [you] can expect to obtain" pertaining to an employee of the Johnsburg Central School who was the subject of disciplinary charges and later resigned. Specifically, you raised the following questions:

> "1) Should the board have named the individual [redacted] when it took its first action on April 8 to suspend here, but did not name her?
>
> 2) Should the board have stated publicly in the April 8 meeting motion the reason for its disciplinary action of suspension without any pay against 'an employee' who we now know is [redacted]
>
> 3) Now that we know the name of the person in question because she has resigned, how much more detail must be publicly available according to FOIL? Does the Personal Privacy Protection Law apply here? For example, must the school release to us if requested:
>
> • [redacted] position/title at the school (we believe she is a staff member, not a teacher, but have not yet confirmed this)
> • Her length of employment
> • Her address and age
> • Any prior disciplinary actions against her."

In this regard, I offer the following comments.

First, the Personal Privacy Protection Law would not have been pertinent, for that statute applies only to records maintained by state agencies; it excludes units of local government, such as schools or school districts, from its coverage.

Second, it is unclear on the basis of your letter whether the subject of the action taken was a tenured employee. If she was tenured, §3020-a of the Education Law would have required that the Board initiate charges during an executive session. If she was not a tenured employee, the Board would nonetheless have had a basis for considering the matter in executive session. Section 105(1)(f) permits a public body to enter into executive session to discuss:

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

The issue clearly would involved either the employment history of a particular person or a matter leading to the discipline of a particular person, thereby enabling the Board to validly conduct an executive session.

Although the Open Meetings Law requires that a motion for entry into executive session indicate "the general area or areas of the subject or subjects to be considered", it has been advised that a motion to initiate charges, for example, need not identify the employee. Guidance to that effect has been offered based in part on the judicial interpretation of the Freedom of Information Law. In brief, it has been held that when allegations or charges of misconduct have not yet been determined or did not result in disciplinary action, the records relating to such allegations may be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §87(2)(b); Herald Company v. School District of the City of Syracuse, 430 NYS2d 460 (1980)].

In consideration of the foregoing and in response to the first two questions that you raised, I do not believe that the Board would have been required to name the subject of the discussion or that the charges, which were not proven, would have to have been disclosed.

Third, several of the remaining items of your interest must, in my view, be made available.

By way of background, there is nothing in the Freedom of Information Law that deals specifically with personnel records or personnel files. Further, the nature and content of so-called personnel files may differ from one agency to another, and from one employee to another. In any case, neither the characterization of documents as "personnel records" nor their placement in personnel files would necessarily render those documents "confidential" or deniable under the Freedom of Information Law (see Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980). On the contrary, the contents of those documents serve as the relevant factors in determining the extent to which they are available or deniable under the Freedom of Information Law. Two of the grounds for denial to which you alluded are relevant to an analysis of the matter; neither, however, could in my view serve to justify a denial of access.

Perhaps of greatest significance is the provision cited earlier, §87(2)(b), concerning unwarranted invasions of personal privacy.

While the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public officers employees. It is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public officers and employees are required to be more accountable than others. With regard to records pertaining to public officers and employees, the courts have found that, as a general rule, records that are relevant to the performance of a their official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, supra; Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

The other ground for denial of significance, §87(2)(g), states that an agency may withhold records that:

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

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

In terms of the judicial interpretation of the Freedom of Information Law, I point out that in situations in which allegations or charges have resulted in the issuance of a written reprimand,

disciplinary action, or findings that public employees have engaged in misconduct, records reflective of those kinds of determinations have been found to be available, including the names of those who are the subjects of disciplinary action [see Powhida v. City of Albany, 147 AD 2d 236 (1989); also Farrell, Geneva Printing, Scaccia and Sinicropi, supra].

In Geneva Printing, supra, a public employee charged with misconduct and in the process of an arbitration hearing engaged in a settlement agreement with a municipality. One aspect of the settlement was an agreement to the effect that its terms would remain confidential. Notwithstanding the agreement of confidentiality, which apparently was based on an assertion that "the public interest is benefited by maintaining harmonious relationships between government and its employees", the court found that no ground for denial could justifiably be cited to withhold the agreement. On the contrary, it was determined that:

> "the citizen's right to know that public servants are held accountable when they abuse the public trust outweighs any advantage that would accrue to municipalities were they able to negotiate disciplinary matters with its employee with the power to suppress the terms of any settlement".

In so holding, the court cited a decision rendered by the Court of Appeals and stated that:

> "In Board of Education v. Areman, (41 NY2d 527), the Court of Appeals in concluding that a provision in a collective bargaining agreement which bargained away the board of education's right to inspect personnel files was unenforceable as contrary to statutes and public policy stated: 'Boards of education are but representatives of the public interest and the public interest must, certainly at times, bind these representatives and limit or restrict their power to, in turn, bind the public which they represent. (at p. 531).
>
> A similar restriction on the power of the representatives for the Village of Lyons to compromise the public right to inspect public records operates in this instance.
>
> The agreement to conceal the terms of this settlement is contrary to the FOIL unless there is a specific exemption from disclosure. Without one, the agreement is invalid insofar as restricting the right of the public to access.:

It was also found that the record indicating the terms of the settlement constituted a final agency determination available under the Law. The decision states that:

> "It is the terms of the settlement, not just a notation that a settlement resulted, which comprise the final determination of the matter. The public is entitled to know what penalty, if any, the employee

> suffered...The instant records are the decision or final determination of the village, albeit arrived at by settlement..."

In consideration of the foregoing and your questions, it is clear that a public employee's title must be disclosed, for it clearly relates to the performance of one's duties. Records indicating length of one's employment would also be available based on the same rationale. I note, too, that attendance and leave records have been found to be accessible (see Capital Newspapers, supra). Similarly, in view of judicial decisions cited earlier, if there were determinations in which disciplinary action was taken, records reflective of those actions would also be accessible under the law. With respect the home address, §89(7) specifies that the home address of a present or former public employee need not be disclosed, and it has been consistently advised that one's age may be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3457

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May 14, 2002

E-Mail

TO: Zali Win <[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. Win:

As you are aware, I have received your letter concerning your ability to videotape town board meetings. You wrote that the town board adopted a policy stating that "audio and/or videotaping shall be permitted so long as such action is unobtrusive and non-disruptive." Since the adoption of that policy, the board has approved a resolution indicating that "video taping devices must be in the back of the room, not in any aisle, in the supervisor-designated area." Without familiarity with the meeting room, the width of the aisle or the number of those present, I cannot provide unequivocal guidance. Although you indicated that you are familiar with opinions previously rendered by this office, I would like to offer the following general comments.

As you may know, Peloquin v. Arsenault [162 Misc. 2d 306, 616 NYS2d 716 (1994)] is the only reported decision that deals with the use of video recording devices at open meetings. However, it is the latest in a series of decisions pertaining to the use of recording equipment at meetings. In my opinion, those decisions consistently apply certain principles. One is that a public body, such as a town board, has the ability to adopt reasonable rules concerning its proceedings. The other involves whether the use of the equipment would be disruptive.

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

Notwithstanding Davidson, however, the Committee advised that the use of tape recorders should not be prohibited in situations in which the devices are unobtrusive, for the presence of such devices would not detract from the deliberative process. In the Committee's view, a rule prohibiting the use of unobtrusive tape recording devices would not be reasonable if the presence of such devices would not detract from the deliberative process.

This contention was initially confirmed in a decision rendered in 1979. That case arose when two individuals sought to bring their tape recorders at a meeting of a school board in Suffolk County. The school board refused permission and in fact complained to local law enforcement authorities who arrested the two individuals. In determining the issues, the court in People v. Ystueta, 418 NYS 2d 508, cited the Davidson decision, but found that the Davidson case:

> "was decided in 1963, some fifteen (15) years before the legislative passage of the 'Open Meetings Law', and before the *widespread use of hand held cassette recorders which can be operated by individuals without interference with public proceedings or the legislative process.* While this court has had the advantage of hindsight, it would have required great foresight on the part of the court in Davidson to foresee the opening of many legislative halls and courtrooms to television cameras and the news media, in general. Much has happened over the past two decades to alter the manner in which governments and their agencies conduct their public business. The need today appears to be truth in government and the restoration of public confidence and not 'to prevent star chamber proceedings'...In the wake of Watergate and its aftermath, the prevention of star chamber proceedings does not appear to be lofty enough an ideal for a legislative body; and the legislature seems to have recognized as much when it passed the Open Meetings Law, embodying principles which in 1963 was the dream of a few, and unthinkable by the majority"(id., 509-510; emphasis mine).

Several years later, the Appellate Division 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 Peloquin, supra, the court focused primarily on the manner in which camera equipment is physically used and found that the unobtrusive use of cameras at open meetings could not be prohibited by means of a "blanket ban." The Court expansively discussed the notion of what may be "obtrusive" and referred to the Mitchell holding and quoted from an opinion rendered by this office as follows:

> "On August 26, 1986 the Executive Director of the Committee on Open Government opined (OML-AO-1317, p.3) with respect to *video* recording as follows:
>
> > 'If the equipment is large, if special *lighting* is needed, and if it is obtrusive and distracting, I believe that a rule prohibiting its use under those circumstances would be reasonable. However, if advances in technology permit video equipment to be used without special lighting, in a stationary location and in an unobtrusive manner, it is questionable in my view whether a prohibition under those circumstances would be reasonable.'
>
> On April 1, 1994, Mr. Freeman further opined (OML-AO-2324) that a county legislature's resolution limiting hand held camcorders to the spectator area in the rear

of the legislative chamber was not per se unreasonable but rather, as challenged, it depended for its legitimacy on whether or not the camcorders could actually record the proceedings from that location.

Blanket prohibition of audio recording is not permissible, and it is likely that the appellate courts would find that also to be the case with blanket prohibitions of video recording. However, what might be reasonable in one physical setting - a village board restricting camcording to the rear area of *its* meeting room - might not be in another - the larger chambers of a county legislature (OML-AO-1317, supra). It might well be reasonable in a village or other space-restricted setting to restrict the number of camcorders to one, as the court system may with its pooling requirement for video coverage of trials (22 NYCRR Parts 22 and 131). Such a requirement might be viewed as unreasonable in a large county legislative chamber or where a local board of education is conducting a meeting in a school auditorium.

As Mr. Freeman observed with respect to video recording (OML-AO-1317, supra), if it is 'obtrusive and distracting', a ban on it is not unreasonable. It is here claimed to be distracting. Tupper Lake Village Board members and some segment of the public aver that they are distracted from the business at hand because they do not wish to appear on television - the sole justification offered in defense of the policy.

Mitchell, supra, held that fear of public airing of one's comments at a public meeting is insufficient to sustain a ban on audio recording.

Is Mr. Peloquin's (or anyone's else's) video recording of a village board proceedings obtrusive?...

"...Hand held audio recorders *are* unobtrusive (*Mitchell*, supra); camcorders may or may not be depending, as we have seen, on the circumstances. Suffice it to say, however, in the face of *Mitchell*, the Committee on Open Government's (Robert Freeman's) well-reasoned opinions supra and the court system's pooled video coverage rules/options, a blanket ban on all cameras and camcorders when the sole justification is a distaste for appearing on public access cable television is unreasonable. While "distraction" and "unobtrusive" are subjective terms, in the face of the virtual presumption of openness contained in Article 7 of the Public Officers law and the insufficient justification offered by the Village, the 'Recording Policy' in issue here must fall" (id., 717, 718; emphasis added by the court).

While I hope that the foregoing is useful and instructive, as suggested at the outset, the factual circumstances are, in my view, critical in attempting to determine whether or the extent the town's actions are reasonable or whether the placement of your camera may be disruptive or obtrusive.

RJF:jm

FOIL-AO-13364
OML-AO-3458

From: Robert Freeman
To: [redacted]
Date: 5/17/02 12:23PM
Subject: Dear Mr. Farbstein:

Dear Mr. Farbstein:

I have received your inquiry concerning "access to library hearing records" and whether those records are subject to the Freedom of Information Law.

In this regard, first, as a general matter, the Freedom of Information Law applies to records maintained by entities of state and local government. Some libraries, such as school district or municipal libraries, are clearly governmental entities, and their records would be subject to rights of access conferred by the Freedom of Information Law. Others, even though they may be called "public" libraries and receive significant government funding, are not-for-profit entities (i.e., association and free association libraries). In those instances, because they are not governmental, I do not believe that the Freedom of Information Law would apply.

Second, you referred to a "library hearing". I am unfamiliar with that phrase. If you mean a "meeting" of a library board of trustees, those boards, including those that may be not-for-profit as described above, are required by section 260-a of the Education Law to comply with the Open Meetings Law. Under that law, meetings of those boards are presumptively open to the public, and minutes would have to be prepared.

I hope that I have been of assistance.

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

OML-AO-3459

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May 20, 2002

Burl Osborne, Deputy Sheriff
Seneca County Sheriff's Department
44 W. William Street
Waterloo, NY 13165

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

Dear Deputy Sheriff Osborne:

I have received your letter in which you asked whether "a Village Committee [must] write minutes when there is no quorum present, at the meeting." You indicated that the committee consists of members of the board of trustees, that notice is posted and an agenda is prepared, but that there will not be a vote on any motion.

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

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)].

Second, the Open Meetings Law contains what might be viewed as minimum requirements concerning the contents of minutes. Subdivision (1) of §106 states that:

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

Based on the foregoing, if there are no motions, proposals, resolutions or action taken, technically, there is no requirement that minutes be prepared.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

OML-AO-3460

From: Robert Freeman
To: [redacted]
Date: 5/24/02 9:26AM
Subject: Dear Mr. Katz:

Dear Mr. Katz:

I have received your letter in which you asked whether meetings of a high school government body are subject to the Open Meetings Law.

There are no judicial decisions relating to the issue. However, I believe that the same kind of analysis would apply with respect student councils and their status under the Open Meetings Law as has been applied with respect to other entities. In brief, it has been held in a variety of situations that advisory bodies that do not consist solely of members of a governing body and which have no authority to take final and binding action do not constitute public bodies and, therefore, are outside the coverage of the Open Meetings Law. On the other hand, if an entity does have the power to take action or, for example, to determine the manner in which public moneys are expended or allocated, without review by a different decision maker or decision making body, case law would suggest that it is a public body subject to the Open Meetings Law.

If you are interested in obtaining a copy of the opinion to which you referred, it can be mailed or faxed by this office.

I hope that I have been of assistance.

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

OML-AO-3161

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May 24, 2002

Hon. Donald B. Wilbur
Supervisor
Town of Greenwich
2 Academy Street
Greenwich, NY 12834

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

Dear Supervisor Wilbur:

I have received your letter of April 24 in which you requested an opinion concerning the status of a certain gathering in relation to the Open Meetings Law.

By way of background, you and others attended a meeting on April 11 to discuss arrangements for a safe alcohol free event to be held for Greenwich students and their dates following a prom. The matter was considered "critical" due to the recent deaths of two students following an accident that involved the use of alcohol, and on April 14, 32 residents gathered at the school to consider what the community could or should do. You wrote that among those who attended were "members of the Greenwich and Easton Town Boards, the Village of Greenwich Board, Greenwich Central School Board, School Administration, members of the local clergy, law enforcement, district attorney and the Council for Prevention." You added "[t]his was a group of concerned residents of our communities who were gathered to discuss social issues of parents and children in an effort to save the lives of our young people", "a gathering that crossed many professions including people who happen to be elected officials", and that it "was in no way a Town Board, Village Board or School Board meeting." Nevertheless, you indicated that you have been "chastised" by a local newspaper for holding an "illegal or closed door meeting."

From my perspective, as you described the gathering, it would not have constituted a meeting of the Town Board or any other public body, and the Open Meetings Law would not have applied.

In this regard, the Open Meetings Law pertains to meetings of public bodies, and §102(1) of the Open Meetings Law defines the term "meeting" to mean "the official convening of a public body for the purpose of conducting public business". It is emphasized that the definition of "meeting" has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that any gathering of a quorum of a public body

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

Inherent in the definition and its judicial interpretation is the notion of intent. If there is an intent that a majority of a public body convene for the purpose of conducting public business, such a gathering would, in my opinion, constitute a meeting subject to the requirements of the Open Meetings Law. However, if there is no intent that a majority of public body will gather for purpose of conducting public business, collectively, as a body, but rather for the purpose of gaining education, training, or to listen to a speaker as part of an audience or group, I do not believe that the Open Meetings Law would be applicable. In this instance, it is my understanding those present attended as concerned citizens, and not in their capacities or functioning as members of municipal boards.

In the same decision as that referenced above, the Court specified that "not every assembling of the members of a public body was intended to be included within the definition", indicating that social events or chance meetings do not fall within the Open Meetings Law (id., 416). I note that similar issues 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.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Chris McCormick
Hon. Daniel P. Shaw
Mr. Ken Tingley
The Eagle
The Greenwich Journal and Salem Press
Hon. Elaine Kelly

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3462

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

May 24, 2002

Hon. Roberta Sue Moore
Councilwoman
237 Wyncoop Creek Road
Chemung, NY 14825

The staff of the Committee on 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. Moore:

I have received your letter of April 26. Please understand that requests for advisory opinions are answered, in an effort to be fair, in the chronological order in which they are received.

As I understand your question, you asked whether action taken in executive session "w/out consent" would be "void/invalid." Although I do not fully understand your question, I offer the following comments.

First, based on the language of both §§105(1) and 106(2) of the Open Meetings Law, it is clear that a public body may take action during a proper executive session, unless the vote is to appropriate public moneys. The former 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, proved, however, that *no action by formal vote* shall be taken to appropriate public moneys..."

The latter pertains to minutes of meetings and provides that:

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

Second, in the event that a vote was taken during an executive session that should have been taken in public, I believe that the vote remains valid unless and until a court renders a determination to the contrary. According to §107(1) of the Open Meetings Law, when a lawsuit is initiated under that statute, "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." Therefore, even if action is taken in violation of the Open Meetings Law, it remains in effect, unless a court asserts its discretionary authority to invalidate the action.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT FOIL-AO-13375
OML-AO-3463

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May 28, 2002

E-Mail

TO: Patrick Rausch <patr@us.ibm.com>

FROM: Robert J. Freeman, Executive Director

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

Dear Mr. Rausch:

I have received your letter in which you indicated that the you are member of a board of education, and that the Board has adopted a policy which states in part that: "Matters discussed in executive sessions must be treated as confidential; that is, never discussed out of executive session." You have questioned the propriety of the policy. In addition, you have sought a recommendation concerning your ability to divulge information that should not have been discussed during an executive session. By means of example you wrote that:

> "[Y]our superintendent uses the 'Specific history of a particular person' reason to move into executive session to discuss financial problems like double bookings of revenues, or other items that create a dollar shortfall in out budget. He says that the public will demand to know who did it or make a call that it was the business manager, and this is why the confidentiality. [You] believe this is wrong, and want to discuss the financial issues in public without any personnel discussion. When [you] raise this, the board majority accepts the superintendent's personnel excuse to not do so, and continues the executive session under the confidentiality cover."

From my perspective, the policy is inconsistent with law. In this regard, I offer the following comments.

First, it appears that the use of an executive session in the circumstance that you described would have been inappropriate.

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. 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 matters relating to the budget, 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 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.

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

I am unaware of any statute that would prohibit a Board member from disclosing the kind of information to which you referred. Even though information might have been obtained during an executive session properly held or from records marked "confidential", I note that the term

"confidential" in my view has a narrow and precise technical meaning. For records or information to be validly characterized as confidential, I believe that such a claim must be based upon a statute, an act of Congress or the State Legislature, that specifically confers or requires confidentiality.

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

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

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

Historically, I believe that public bodies were created to order to reach collective determinations, determinations that better reflect various points of view within a community than a single decision maker could reach alone. Members of boards should not in my opinion be unanimous in every instance; on the contrary, they should represent disparate points of view which, when conveyed as part of a deliberative process, lead to fair and representative decision making. Nevertheless, notwithstanding distinctions in points of view, the decision or consensus by the majority of a public body should in my opinion be recognized and honored by those members who may dissent. Disclosure made contrary to or in the absence of consent by the majority could result in unwarranted invasions of personal privacy, impairment of collective bargaining negotiations or

even interference with criminal or other investigations. In those kinds of situations, even though there may be no statute that prohibits disclosure, release of information could be damaging to individuals and the functioning of government.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
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OML-AO-3464

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May 28, 2002

Mr. Arthur Springer
[redacted]

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

Dear Mr. Springer:

I have received your letter of April 28 in which you sought a clarification concerning a response to an earlier inquiry that focused on the ability of you and others to hear the comments and deliberations of members of the Board of Directors of the New York City Health and Hospitals Corporation and others at its meetings. You questioned whether the principle offered in my opinion of April 23 would be equally applicable to "board committee meetings." In brief, it was advised in that opinion that a public body must conduct its business in a manner that enables the public to hear its comments and deliberations, and that it would be unreasonable not to use an existing sound system if those in attendance cannot otherwise hear.

The same advice would apply with respect to meetings conducted by committees consisting of Board members.

The Open Meetings Law pertains to public bodies, and §102(2) defines the phrase "public meeting" to mean:

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

The last clause of the definition refers to any "committee or subcommittee or similar body of [a] public body." Based on that language and judicial decisions, when a public body, such as the board of directors of a public corporation, creates or designates its own members to serve as a committee or subcommittee, the committee or subcommittee would constitute a public body subject to the requirements of the Open Meetings law. Therefore, committees of the Board consisting solely of its own members would have the same obligations regarding notice and openness, for example,

as well as the same authority to conduct executive sessions as the governing body [see Glens Falls Newspapers, Inc. v. Solid Waste and Recycling Committee of the Warren County Board of Supervisors, 195 AD2d 898 (1993)]. If, for example, the Board of Directors consists of seven members, a quorum of the Board would be four. If a standing committee consists of three members, because the committee is a public body separate and distinct from the Board, its quorum would be three.

When a committee is subject to the Open Meetings Law, I believe that it has the same obligation as the governing body to conduct its meetings in a manner consistent with the clear intent of the law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

From: Robert Freeman
To: [redacted]
Date: 5/29/02 5:03PM
Subject: Dear Mr. Nudd:

Dear Mr. Nudd:

I have received your inquiry, and I believe that a board of assessment review constitutes a "public body" required to comply with the Open Meetings Law. However, I note that section 108(1) of that law exempts judicial and quasi-judicial proceedings from its coverage. In my view, following the public hearing held by the BAR, its deliberations could be characterized as "quasi-judicial" and, therefore, outside the coverage of the Open Meetings Law.

For a more detailed explanation, it is suggested that you connect with our website and the index to opinions rendered under the Open Meetings Law. From there, click on to "A" and scroll down to "Assessment Board." The two highest numbered opinions will be available online in full text.

I hope that I have been of assistance.

Robert J. Freeman
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From: Robert Freeman
To: [redacted]
Date: 5/31/02 9:22AM
Subject: Dear Mr. Girst:

Dear Mr. Girst:

I have received your inquiry concerning a board of education that entered into executive session and never returned to the original site of the open meeting to inform the public that the meeting had ended.

Assuming that the board's business concluded at the end of the executive session, I believe that the board would have been guilty of bad manners or an absence of courtesy. In short, there is nothing in the law that requires a public body to return to an open meeting following an executive session. Further, if enough members leave a meeting so that less than a quorum remains, the meeting is simply over.

It is suggested that, at the next meeting, you ask the board if its business will end at the conclusion of the executive session. Depending on the answer, the public will know whether to stay or return to their homes.

I hope that I have been of assistance.

Robert J. Freeman
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From: Robert Freeman
To: mchealth@mcls.rochester.lib.ny.us
Date: 5/31/02 9:36AM
Subject: Dear Mr. Ricci:

Dear Mr. Ricci:

As you suggested, the Open Meetings Law is applicable to meetings of public bodies (i.e., city councils, town boards, county legislatures, etc.). Unless a quorum of a public body gathers for the purpose of conducting public business collectively, as a body, the Open Meetings Law would not be implicated.

In the context of the situations to which you referred, you could choose to hold those gatherings open to the public and the news media, but there would be no right of access or an obligation to do so.

I hope that I have been of assistance.

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STATE OF NEW YORK
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June 3, 2002

Mr. Robert E. White
Attorney at Law
110 Main Street
Saranac Lake, NY 12983

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

Dear Mr. White:

I have received your letter of May 3. You indicated that, as its attorney, you are involved in a disciplinary proceeding initiated under §75 of the Civil Service Law in the Saranac Lake Central School District. You raised two questions concerning disclosure of information relating to the matter.

First, when the Board is about to enter into executive session to discuss possible disciplinary action against an employee, you asked whether the motion to do so should "identify by name the employee that is going to be discussed in executive session." This office has consistently advised that the identity of the person who is the subject of an executive session in the kind of situation to which you referred need not be made known. In this regard, I offer the following comments.

As you are aware, 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.

The provision that would justify an executive session in the situation described, §105(1)(f), 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).

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, holding 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.). *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); emphasis added].

The second question involves a situation in which the members of a board of education to initiate charges and whether "they should identify the employee by name when they come out of executive session and pass the official resolution preferring charges against the employee." Again, I do not believe that the board would be required to identify the person charged by name. In this instance, the Freedom of Information Law offers guidance.

The resolution adopted by the board would be memorialized in the form of a record, and I believe that the name could be withheld under the Freedom of Information Law. As a general matter, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Pertinent is §87(2)(b), which authorizes an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." Although the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public employees. It is clear that public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public employees are required to be more accountable than others. Further, the courts have found that, as a general rule, records that are relevant to the performance of a public employee's official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

FOIL-AO-1338 Page 1
OML-AO 3469

From: Robert Freeman
To: Bob and Jenny Petrucci
Date: 6/3/02 2:03PM
Subject: Re: 2 Issues

When an agency indicates that it does not maintain a record, an applicant may seek a written certification under section 89(3) of the FOIL in which an official asserts that a diligent search for the record was made but that the record cannot be found. It is suggested that you review that provision and request such a certification if you believe that it would be useful to do so.

With respect to the minutes, section 106 of the Open Meetings Law prescribes what might be characterized as minimum requirements concerning the contents of minutes. For open meetings, subdivision (1) pertaining to open meetings indicates that, 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." Based on the foregoing, minutes need not include reference to comments made or each issue that might have been considered. In short, minutes may be expansive, but they need only include reference to the activities specifically referenced in section 106(1).

I hope that I have been of assistance.

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STATE OF NEW YORK
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OML-AO-3470

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June 13, 2002

Mr. Christopher Pawelski
[redacted]

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

Dear Mr. Pawelski:

I have received your letter of May 6 and the materials relating to it. You referred to minutes or the absence of minutes concerning meetings of the Operations Committee of the Cornell Cooperative Extension of Orange County. Having reviewed your comments and the minutes that you transmitted, it appears that you may have sought or desired more information that the law requires.

Section 106 of the Open Meetings Law pertains to minutes of meetings and prescribes minimum requirements regarding their contents. Subdivision (1) relates to minutes of open meetings and states that minutes must consist, at a minimum, of "a record or summary of all motions, proposals, resolutions and any other matter formally voted on and the vote thereon." If none of those events occurs, there is no obligation to prepare minutes, and I note that many items within the minutes that you sent involve matters that were not required to have been included in minutes.

I hope that the foregoing serves to clarify your understanding of the Open Meetings Law.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Mark Brigham

OML-AO-3471

From: Robert Freeman
To: [redacted]
Date: 6/11/02 9:08AM
Subject: Dear Dr. Gibbs:

Dear Dr. Gibbs:

I have received your inquiry concerning the status of a not-for-profit corporation, North Country Life Fight, Inc., under the Open Meetings Law. You wrote that the purpose of the corporation is to "promote, supply and maintain a medical support system for emergency helicopter transportation" through the use of the New York State Police helicopter. You indicated that the corporation recoved some funding from municipalities, but that it also acquires funding through fundraising efforts, grants, etc.

In this regard, the Open Meetings Law is applicable to public bodies, and section 102(2) defines the phrase "public body" to mean, in brief, an entity consisting of two or more members that conducts public business and performs a governmental function.

The receipt of government funding is not determinative of whether an entity is subject to the Open Meetings Law, and typically, not-for-profit or private entities are not governmental in nature and, therefore, would not be subject to the Open Meetings Law. The situations in which they have been found to fall within the coverage of that statute have involved cases in which there is substantial government control over those entities. For instance, if government officials have the authority to choose or comprise a majority of the membership of a board of directors, a not-for-profit corporate corporation would, based on judicial decisions, constitute a "public body" subject to the Open Meetings Law. Similarly, it is has been found by the state's highest court that volunteer fire companies are subject to the Freedom of Information Law (the companion of the Open Meetings Law), notwithstanding their corporate status. In short, the Court found that volunteer fire companies would not exist but for their relationships with government and that they perform what has historically been considered "an essential governmental function."

In your situation, unless there is substantial control over the board of directors by government, it is doubtful in my view that its meetings would be found to be subject to the Open Meetings Law.

I hope that I have been of assistance.

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STATE OF NEW YORK
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OML-AO - 3472

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June 18, 2002

Mr. Tim Gannon
Reporter
The News-Review Newspaper
P.O. Box 1500
Mattituck, NY 11952

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

Dear Mr. Gannon:

I have received your letter in which you questioned the sufficiency of a resolution approved by the Riverhead Board of Education "that includes no mention of who or what the resolution applies to." The resolution states that:

> "...the President of the Board of Education and the Superintendent of Schools are hereby authorized to execute an Agreement with a district employee. Such Agreement was reviewed by the Board in executive session. The President of the Board and the Superintendent of Schools are further authorized to execute such documents as are required by such Agreement."

Although you were informed that by an attorney for the District that he was "waiting for an opinion from [this] office", I have received no correspondence from him.

In consideration of the matter, I believe that the resolution should have included the name of the employee and that the agreement referenced in the resolution must be made available in great measure, if not in its entirety. In this regard, I offer the following comments.

First, §106 of the Open Meetings Law pertains to minutes, and subdivision (1) states that minutes of an open meeting must consist, at a minimum, "of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon." The only decision of which I am aware that may be pertinent to the matter is Mitzner v. Goshen Central School District Board of Education [Supreme Court, Orange County, April 15, 1993]. That case involved a series of complaints made by the petitioner that were reviewed by the school board president, and the minutes of the board meeting stated that "the Board hereby ratifies the action of

Bernard Mitzner." The court held that "these bare-bones resolutions do not qualify as a record or summary of the final determination as required" by §106 of the Open Meetings Law. As such, the court found that the failure to indicate the nature of the determination of the complaints was inadequate. In the context of your inquiry, I believe that, in order to comply with the Open Meetings Law and to be consistent with the thrust of the holding in Mitzner, minutes must indicate in some manner the nature of the agreement and the identity of the employee.

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

I note that there is nothing in the Freedom of Information Law that deals specifically with personnel records or personnel files. Further, the nature and content of so-called personnel files may differ from one agency to another, and from one employee to another. In any case, neither the characterization of documents as "personnel records" nor their placement in personnel files would necessarily render those documents "confidential" or deniable under the Freedom of Information Law (see Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980). On the contrary, the contents of those documents serve as the relevant factors in determining the extent to which they are available or deniable under the Freedom of Information Law. Two of the grounds for denial are relevant to an analysis of the matter; neither, however, would in my view serve to justify a denial of access.

Perhaps of greatest significance is §87(2)(b), which permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". In addition, §89(2)(b) provides a series of examples of unwarranted invasions of personal privacy.

While the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public officers employees. It is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public officers and employees are required to be more accountable than others. With regard to records pertaining to public officers and employees, the courts have found that, as a general rule, records that are relevant to the performance of a their official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, supra; Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

The other ground for denial of significance, §87(2)(g), states that an agency may withhold records that:

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

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

In Geneva Printing, supra, a public employee charged with misconduct and in the process of an arbitration hearing engaged in a settlement agreement with a municipality. One aspect of the settlement was an agreement to the effect that its terms would remain confidential. Notwithstanding the agreement of confidentiality, which apparently was based on an assertion that "the public interest is benefited by maintaining harmonious relationships between government and its employees", the court found that no ground for denial could justifiably be cited to withhold the agreement. In so holding, the court cited a decision rendered by the Court of Appeals and stated that:

> "In Board of Education v. Areman, (41 NY2d 527), the Court of Appeals in concluding that a provision in a collective bargaining agreement which bargained away the board of education's right to inspect personnel files was unenforceable as contrary to statutes and public policy stated: 'Boards of education are but representatives of the public interest and the public interest must, certainly at times, bind these representatives and limit or restrict their power to, in turn, bind the public which they represent. (at p. 531).
>
> "A similar restriction on the power of the representatives for the Village of Lyons to compromise the public right to inspect public records operates in this instance.
>
> "The agreement to conceal the terms of this settlement is contrary to the FOIL unless there is a specific exemption from disclosure.

> Without one, the agreement is invalid insofar as restricting the right of the public to access."

It was also found that the record indicating the terms of the settlement constituted a final agency determination available under the Law. The decision states that:

> "It is the terms of the settlement, not just a notation that a settlement resulted, which comprise the final determination of the matter. The public is entitled to know what penalty, if any, the employee suffered...The instant records are the decision or final determination of the village, albeit arrived at by settlement..."

Also pertinent is a decision in which the subject of a settlement agreement with a town that included a confidentiality clause brought suit against the town for disclosing the agreement under the Freedom of Information Law. In considering the matter, the court stated that:

> "Plaintiff argues that provisions of FOIL did not mandate disclosure in this instance. However, it is clear that any attempt to conceal the financial terms of this expenditure would violate the Legislative declaration of §84 of the Public Officer's Law, as it would conceal access to information regarding expenditure of public monies.
>
> "Although exceptions to disclosure are provided in §§87 and 89, plaintiff has not met his burden of demonstrating that the financial provisions of this agreement fit within one of these statutory exceptions (see Matter of Washington Post v New York State Ins. Dept. 61 NY2d 557, 566). While partially recognized in Matter of LaRocca v Bd. of Education, 220 AD2d 424, those narrowly defined exceptions are not relevant to defendants' disclosure of the terms of a financial settlement (see Matter of Western Suffolk BOCES v Bay Shore Union Free School District, ___AD2d___ 672 NYS2d 776). There is no question that defendants lacked the authority to subvert FOIL by exempting information from the enactment by simply promising confidentiality (Matter of Washington Post, supra p567).
>
> "Therefore, this Court finds that the disclosure made by the defendant Supervisor was 'required by law', whether or not the contract so provided" (Hansen v. Town of Wallkill, Supreme Court, Orange County, December 9, 1998).

In short, I believe that the agreement, a contract between the District and an employee, must be disclosed. A possible exception to disclosure would involve the situation in which part of an agreement involves a requirement that the employee engage in drug or alcohol treatment, for example. In that instance, that portion of the document could, in my opinion, be deleted on the ground that disclosure would constitute an unwarranted invasion of personal privacy, but the remainder would ordinarily be accessible.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Chris Powers

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June 20, 2002

Mr. Craig B. Greenfield
[redacted]

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

Dear Mr. Greenfield:

I have received your letter in which you raised issues concerning the Half Hollow Hills School District process of school redistricting.

According to your letter:

> "In addition to having presented 'plans' from A through E to the public but modifying and finalizing the plans between meetings in secrecy (all the while impacting students' lives without their parents knowing or being able to object), the Board, as its final act, presented a plan denoted 'E-3' at the final public meeting, but which was, [you] recently learned, a different plan from that described to the public using the same name. Thus, the vote was taken on a plan, which the public knew as something different from what, in reality, it was. One example was the movement of the redistricting line in [your] neighborhood which, although described in the E-3 nomenclature over several weeks as one street, actually turned out to be a different street due to the Board's either changing the line after the vote (a real possibility) or the Board's 'hoodwinking' the public by using the same E-3 name, but with different, and unknown parameters."

You have requested my views concerning the foregoing in relation to the Open Meetings Law, and in this regard, I offer the following comments.

From my perspective, it is unclear when or whether meetings were held. However, it appears that the Board took action in private by altering the location of the "E-3" designation as it originally had been presented to the public. If meetings were held, either by means of an actual convening or by phone or via email, for example, I believe that the Open Meetings Law would have been implicated.

By way of background, it is emphasized that the definition of "meeting" [Open Meetings Law, §1102(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, stated that:

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

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

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

Based upon the direction given by the courts, if a majority of the Board gathers to discuss District business, 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.

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

Based on relatively recent legislation, I believe that 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."

As amended, §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 amendments to the Open Meetings Law in my view 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 telephone calls or 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..."

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.

The remaining area of inquiry involves a request made under the Freedom of Information Law in February to which the Board has only responded in part. You indicated that you requested a variety of records, including minutes, notes "or any written indication of how [your] street was taken from one plan, put on another plan, removed from that plan and then put into the final plan....together with the reports of any consultants on whose opinion they relied." As of the date of your letter to this office, you had received only "copies of emails from community residents to the Board, and nothing else..."

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. 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.

I point out 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, 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)].

A recent judicial decision cited and confirmed the advice rendered by this office. In Linz v. The Police Department of the City of New York (Supreme Court, New York County, NYLJ, December 17, 2001), it was held that:

> "In the absence of a specific statutory period, this Court concludes that respondents should be given a 'reasonable' period to comply with a FOIL request. The determination of whether a period is reasonable must be made on a case by case basis taking into account the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure. Such a standard is consistent with some of the language in the opinions, submitted by petitioners in this case, of the Committee on Open Government, the agency charged with issuing advisory opinions on FOIL."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, or if the acknowledgement of the receipt of a request fails to include an estimated date for granting or denying access, 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)].

Next, it is emphasized 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. Insofar as existing records maintained by or for the District fall within the scope of your request, I believe that the District is obliged to respond in a manner consistent with law. If records do not exist, the District in my view should inform you of that finding in writing.

Lastly, when a request involves existing records, 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.

Here I point out that the Freedom of Information Law is applicable to all District records, for §86(4) defines the term "record" expansively to mean:

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

Based on the definition, internal communications, notes and materials prepared for the District by a consultant, for example, would constitute "records" that fall within the scope of the Freedom of Information Law.

Records prepared by agency staff for internal agency use would constitute "intra-agency materials" that fall within the scope of §87(2)(g). That provision permits an agency to withhold records that:

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

iii. final agency policy or determinations; or

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

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

It has been held by the Court of Appeals, the state's highest court, that records prepared for an agency by a consultant are agency records that should be treated as if they were prepared by agency staff. In a discussion of the issue of records prepared by consultants for agencies, the Court stated that:

"Opinions and recommendations prepared by agency personnel may be exempt from disclosure under FOIL as 'predecisional materials, prepared to assist an agency decision maker***in arriving at his decision' (McAulay v. Board of Educ., 61 AD 2d 1048, aff'd 48 NY 2d 659). Such material is exempt 'to protect the deliberative process of government by ensuring that persons in an advisory role would be able to express their opinions freely to agency decision makers (Matter of Sea Crest Const. Corp. v. Stubing, 82 AD 2d 546, 549).

"In connection with their deliberative process, agencies may at times require opinions and recommendations from outside consultants. It would make little sense to protect the deliberative process when such reports are prepared by agency employees yet deny this protection when reports are prepared for the same purpose by outside consultants retained by agencies. Accordingly, we hold that records may be considered 'intra-agency material' even though prepared by an outside consultant at the behest of an agency as part of the agency's deliberative process (see, Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD 2d 546, 549, supra; Matter of 124 Ferry St. Realty Corp. v. Hennessy, 82 AD 2d 981, 983)" [Xerox Corporation v. Town of Webster, 65 NY 2d 131, 132-133 (1985)].

Based upon the foregoing, records prepared by agency staff or a consultant for an agency may be withheld or must be disclosed based upon the same standards. It is emphasized that the Court in Xerox specified that the contents of intra-agency materials determine the extent to which they may be available or withheld, for it was held that:

"While the reports in principle may be exempt from disclosure, on this record - which contains only the barest description of them - we

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

In sum, insofar as the materials at issue involve records communicated between or among District officials or that were prepared for the District by a consultant, I believe that those portions consisting of statistical or factual information, instructions to staff that affect the public or final District policy or determinations must be disclosed.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

STATE OF NEW YORK
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June 21, 2002

E-Mail

TO: Yehuda Katz <[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. Katz:

As you are aware, I have received your inquiry concerning the propriety of an executive session held by the board of the Brooklyn College Association to discuss the budget for the Student Government of the College of Arts and Sciences.

In this regard, first, the state's highest court has held that an equivalent entity, an association at a CUNY community college authorized to review budgets and allocate student activity fees and disbursements, constitutes a "public body" required to comply with the Open Meetings Law [Smith v. CUNY, 92 NY2d 707 (1999)].

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

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

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

When a discussion by a public body involves consideration of a budget, I believe that it must be conducted in public. Often a discussion concerning the budget has an impact on personnel. Nevertheless, despite its frequent use, the term "personnel" appears nowhere in the Open Meetings Law. It is true that one of the grounds for entry into executive session often relates to personnel matters. From my perspective, however, the term is overused and is frequently cited in a manner that is misleading or causes unnecessary confusion. To be sure, some issues involving "personnel" may be properly considered in an executive session; others, in my view, cannot. Further, certain matters that have nothing to do with personnel may be discussed in private under the provision that is ordinarily cited to discuss personnel.

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

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

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

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

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

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

When a discussion concerns matters of policy, such as the manner in which public money will be expended or allocated, the functions of a department or perhaps the creation or elimination of positions, I do not believe that §105(1)(f) could be asserted, even though the discussion may relate to "personnel". For example, if a discussion involves staff reductions or layoffs due to budgetary concerns, the issue in my view would involve matters of policy. Similarly, if a discussion of possible layoffs relates to positions and whether those positions should be retained or abolished, the discussion would involve the means by which public monies would be allocated. In none of the instances described would the focus involve a "particular person" and how well or poorly an

individual has performed his or her duties. To reiterate, in order to enter into an executive session pursuant to §105(1)(f), I believe that the discussion must focus on a particular person (or persons) in relation to a topic listed in that provision. As stated judicially, "it would seem that under the statute matters related to personnel generally or to personnel policy should be discussed in public for such matters do not deal with any particular person" (Doolittle v. Board of Education, Supreme Court, Chemung County, October 20, 1981).

Lastly, since you asked what "relief" there might be if the Association failed to comply with the Open Meetings Law, I point out that that statute includes provisions regarding its enforcement. Subdivision (1) of §107 states that:

> "Any aggrieved person shall have the 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 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, in an effort to enhance understanding of and compliance with the Open Meetings Law, a copy of this opinion will be forwarded to the Association. While our opinions are not binding, it is our intent that they be considered educational and persuasive.

I hope that I have been of assistance.

RJF:jm

cc: Brooklyn College Association

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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June 21, 2002

Mr. Peter C. Godfrey
Hodgson Russ
One M&T Plaza, Suite 2000
Buffalo, NY 14203-2391

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

Dear Mr. Godfrey:

I have received your letter in which you referred to an advisory opinion prepared on May 6 at the request of Charles H. Goris. With the additional information that you have provided, you asked that I respond to the following inquiry:

> "Did the Town Board violate the Open Meetings Law when it briefly met in private with its attorney discuss matters squarely within the scope of the attorney-client privilege and then returned to public session to debate and vote on the resolution?"

In this regard, first, neither myself nor anyone in office has the authority to determine whether a statute was violated, and we never use the term "violate" in considering whether or the extent to which an entity might have complied with law.

Second, while I appreciate your description of the facts, the difficulty in my view involves the means or procedure by which the Board excluded the public from its meeting. You described the closed session as a portion of a meeting during which the Board "met privately with its attorney to ask legal questions and receive legal advice concerning an application for a special use permit." Nevertheless, both you and Mr. Goris indicated that a motion was made and approved "to adjourn into a brief executive session in order to consider the comments made at the beginning of the meeting regarding the Mesmer airstrip." On the basis of that description of the private gathering, I believe that my opinion was accurate. More importantly, for the same reason, neither Mr. Goris nor others present would have known the reason for the private gathering as you described it. That description, coupled with a review of the grounds for entry into executive session, would not have enabled those present or me, from this vantage point, to offer an opinion suggesting that the Board was acting in compliance with law.

From my perspective, your question, as well as Mr. Goris' inquiry, arose due to the use and application of terms that might have been misleading. In this regard, I offer the following comments.

As you are aware, there are two vehicles that may authorize a public body to discuss public business in private. One involves entry into an executive session, and §102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. Further, the Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. In short, prior to conducting an executive session, a motion must be made that includes reference to the subject or subjects to be discussed, and it must be carried by majority vote of a public body's membership.

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

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

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

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

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

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

> "In general, 'the privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services (iii) assistance in some legal proceedings, and not (d) for the purpose of committing a

> crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client'" [People v. Belge, 59 AD 2d 307, 399, NYS 2d 539, 540 (1977)].

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

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

Although it is not my intent to be overly technical, as suggested earlier, the procedural methods of entering into an executive session and asserting the attorney-client privilege differ. In the case of the former, the Open Meetings Law applies, and I believe that the advice offered in the opinion sent to Mr. Goris was accurate based on the information that he provided, which in turn was based on a motion made by a Town official in public. 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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
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June 24, 2002

Mr. Robert M. Leff
Leff, Leff, & Leff, LLP
1022 Park Boulevard
Massapequa Park, NY 11762-2711

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

Dear Mr. Leff:

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

You referred to a board of trustees that "holds public meetings, public hearings and business meetings, the latter of which occurs, both prior and subsequent to the public meetings...." You asked whether the board is required to give notice before "these business session meetings" and if any such notice must include items on the agenda.

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

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

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

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

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

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

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

Second, every meeting, including a "business session meeting", must be preceded by notice given in accordance with §104 of the Open Meetings Law. That provision states that:

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

Stated differently, if a meeting is scheduled at least a week in advance, notice of the time and place must be given to the news media and to the public by means of posting in one or more designated public locations, not less than seventy-two hours prior to the meeting. If a meeting is scheduled less than a week an advance, again, notice of the time and place must be given to the news media and posted in the same manner as described above, "to the extent practicable", at a reasonable time prior to the meeting. 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, there is nothing in the Open Meetings Law that makes reference to agendas. Therefore, while that statute requires that every meeting be preceded by notice indicating the time and place and that such notice must be given to the news media and posted in one or more conspicuous public locations, there is no requirement that notice of a meeting include an agenda or an indication of the subjects to be considered at a meeting.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

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June 24, 2002

Mr. Matthew J. Reynolds
[redacted]

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. Reynolds:

I have received your letter in which you raised questions concerning the implementation of the Open Meetings and Freedom of Information Laws by the Village of Hamburg. Rather than focusing on the particular situations that you described, in the following comments, I will focus on the two grounds for entry into executive session upon which you focused, those pertaining to "litigation and personnel."

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

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

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

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

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

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

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

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

I note, too, that the courts have provided direction with respect to the sufficiency of a motion to discuss litigation, it has been held that:

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

With respect to the enforcement of the Open Meetings Law, that statute contains no provisions involving negligence or criminal penalties. However, I note that §107 provides that a court may invalidate action taken in private that should have been taken in public and may award attorney's fees to the successful party. In addition, there have been situations in which public bodies have been ordered by courts to comply with the Open Meetings Law, but have failed to do so, and the courts have found the members to have been in contempt. As you may be aware, a finding of contempt can result in incarceration and/or the payment of a fine.

Lastly, since you referred to the possibility of delayed responses to requests under the Freedom of Information Law, I point out that that statute, 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.

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, 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)].

A recent judicial decision cited and confirmed the advice rendered by this office. In Linz v. The Police Department of the City of New York (Supreme Court, New York County, NYLJ, December 17, 2001), it was held that:

> "In the absence of a specific statutory period, this Court concludes that respondents should be given a 'reasonable' period to comply with a FOIL request. The determination of whether a period is reasonable must be made on a case by case basis taking into account the volume of documents requested, the time involved in locating the

> material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure. Such a standard is consistent with some of the language in the opinions, submitted by petitioners in this case, of the Committee on Open Government, the agency charged with issuing advisory opinions on FOIL."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, or if the acknowledgement of the receipt of a request fails to include an estimated date for granting or denying access, 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)].

In effort to enhance compliance with and understanding of open government laws, a copy of this opinion will be sent to the Board of Trustees.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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June 26, 2002

Mr. Thomas J. Dolan
The Buffalo News
One News Plaza
P.O. Box 100
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Mr. E. Thomas Jones
Town Attorney
Town of Amherst
5583 Main Street
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. Dolan and Mr. Jones:

I have received Mr. Dolan's letters of May 22 and May 28, and Mr. Jones' letter of June 5, each of which involves practices of the Amherst Town Board relative to the Open Meetings Law. In consideration of the issues that you raised, I offer the following comments.

First, 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.

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

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

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

In my view, only to the extent that the Board discusses its litigation strategy could an executive session be properly held under §105(1)(d).

I note, too, that the courts have provided direction with respect to the sufficiency of a motion to discuss litigation, it has been held that:

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

With respect to the assertion of the attorney-client privilege, relevant is §108(3), which exempts from the Open Meetings Law:

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

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

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

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

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

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

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

While it is not my intent to be overly technical, as suggested earlier, the procedural methods of entering into an executive session and asserting the attorney-client privilege differ. In the case of the former, the Open Meetings Law applies. In the case of the latter, because the matter is exempted from the Open Meetings Law, the procedural steps associated with conducting executive sessions do not apply. It is suggested that when a meeting is closed due to the exemption under consideration, a public body should inform the public that it is seeking the legal advice of its attorney, which is a matter made confidential by law, rather than referring to an executive session.

Third, 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. Matters of policy that affect personnel, consideration of the budget or the creation or elimination of positions, for example, typically cannot validly be considered in executive session.

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

It is noted that the Appellate Division 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, the only direct reference in the Open Meetings Law to "contract negotiations" pertains to collective bargaining negotiations. Specifically, §105(1)(e) permits a public body to enter into executive session to discuss "collective negotiations pursuant to article fourteen of the civil service law." Article Fourteen of the Civil Service Law is commonly known as the "Taylor Law", and it deals with the relationship between public employers and public employee unions. In short, not all negotiations involve collective bargaining, and the application of §105(1)(e) is limited.

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

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

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

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

In a related vein, when action is taken by a public body, I believe that it must be memorialized in minutes, and §106 of the Open Meetings Law provides that:

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

In view of the foregoing, it is clear in my opinion that minutes of open meetings must include reference to action taken by a public body.

Lastly, Mr. Dolan made reference to a situation in which candidates for a position may be interviewed and in which the Board planned "to do the interviews by having board members ferry in and out of the room, being careful not to have a quorum at any one time." In this regard, it is

unclear why those steps would be necessary to conduct business in private. Interviewing a candidate for a position would involve a matter leading to the appointment or employment of a particular person, as well as consideration of the individual's employment history. That being so, I believe that an executive session could properly be held under §105(1)(h). In terms of "ferrying" members in and out of the room, in a case involving a series of less than quorum meetings held by members of a board of education, the Appellate Division found that there was no violation of the Open Meetings Law, stating that there was "no evidence to indicate that the members of respondent engaged in any attempt to evade the requirements of the Open Meetings Law" [Tri-Village Publishers, Inc. v. St. Johnsville Board of Education, 110 AD2d 932, 933 (1985)]. From my perspective, the Court clearly inferred that if the less than quorum gatherings were intended to circumvent the Open Meetings Law, the Board would have acted in contravention of that statute.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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June 27, 2002

Mr. Rudolph Meola
Board Member
Town of Hague
Community Center
Graphite Mountain Road
Hague, NY 12836

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

Dear Mr. Meola:

I have received your letter of May 20 and the correspondence attached to it. According to the materials, the Hague Town Supervisor "directed his secretary to poll the Town Board by phone for authorization to pay a $4700.00 bill for services rendered on the dredging of the boat launch." You wrote that you "said No, one other board member could not be reached and the other three members said Yes", and the bill was paid. You have asked whether the foregoing is "acceptable."

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 telephone calls, 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 Town Board, 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, 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 a series of telephone calls or, for example, by e-mail. I note, too, that in order to have a quorum, "reasonable notice" must be given to all the members. According to the materials that you provided, one of the members received no notice.

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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board

STATE OF NEW YORK
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June 27, 2002

Ms. Joan A. Connell
Associate Attorney
NYS Department of Labor
Counsel's Office
Building 12, Room 509
State Campus
Albany, NY 12240

The staff of the Committee on 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. Connell:

I have received your letter of May 22 and the materials attached to it. You have sought an advisory opinion concerning the status of local workforce investment boards (LWIB's) under the Open Meetings Law.

You referred to advisory opinions rendered by this office which appear to be inconsistent, and having reviewed them and the federal statutes to which they relate, I agree with your assessment. The first, OML-AO-2932, involved a private industry council, and it was advised that the entity in question is likely subject to the Open Meetings Law. The second, OML-AO-3341, dealt with an LWIB, and it was advised that the Open Meetings Law likely does not apply. For the reasons offered in the ensuing analysis and upon further review of the issue, I believe that a court would determine that LWIB's are subject to the Open Meetings Law.

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

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

Based on the foregoing, to constitute a "public body", an entity must consist of at least two members, conduct public business and perform a governmental function for the state or for one or more public corporations, i.e., municipalities.

In consideration of the means by which LWIB's are created, a key issue in my view involves whether they function solely pursuant to federal law. The rationale for the second opinion to which you referred related to a case dealing with the status of a "laboratory animals use committee" (LAUC) created by federal law in which the Court of Appeals held that "the powers of the LAUC derive solely from Federal law...and for that reason alone...the Committee is not a public body as defined by the Open Meetings Law" [American Society for the Prevention of Cruelty to Animals v. Board of Trustees of the State University of New York, 79 NY2d 927, 929 (1992)].

The federal statute authorizing the creation of a LAUC, 7 USC §2143, states that "each research facility [shall] establish at least one Committee", that "[e]ach Committee shall be appointed by the chief executive officer of each such research facility and shall be composed of not fewer than three members", and that "[s]uch members shall possess sufficient ability to assess animal care, treatment, and practices in experimental research as determined by the needs of the research facility and shall represent society's concerns regarding the welfare of animal subjects used at such facility." In short, the head of every facility, whether public or private, that engages in laboratory research involving animals, must establish a LAUC. No entity of federal, state or local government has the authority to designate the members of a LAUC, there is no general governmental oversight of or participation in the activities of a LAUC, and there is no mandatory legal nexus between a LAUC and state or local government.

In contrast, subdivision (a) of §116 the Workforce Investment Act of 1998 (H.R. 1385) provides that the governor of a state "shall designate local workforce areas within the State". Further, states are heavily involved in workforce planning functions, for subdivision (c) provides that "a State may require regional planning by local boards", "require" those boards to share information, and "require the local boards for a designated region to coordinate the provision of workforce investment activities..." The introductory portions §117 provide as follows:

> "(a) ESTABLISHMENT. - There shall be established in each local area of a State, and certified by the Governor of the State, a local workforce investment board, to set policy for the portion of the statewide workforce investment system within the local area (referred to in this title as a 'local workforce investment system').
>
> (b) MEMBERSHIP. -
>
> (1) STATE CRITERIA. - The Governor of the State, in partnership with the State board, shall establish criteria for use by chief elected officials in the local areas for appointment of members of the local boards in such local areas in accordance with the requirements of paragraph (2)."

Additionally, the initial provisions of subdivision (c) of §117 state:

> "(A) IN GENERAL. - The chief elected official in a local area is authorized to appoint the members of the local board for such area, in accordance with the State criteria established under subsection (b).
>
> (B) MULTIPLE UNITS OF LOCAL GOVERNMENT IN AREA. -
> (i) IN GENERAL - In a case in which a local area includes more than 1 unit of general local government, the chief elected officials of such units may execute an agreement that specifies the respective roles of the individual chief elected officials -
> (I) in the appointment of the members of the local board from the individuals nominated or recommended to be such members in accordance with the criteria established under subsection (b); and
> (II) in carrying out any other responsibilities assigned to such officials under this subtitle.
> (ii) LACK OF AGREEMENT. - If, after a reasonable effort, the chief elected officials are unable to reach agreement as provided under clause (i), the Governor may appoint the members of the local board from individuals so nominated or recommended."

Unlike a LAUC, where state and local government play no role at all in implementing the statute, in the case of the LWIB, the Governor and state and local government officials have the ability and often the responsibility to carry out certain functions in implementing federal law. In its consideration of the LAUC, the Court of Appeals found 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" (id., 929).

The "powers and functions" of the LWIB, in my view, do not "derive solely" from federal law; they derive in part from the powers, functions and duties of state and local government officials. That being so, I believe that, in the words of the definition of "public body", they "conduct public business" and are involved in "performing a governmental function for the state...or for a public corporation", such as a county, city, town or village. If my conclusion is accurate, a LWIB constitutes a public body subject to the Open Meetings Law.

Lastly, you asked whether LWIB's also fall within the scope of §41 of the General Construction Law. That statute, which was recently 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."

Since LWIB's consist of at least three persons, and since those persons "are charged with [a] public duty to be performed or exercised by them jointly or as a board", I believe that those entities are subject to §41 of the General Construction Law, as well as the Open Meetings Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Tom Pritchard

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July 1, 2002

E-Mail

TO: Calvin Fain [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. Fain:

I have received your inquiry concerning the contents of minutes of a board of education.

In this regard, §106 of the Open Meetings Law pertains to minutes, and subdivision (1) states that minutes of an open meeting must consist, at a minimum, "of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon." The only decision of which I am aware that may be pertinent to the matter is Mitzner v. Goshen Central School District Board of Education [Supreme Court, Orange County, April 15, 1993]. That case involved a series of complaints made by the petitioner that were reviewed by the school board president, and the minutes of the board meeting stated that "the Board hereby ratifies the action of the President in signing and issuing eight Determinations in regard to complaints received from Mr. Bernard Mitzner." The court held that "these bare-bones resolutions do not qualify as a record or summary of the final determination as required" by §106 of the Open Meetings Law. As such, the court found that the failure to indicate the nature of the determination of the complaints was inadequate. In the context of your inquiry, I believe that, in order to comply with the Open Meetings Law and to be consistent with the thrust of the holding in Mitzner, minutes must indicate in some manner the nature of the action taken.

It is also noted that subdivision (3) of §106 specifies that minutes of open meetings must be prepared and made available to the public within two weeks of meetings and that the Freedom of Information Law has long required that a record be maintained that indicates the manner in which each member voted. That record typically exists within minutes of meetings.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3182

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July 1, 2002

Ms. Delores Burhart
[redacted]

The staff of the Committee on 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. Burhart:

I have received your letter and the materials attached to it. You expressed the belief that the Moriah Town Board "appears to be selective when allowing public participation at public, town board meetings."

In brief, after a letter prepared by the Town Historian was read aloud at a Town Board meeting, you sought to express your disagreement with its contents and asked that a letter that you prepared be read aloud at a meeting held on May 14. You wrote that, at that meeting, "the floor was open twice for public participation and much criticism was expressed by community members regarding several issues, as well as, support." When you asked the Supervisor to read the letter, he refused to do so, stating that "it is full of hate."

I offer the following comments with respect to the foregoing and a review of the letter that you asked to have read.

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

Although public bodies have the right to adopt rules to govern their own proceedings (see e.g., Town Law, §63; Education Law, §1709), the courts have found in a variety of contexts that such rules must be reasonable. For example, although a board of education may "adopt by laws and rules for its government and operations", in a case in which a board's rule prohibited the use of tape

recorders at its meetings, the Appellate Division found that the rule was unreasonable, stating that the authority to adopt rules "is not unbridled" and that "unreasonable rules will not be sanctioned" [see Mitchell v. Garden City Union Free School District, 113 AD 2d 924, 925 (1985)]. Similarly, if by rule, a public body chose to permit certain citizens to address it for ten minutes while permitting others to address it for three, or not at all, such a rule, in my view, would be unreasonable.

With regard to the information that you offered, there are federal court decisions indicating that if commentary is permitted within a certain subject area, negative commentary in the same area cannot be prohibited.

It has been held by the United States Supreme Court that a school board meeting in which the public may speak is a "limited" public forum, and that limited public fora involve "public property which the State has opened for use by the public as a place for expressive activity" [Perry Education Association v. Perry Local Educators' Association, 460 US 37, 103. S.Ct. 954 (1939); also see Baca v. Moreno Valley Unified School District, 936 F. Supp. 719 (1996)]. In Baca, a federal court invalidated a bylaw that "allows expression of two points of view (laudatory and neutral) while prohibiting a different point of view (negatively critical) on a particular subject matter (District employees' conduct or performance)" (id., 730). That prohibition "engenders discussion artificially geared toward praising (and maintaining) the status quo, thereby foreclosing meaningful public dialogue and ultimately, dynamic political change" [Leventhal v. Vista Unified School District, 973 F.Supp. 951, 960 (1997)]. In a decision rendered by the United States District Court, Eastern District of New York (1997 WL588876 E.D.N.Y.), Schuloff, v. Murphy, it was stated that:

> "In a traditional public forum, like a street or park, the government may enforce a content-based exclusion only if it is necessary to serve a compelling state interest and is narrowly drawn to achieve that end. Perry Educ. Ass'n., 460 U.S. at 45. A designated or 'limited' public forum is public property 'that the state has opened for use by the public as a place for expressive activity.' Id. So long as the government retains the facility open for speech, it is bound by the same standards that apply to a traditional public forum. Thus, any content-based prohibition must be narrowly drawn to effectuate a compelling state interest. Id. at 46."

In short, if a letter was read offering one point of view, I believe that your letter offering a differing a different point of view should have been accorded the same treatment.

Lastly, having read the letter that you proposed to have read, while it includes criticism and a view different from that of the Town Historian, I would not characterize it as being "full of hate."

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-3483

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July 3, 2002

Mr. Donald M. Stiglmeier
Clarence Senior Citizens, Inc.
4600 Thompson Road
Clarence, NY 14031

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

Dear Mr. Stiglmeier:

I have received your letter and the materials attached to it. You have asked whether the Clarence Senior Citizens, Inc. ("the Corporation") is subject to the Freedom of Information and Open Meetings Laws. According to the materials, the Corporation is a not-for-profit corporation.

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

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

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

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."

In consideration of the foregoing, as a general matter, the Freedom of Information Law pertains to entities of state and local government in New York.

Although not-for-profit corporations typically are not governmental entities and, therefore, fall beyond the scope of the Freedom of Information and Open Meetings Laws, the courts have found that the incorporation status of those entities is, alone, not determinative of their status under the statutes in question. Rather, they have considered the extent to which there is governmental control over those corporations in determining whether they fall within the coverage of those statutes.

In the first such decision, Westchester-Rockland Newspapers v. Kimball [50 NYS 2d 575 (1980)], the issue involved access to records relating to a lottery conducted by a volunteer fire company, the Court of Appeals found that volunteer fire companies, despite their status as not-for-profit corporations, are "agencies" subject to the Freedom of Information Law. In so holding, the Court stated that:

> "We begin by rejecting respondent's contention that, in applying the Freedom of Information Law, a distinction is to be made between a volunteer organization on which a local government relies for performance of an essential public service, as is true of the fire department here, and on the other hand, an organic arm of government, when that is the channel through which such services are delivered. Key is the Legislature's own unmistakably broad declaration that, '[a]s state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (emphasis added; Public Officers Law, §84).
>
> For the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objections cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" (id. at 579].

In another decision rendered by the Court of Appeals, Buffalo News v. Buffalo Enterprise Development Corporation [84 NY 2d 488 (1994)], the Court found 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).

Most recently, in a case involving a not-for-profit corporation, the "CRDC", the court found that:'

> "...the CRDC was admittedly formed for the purpose of financing the cost of and arranging for the construction and management of the Roseland Waterpark project. The bonds for the project were issued on behalf of the City and the City has pledged $395,000 to finance capital improvements associated with the park. The CRDC denies the City has a controlling interest in the corporation. Presently the Board has eleven members, all of whom were appointed by the City (see Resolution #99-083). The Board is empowered to fill any vacancies of six members not reserved for City appointment. Of those reserved to the City, two are paid City employees and the other three include the City mayor and council members. Formerly the Canandaigua City Manager was president of the CRDC. Additionally, the number of members may be reduced to nine by a board vote (see Amended Certificate of Incorporation Article V(a)). Thus the CRDC's claim that the City lacks control is at best questionable.
>
> "Most importantly, the City has a potential interest in the property in that it maintains an option to purchase the property at any time while the bonds are outstanding and will ultimately take a fee title to the property financed by the bonds, including any additions thereto, upon payment of the bonds in full. Further, under the Certificate of Incorporation, title to any real or personal property of the corporation will pass to the City without consideration upon dissolution of the corporation. As in Matter of Buffalo News, supra, the CRDC's intimate relationship with the City and the fact that the CRDC is performing its function in place of the City necessitates a finding that

> it constitutes an agency of the City of Canandaigua within the meaning of the Public Officers Law and therefore is subject to the requirements of the Freedom of Information Law...
>
> "In Smith v. City University of New York, supra at page 713, the Court of Appeals held 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.' In the present case, the CRDC is clearly exercising more than an advisory function and qualifies as a public body within the meaning of the Public Officers Law. The CRDC is a formally constituted body with pervasive control over the entity it was created to administer. It has officially established duties and organizational attributes of a substantive nature which fulfill a governmental function for public benefit. As such its operations are subject to the Open Meetings Law" (Canandaigua Messenger, Inc. v. Wharmby, Supreme Court, Ontario County, May 11, 2001).

I note that the Appellate Division unanimously affirmed the findings of the Supreme Court regarding the foregoing in a decision rendered on March 15 of this year.

A review of the by-laws of the corporation indicates that the Clarence Town Board exercises substantial control over the Corporation and its Board of Directors. Article IV, subdivision (1) states that "Members of the Board of Directors shall be appointed by a majority of the Clarence Town Board." Subdivision (2) provides that "At each annual organization meeting of the Clarence Town Board, said Town Board shall appoint Board of Director members to serve for such terms as hereinafter provided or until his prior resignation or removal." Subdivision (3) states in part that: "The number of directors may be increased or decreased by votes of a majority of the Clarence Town Board." Subdivision (5) provides that: "Any or all of the member directors may be removed for cause by a majority vote of the members of the Board of Directors and a majority of the Clarence Town Board. Member directors may removed without cause only by vote of the Clarence Town Board."

In short, the Town Board essentially has complete control over the membership of the Board of Directors of the Corporation. That being so, and in consideration of the judicial decisions cited earlier, I believe that the Corporation is subject to both the Freedom of Information and Open Meetings Laws.

If my contention is accurate, there may portions of the by-laws which are, in my view, inconsistent with law. For instance, in subdivision (9) the members are authorized to vote by phone and in subdivision (14), they may authorize other members to vote on their behalf by proxy. Neither in my view would be consistent with the Open Meetings Law. I note, too, that §41 of the General Construction Law indicates that action may be taken only by means of an affirmative vote of a

majority of the total membership of a public body, but that subdivision (8) authorizes action to be taken by a majority of those present when a quorum convenes.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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July 8, 2002

E-MAIL

TO: Bob & Jenny Petrucci [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. and Ms. Petrucci:

As you are aware, I have received your inquiry of June 7. To the extent that this office is authorized to respond, I offer the following comments.

First, 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.

Second, if action is taken by a public body and no reference is made to that action in the minutes of its meeting, the public body, in my view, would have failed to perform a duty required by law to be performed. In that event, an Article 78 proceeding could be initiated to compel the public body to comply with law.

Next, 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."

Lastly, if a legal opinion is prepared in writing, it would be subject to the attorney-client privilege and, therefore, exempt from disclosure under the Freedom of Information Law, §87(2)(a), unless the client (i.e. a legislative body) waives the privilege.

I hope that I have been of assistance.

RJF:jm

cc: Charlene Indelicato

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3485

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July 8, 2002

Hon. Sandra Bonci
Town Clerk
Town of Erin
1138 Breesport Road
Erin, NY 14838

The staff of the Committee on 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. Bonci:

I have received your letter concerning the contents of minutes that you prepare as clerk of the Town of Erin and a contention that the minutes cannot be disclosed until they have been approved by the Town Board.

In this regard, the Open Meetings Law provides direction concerning the issues that you raised. Specifically, §106 states that:

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

Based on the foregoing, minutes must be prepared and made available to the public within two weeks of a meeting. Further, minutes of meetings 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.

Although as a matter of practice, policy or tradition, many public bodies approve minutes of their meetings, there is nothing in the Open Meetings Law or any other statute of which I am aware that requires that minutes be approved. In an opinion of the State Comptroller rendered nearly fifty years ago, it was advised that there is no statutory requirement that a town board approve minutes of a meeting, but that it was "advisable" that a motion to approve minutes be made after the members have had an opportunity to review the minutes (1954 Ops.St.Compt. File #6609). While it may be "advisable" for a board to review minutes, due to the clear authority conferred upon town clerks under §30 of the Town Law and the direction provided by §106 of the Open Meetings Law, I do not believe that a town board can require that minutes be approved prior to disclosure.

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.

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-13151
OML-AO-3486

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July 11, 2002

Mr. Robert Mishkin
Town and Country Senior Residence
53 Mountain Avenue
Mount Kisco, NY 10549

The staff of the Committee 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. Mishkin:

I have received your letter of June 12 and the materials attached to it. Please accept my apologies for the delay in response and understand that, in fairness, responses to inquiries are prepared in the order in which they are received.

As I understand the materials, on June 4, you requested certain records from the Village of Mount Kisco relating to the "Woodcrest at Leonard Park" proposal, specifically, the DEIS, minutes of meetings of the Planning Board during which "appearances" were made concerning the proposal, and tape recordings of those meetings. In an acknowledgment of the receipt the request, you were informed that a review of the records sought and a determination would be made within sixty days of that acknowledgment. Following a conversation that we had, you wrote to the Village Manager, indicating that I advised that "according to State Law all records are public and should be available to the public within two weeks of the original meeting."

Since your statement to the Village Manager is not entirely accurate, for purposes of clarification, I offer the following comments.

First, while I do not recall the specifics of our conversation, I would conjecture that the reference to two weeks to disclose related to a provision in the Open Meetings Law. 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."

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."

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, 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.

Second, with respect to the DEIS, the regulations promulgated by the Department of Environmental Conservation indicate that the DEIS must be made "readily available." The regulations, which appear in 6 NYCRR 617.10, refer to "Draft EIS's" and state in subdivision (e) that:

> "The draft EIS, together with the notice of its completion, shall be filed and made available for copying as follows:
>
> (1) one copy with the commissioner;
>
> (2) one copy with the appropriate regional office of the department;
>
> (3) one copy with the chief executive officer of the political subdivision in which the action will be principally located;
>
> (4) if other agencies are involved in the approval of the action, with each such agency;
>
> (5) one copy with persons requesting it. When sufficient copies of a statement are not available, the lead agency may charge a fee to persons requesting the statement to cover the costs in making the additional statement available..."

Subdivision (h), which pertains to "final" EIS's, states that "The final EIS, together with notice of its completion, shall be filed in the same manner as a draft EIS". Further, subdivision (i) provides that "Each agency which prepares notices, statements and findings required in this part shall retain copies thereof in a file which is readily available for public inspection"(emphasis added). Since the DEIS must be filed with the chief executive officer of the municipality and must be made available promptly, it would seem that a delay in disclosure of as much as sixty days may be inconsistent with law.

Third, tape recordings of open meetings maintained by or for the Village clearly constitute Village records subject to the Freedom of Information Law, and it was held more than twenty years

ago that they are accessible to the public (Zaleski v. Hicksville Union Free School District, Supreme Court, Nassau County, NYLJ, December 27, 1978).

Lastly, unless a different provision of law provides to the contrary, the Freedom of Information Law offers 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.

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, 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)].

A recent judicial decision cited and confirmed the advice rendered by this office. In Linz v. The Police Department of the City of New York (Supreme Court, New York County, NYLJ, December 17, 2001), it was held that:

> "In the absence of a specific statutory period, this Court concludes that respondents should be given a 'reasonable' period to comply with a FOIL request. The determination of whether a period is reasonable must be made on a case by case basis taking into account

> the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure. Such a standard is consistent with some of the language in the opinions, submitted by petitioners in this case, of the Committee on Open Government, the agency charged with issuing advisory opinions on FOIL."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, or if the acknowledgement of the receipt of a request fails to include an estimated date for granting or denying access, 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)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Patricia Dwyer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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July 12, 2002

Mr. Joseph Izzo
[redacted]

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

Dear Mr. Izzo:

I have received your letter in which you questioned whether it was proper for a village board of trustees to "have claimed attorney client privilege when having executive session meetings."

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

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

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

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

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

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

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

In my view, only to the extent that the Board discusses its litigation strategy may an executive session be properly held under §105(1)(d).

I note, too, that the courts have provided direction with respect to the sufficiency of a motion to discuss litigation, it has been held that:

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

With respect to the assertion of the attorney-client privilege, relevant is §108(3), which exempts from the Open Meetings Law:

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

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

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

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

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

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

I note that the mere presence of an attorney does not signify the existence of an attorney-client relationship; in order to assert the attorney-client privilege, the attorney must in my view be providing services in which the expertise of an attorney is needed and sought. Further, often at some point in a discussion, the attorney stops giving legal advice and a public body may begin discussing

or deliberating independent of the attorney. When that point is reached, I believe that the attorney-client privilege has ended and that the body should return to an open meeting.

While it is not my intent to be overly technical, as suggested earlier, the procedural methods of entering into an executive session and asserting the attorney-client privilege differ. In the case of the former, the Open Meetings Law applies. In the case of the latter, because the matter is exempted from the Open Meetings Law, the procedural steps associated with conducting executive sessions do not apply. It is suggested that when a meeting is closed due to the exemption under consideration, a public body should inform the public that it is seeking the legal advice of its attorney, which is a matter made confidential by law, rather than referring to an executive session.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees, Village of Sloatsburg

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3488

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July 15, 2002

Mr. Arthur Norden
[redacted]

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

Dear Mr. Norden:

I have received your letter of June 19 in which you sought an advisory opinion relating to a provision in the contract of the Superintendent of the Sullivan West Central School District. The item in question states that:

> "The Board, individually and collectively, shall promptly and discreetly refer to the Superintendent, in writing, for his study and recommendation, any and all criticisms, complaints, suggestions, communications or comments regarding the administration of the District or the Superintendent's performance of his duties."

You have asked whether the language quoted above "preclude[s] public discussion by the board of school issues at a legally convened meeting unless the Superintendent has had prior written notice of the issues of that discussion." In a related vein, you questioned whether "a 'collectively' and 'discreetly' written referral of such stated issues by a quorum of the board represent a violation of the Open Meetings Law."

From my perspective, in consideration of the terms of the provision quoted above, there are a variety of considerations that relate to the Open Meetings Law, and in this regard, I offer the following comments.

First, whether written notice must be given to the Superintendent involves an issue separate from the Open Meetings Law, and I cannot offer guidance concerning that aspect of your question. As the matter pertains to the Open Meetings Law, the phrase "individually and collectively" appears to indicate communications may be made to the Superintendent by a Board member acting "individually" or by the Board "collectively" as a whole. In the case of the former, I do not believe that the Open Meetings Law would be implicated. When a Board member communicates on his or her own initiative, separate from other Board members, there would be no convening of the Board, nor would there be any action taken by the Board. On the other hand, in the case of the latter, where

the Board acts "collectively", I believe that it may do so only at a meeting held in accordance with the Open Meetings Law.

In general, action by a public body may be taken 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 (see Cheevers v. Town of Union Supreme Court, Broome County, September 3, 1998).

Second, I believe that there is a clear distinction between matters relating to the Superintendent's performance and those "regarding the administration of the District", and that the latter, if discussed by the Board, must ordinarily be considered in public. As you are likely aware, paragraphs (a) through (h) of §105(1) of the Open Meetings Law specify and limit the subjects that may properly be considered during an executive session. Pertinent with respect to a discussion of the Superintendent's performance is paragraph (f), which authorizes a public body to enter into executive session to discuss:

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

Since a discussion of that nature would involve the employment history of a particular person, §105(1)(f) could, in my view, be properly invoked.

However, if a matter involves the administration of the District, it is unlikely that the provision cited above or any other ground for entry into executive session would be applicable. In that circumstance, the Open Meetings Law would require discussion by the Board to occur in public.

Lastly, even when a matter may be discussed in executive session, there is no requirement that it must be discussed in executive session. In this regard, both the Open Meetings Law and the

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

OML-AO-3489

From: David Treacy
To: Rucks, Nancy
Date: 7/16/02 11:40AM
Subject: Re: South Shore Estuary Reserve Council meeting

You asked whether the South Shore Estuary Reserve Council may hold candidate presentations without opening the meeting to the public. According to your memo, the Council is in the process of selecting candidates for several positions, and finalists will be offered an opportunity to deliver presentations to the Council.

In my opinion, the Council may hear the candidate presentations in executive session.

As you are aware, every meeting of a public body must be convened as an open meeting. Because the South Shore Estuary Reserve Council was created by state law and charged with the prepararation of a comprehensive manangement plan for the Reserve, I believe that it is a "public body" required to comply with the Open Meetings Law.

Section 102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. As such, it is clear that an executive session is not separate and distinct from an open meeting, but rather that it is a part of an open meeting. Furhter, 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. Section 105(1) specifies and limits the subjects that may appropriately be considered during an executive session.

The provision pertinent to your question is §105(1)(f), which 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..."

In my view, the presentations would involve a matter "leading to the appointment [or] employment... of a particular person" and that, therefore, an executive session could properly be held.

David Treacy
Assistant Director
NYS Committee on Open Government
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July 16, 2002

Ms. Lois A. Douville
[redacted]

The staff of the Committee on 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. Douville:

I have received your letter of June 22, as well as the materials attached to it. You have sought an advisory opinion concerning the status of the Mohawk & Hudson River Humane Society ("the Society") under the Freedom of Information and Open Meetings Laws.

In this regard, the latter is applicable to meetings of public bodies, and §102 of that statute defines the phrase "public body" to mean:

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

Based on the foregoing, the Open Meetings Law pertains to entities that conduct public business and perform a governmental function for the state or for a municipality. Having reviewed the Society's by-laws, I do not believe that its Board of Directors would constitute a public body.

It has been advised and determined in some instances that the boards of certain not-for-profit corporations are subject to the Open Meetings Law. Those instances have involved situations in which the government has substantial control over a corporation. For example, in a situation in which government officials designate the members of the board of directors of a not-for-profit corporation, I believe that the board such a corporation would constitute a "public body" despite its corporate status. In consideration of the by-laws of the Society, it appears that there is little if any government control, and if that is so, the meetings of its Board would, in my view, fall beyond the requirements of the Open Meetings Law.

Somewhat similarly, 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."

In view of the language quoted above, as a general matter, the Freedom of Information Law pertains to entities of state and local government in New York. I do not believe that the Society could be characterized as an agency or that it has a responsibility to comply with the Freedom of Information Law.

Nevertheless, in consideration of its relationships with governmental entities, it is possible that some of the Society's records may fall within the scope of the Freedom of Information Law. For purposes of that statute, the term "record" is defined to include:

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

Based upon the language quoted above, documents need not be in the physical possession of an agency to constitute agency records; so long as they are produced, kept or filed for an agency, the courts have held they constitute "agency records", even if they are maintained apart from an agency's premises.

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

Perhaps most significant is a decision rendered by the Court of Appeals, the state's highest court, in which it was found that materials received by a corporation providing services pursuant to a contract for a branch of the State University that were kept on behalf of the University constituted "records" falling with the coverage of the Freedom of Information Law. I point out that the Court rejected "SUNY's contention that disclosure turns on whether the requested information is in the physical possession of the agency", for such a view "ignores the plain language of the FOIL definition of 'records' as information kept or held 'by, with or for an agency'" [see Encore College

Bookstores, Inc. v. Auxiliary Services Corporation of the State University of New York at Farmingdale, 87 NY 2d 410. 417 (1995)].

Insofar as records maintained by the Society are "kept, held, filed, produced or reproduced...*for* an agency", such as a municipality, I believe that they would constitute "agency records" that fall within the scope of the Freedom of Information Law. This is not to suggest that a relationship of that nature would transform the Society into an agency required to comply with the Freedom of Information Law, but rather that some of the records that it possesses may be maintained for an agency, and that those records would fall within the coverage of that statute.

In circumstances in which entities or persons outside of government maintain records for a government agency, it has been advised that requests for those records be made to the records access officer of that agency. Pursuant to regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), the records access officer has the duty of coordinating an agency's response to requests for records. In the context of the situation that you described, if the Society maintains records for a municipality, a request should be made to the municipality's records access officer. To comply with the Freedom of Information Law and the implementing regulations, the records access officer would either direct the Society to disclose the municipality's records in a manner consistent with law, or acquire the records the from the Society in order that he or she could review the records for the purpose of determining rights of access.

To reiterate, the responsibility to give effect to or comply with the Freedom of Information Law would not involve the Society, but rather the government agency whose records are maintained by the Society on its behalf.

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-3491

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July 16, 2002

Ms. Dorothy M. Borgus
[redacted]

The staff of the Committee on 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. Borgus:

I have received your letters of June 20 and the material attached to them. You have sought advisory opinions concerning a request for records of the Town of Chili and the adequacy of a reference in an agenda to an executive session to be held by the Town Board.

According to your correspondence, on June 5, you delivered a request to inspect "the Abstract of Audited Vouchers to be presented for a vote on payment at that evening's Town Board meeting." In response to the request, the Town Clerk wrote that:

> "The abstract is presented to the Town Clerk after it is voted on. It is not an official document until then. Abstract will be available to public after I have signed it and it is official which is the day after the meeting."

Attached to your letter is a copy of the abstract, which is stamped "CONFIDENTIAL (For Internal Use Only)".

In this regard, I offer the following comments.

First, although I believe that the record sought is accessible under the Freedom of Information Law for reasons to be discussed in the ensuing remarks, I do not believe that the Town Clerk would have been required to make it available for your inspection instantly. Under §89(3) of that statute, an agency has up to five business days to respond to a request. While I am not suggesting that the cited provision should be used as a means of unnecessarily delaying disclosure, it is clear in my view that the Clerk would not have been required to honor your request immediately.

Second, with respect to rights of access, despite the Town Clerk's view that the abstract was a draft and may not have been "official" when the request was made, I believe that it constituted a record subject to the Freedom of Information Law. That statute pertains to agency records, and §86(4) defines the term "record" expansively to include:

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

Based on the foregoing, whether a document is a draft or is "unofficial", it constitutes a "record" subject to rights of access conferred by the Freedom of Information Law. That is not to suggest that a record must always be disclosed, but rather that it falls within the coverage of the Law.

Second, it has been held that an assertion of confidentiality cannot be upheld, unless a statute specifically confers confidentiality. In Gannett News Service v. Office of Alcoholism and Substance Abuse Services [415 NYS 2d 780 (1979)], a state agency guaranteed confidentiality to school districts participating in a statistical survey concerning drug abuse. The court determined that the promise of confidentiality could not be sustained, and that the records were available, for none of the grounds for denial appearing in the Freedom of Information Law could justifiably be asserted. In a decision rendered by the Court of Appeals, the state's highest court, it was held that a state agency's:

> "long-standing promise of confidentiality to the intervenors is irrelevant to whether the requested documents fit within the Legislature's definition of 'record' under FOIL. The definition does not exclude or make any reference to information labeled as 'confidential' by the agency; confidentiality is relevant only when determining whether the record or a portion of it is exempt..." [Washington Post v. Insurance Department, 61 NY 2d 557, 565 (1984)].

In short, I do not believe that an assertion of confidentiality would serve to remove from public rights of access records that would otherwise be available.

Third, in brief, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, there would have been no basis for denying access to record, even though it had not yet been signed by the Clerk.

Pertinent to an analysis of rights of access is §87(2)(g). Although that provision potentially serves as a basis for a denial of access, due to its structure, it often requires disclosure. Specifically, §87(2)(g) 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.

One of the contentions offered by the New York City Police Department in a decision rendered 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 of Appeals 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][111]). 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 unsigned or "draft" would not represent an end of an analysis of rights of access or an agency's obligation to review the contents of a record.

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).]

Based on a review of the records that you attached, it appears that they consist of factual information and, therefore, that none of the grounds for denial could have been asserted.

As indicated earlier, your other letter deals with the description of an executive session in an agenda.

It is emphasized at the outset that there is nothing in the Open Meetings Law or any other statute of which I am aware that requires the Town Board to prepare an agenda. When an agenda is prepared, it typically serves as an outline, a guide or a framework for activities that may be conducted at a meeting; there is nothing that would bind the Board to or require that the Board follow the agenda.

The portion of the agenda that you highlighted states that as follows: "Resolution to authorize the Town Board to enter into executive session for the purpose of discussing pending legal action/litigation." In my view, there is nothing inadequate or insufficient in relation to the foregoing. Again, it is merely a reference to a topic appearing in an agenda. If the Board later entered into executive session, I believe that motion to do so must be somewhat more expansive.

In that regard, 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 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."

If the Board seeks to discuss its litigation strategy regarding a matter not yet in court, and if the identification of the potential adversary would impair the Board's capacity to carry out its strategy, I do not believe that the identity of the adversary would have be included in the motion. In that event, it is suggested that a motion for entry into executive session indicate that the Board will discuss litigation strategy in relation to a matter in which premature disclosure of the identity of the adversary would be detrimental to the interests of the Town and its residents.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Hon. Richard Brongo

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3492

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July 19, 2002

Joseph A. Glazer, Esq.
President/CEO
Mental Health Association in
New York State, Inc.
194 Washington Ave., Suite 415
Albany, NY 12210

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

Dear Mr. Glazer:

I have received your letter of July 3, as well as the materials attached to it. You have sought an advisory opinion concerning the status of the Pharmacy & Therapeutics Committee ("the Committee"), an entity created by the State Department of Health, under the Open Meetings Law.

According to your letter, the Department in the 2001 Executive Budget "proposed to statutorily create a P & T Committee", but that aspect of the budget was rejected by the State Legislature. Following the rejection by the Legislature, the Department created the Committee "as a completely internal mechanism, requiring no additional statutory or regulatory authority." The Committee makes recommendations to the Commissioner, who has the authority to make determinations concerning the recommendations.

It is your view that the meetings of the Committee "are official meetings of a public body for the purposes of conducting public business" and that "it appears that "closed work sessions" held by the Committee "violate the letter and the intent of the NYS Open Meetings Law."

Based on judicial decisions, I do not believe that the Committee is required to comply with the Open Meetings Law. In this regard, I offer the following comments.

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

> 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. The definition refers to committees, subcommittees and similar bodies of a public body, and judicial interpretations indicate that if a committee, for example, consists solely of members of a particular public body, it constitutes a public body [see e.g., Glens Falls Newspapers v. Solid Waste and Recycling Committee of the Warren County Board of Supervisors, 195 AD2d 898 (1993)]. For instance, in the case of a board of education consisting of seven members, four would constitute a quorum, and a gathering of that number or more for the purpose of conducting public business would be a meeting that falls within the scope of the Law. If that board designates a committee consisting of three of its members, the committee would itself be a public body; its quorum would be two, and a gathering of two or more, in their capacities as members of that committee, would be a meeting subject to the Open Meetings Law.

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, since the Committee has no authority to take any final and binding action for or on behalf of a government agency, I do not believe that it constitutes a public body or, therefore, is obliged to comply with the Open Meetings Law.

The foregoing is not intended to suggest that the Committee cannot hold open meetings. On the contrary, it may choose to conduct meetings in public, and similar entities have done so, even though the Open Meetings Law does not require that they do so.

I hope that the preceding commentary serves to enhance your understanding of the Open Meetings Law and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Donald Behrens
John Signor

STATE OF NEW YORK
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July 19, 2002

Ms. Theresa D'Antonio Krumm
[redacted]

The staff of the Committee on 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. Krumm:

I have received your letter of July 12 in which you requested an advisory opinion concerning certain practices of the Town Board of the Town of Orangetown under the Open Meetings Law.

Specifically, you wrote that Board schedules executive sessions prior to meetings, and excerpts of minutes of meetings indicate that the Board frequently enters into executive session following motions to discuss "particular litigation" or "particular personnel matters." In this regard, I offer the following comments.

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

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

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

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

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

Similarly, reference to an executive session to be held, "if needed", would not guarantee that such a session will be held, but rather that it might be held. From my perspective, that kind of reference would be appropriate.

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

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

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

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

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."

If the Board seeks to discuss its litigation strategy regarding a matter not yet in court, and if the identification of the potential adversary would impair the Board's capacity to carry out its strategy, I do not believe that the identity of the adversary would have be included in the motion. In that event, it is suggested that a motion for entry into executive session indicate that the Board will discuss litigation strategy in relation to a matter in which premature disclosure of the identity of the adversary would be detrimental to the interests of the Town and its residents.

Lastly, 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.

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

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

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

> executive session describe with some detail the nature of the proposed discussion (see, State Comm on Open Govt Adv Opn dated Apr. 6, 1993), and we reject respondents' assertion that the Board's reference to a 'personnel issue' is the functional equivalent of identifying 'a particular person'" [Gordon v. Village of Monticello, 620 NY 2d 573, 575; 209 AD 2d 55, 58 (1994)].

In short, the characterization of an issue as a "particular 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 sent to the Town Board.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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July 24, 2002

E-Mail

TO: Margaret Caraberis [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. Caraberis:

I have received your letter in which you indicated that your board of education will be appointing a new member to fill a vacancy on the board. You added that the board announced that it will hold "2 Special Meetings to go in to Executive Session" to consider the candidates for the position. It is your view that the board should "open the appointment process up to public review", and you have sought advice concerning the matter.

In this regard, I offer the following comments.

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

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

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

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

> "The respondent Board prepared an agenda for each of the five designated regularly scheduled meetings in advance of the time that those meetings were to be held. Each agenda listed 'executive session' as an item of business to be undertaken at the meeting. The petitioner claims that this procedure violates the Open Meetings Law because under the provisions of Public Officers Law section 100[1] provides that a public body cannot schedule an executive session in advance of the open meeting. Section 100[1] provides that a public body may conduct an executive session only for certain enumerated purposes after a majority vote of the total membership taken at an open meeting has approved a motion to enter into such a session. Based upon this, it is apparent that petitioner is technically correct in asserting that the respondent cannot decide to enter into an executive session or schedule such a session in advance of a proper vote for the same at an open meeting" [Doolittle, Matter of v. Board of Education, Sup. Ct., Chemung Ct., 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. Rather than scheduling an executive session, a public body on its agenda or notice of a meeting could refer to or schedule a motion to enter into executive session to discuss certain subjects. Reference to a motion to conduct an executive session would not represent an assurance that an executive session would ensue, but rather that there is an intent to enter into an executive session by means of a vote to be taken during a meeting.

Similarly, reference to an executive session to be held, "if needed", would not guarantee that such a session will be held, but rather that it might be held. From my perspective, that kind of reference would be appropriate.

Second, with respect 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.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
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July 30, 2002

E-MAIL

TO: Donald Symer <[redacted]

FROM: Robert J. Freeman, Executive Director

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

Dear Mr. Symer:

As you are aware, I have received your letter in which you questioned the authority of "one Village Board member acting singly..." According to your letter, at the beginning of a meeting of the Village of Lancaster Board of Trustees, "Trustee John Swanson, apparently acting alone, arose from his chair and pulled the electric plug on the VCR of Video Watchdog Henry Gull and rather angrily threw it in the direction of Mr. Gull."

It is my view that only the Board of Trustees has the authority to determine the extent to which its meetings may be recorded, and that a member acting alone is not empowered to do so. In this regard, I offer the following comments.

First, subdivision (2) of §4-412 of the Village Law, which deals with the powers and duties of boards of trustees, provides in part that "[a] majority of the board shall constitute a quorum for the transaction of business" and that "[t]he board may determine the rules of its procedure." Based on those provisions, I believe that the Board, not a single trustee acting unilaterally, has the authority to take action or determine its rules relative to the use of recording devices.

Second, §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 duty. For the purpose of this provision the words 'whole number' shall be construed to mean the total number which the board, commission, body or other group of persons or officers would have were there no vacancies and were one of the persons or officers disqualified from acting."

In consideration of the foregoing, "not less than a majority of the whole number" of the Board of Trustees may in my view exercise a power, authority or duty of the Board.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees

From: Robert Freeman
To: [redacted]
Date: 7/31/02 10:34AM
Subject: Dear Mr. Laibach:

Dear Mr. Laibach:

I have received your letter in which you wrote that the "official version of the minutes" of meetings of the Village of Tivoli Zoning Board of Appeals "reflected only a small or selective portion of the discussions." You asked whether it is "acceptable for the minutes of village public meetings to arbitrarily exclude certain topics of discussion and inquiry."

In this regard, the Open Meetings Law provides what might be characterized as minimum requirements concerning the contents of minutes. Section 106(1) pertains to minutes of open meetings and states that: "Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon."

Based on the foregoing, it is clear that minutes need consist of a verbatim account of what is said. Similarly, there is no requirement that references to every topic of discussion or inquiry be included in the minutes. However, I believe that every provision of law, including the Open Meetings Law, must be implemented reasonably. If, for instance, the minutes include reference to comments on a given subject that represent one point of view, but exclude comments offering a different point of view, a practice of that nature would, in my opinion, be arbitrary, unreasonable and subject to challenge. A more appropriate practice, in my opinion, would involve including reference to all comments or none, or perhaps briefly indicating the general subject matter of each area of discussion.

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

Robert J. Freeman
Executive Director
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July 30, 2002

Mr. Robert Friedman
Town Attorney
Town of Clarence
One Town Place
Clarence, NY 14031

Mr. Ian R. McPherson
[redacted]

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

Dear Mr. Friedman and Mr. McPherson:

I have received your communications, which are respectively dated July 16 and July 22 and deal with the status of a certain gathering under the Open Meetings Law.

The gathering at issue involved the "Executive Committee" of the Town of Clarence Planning Board, which consists of the three members of the Board, who met with Mr. McPherson, a member of the Town Board. The subject matter discussed at the gathering does not appear to be in dispute. According to a letter addressed to the Town Board by the Chairman of the Planning Board, who serves on the Executive Committee, "[d]ue process of the Town of Clarence procedures" was explained and discussed, a question was raised concerning "new instructions" relating to a project, and no action was taken. In a letter prepared by Mr. McPherson, he indicated that he was asked by the Chairman of Planning Board "to discuss, informally, some of [his] views on policy matters, and on the processing of applications through the system" and "merely [to engage in] an exchange of ideas on how to better service the process and reiteration of opinions..."

Mr. Friedman wrote that the Executive Committee "is not officially designated by the Town Board or the Planning Board as a committee." Nevertheless, Mr. McPherson inferred that the entity is a standing committee, for he referred to the request to meet to obtain his views on policy after the Chairman of the Planning Board announced that "the normal Tuesday morning executive committee meeting had been cancelled."

From my perspective, the key issue is whether the Executive Committee is a "public body". If it is such a body, the gathering in question in my view clearly would have constituted a meeting

that fell within the requirements of the Open Meetings Law, despite its characterization as "informal." In this regard, I offer the following comments.

First, the Open Meetings Law pertains to meetings of public bodies, and a "meeting" is a convening of a quorum of a public body for the purpose of conducting public business [see §102(1)]. Absent a quorum, the Open Meetings Law does not apply [see e.g., Mobil Oil Corp. v. City of Syracuse Industrial Development Agency, 224 AD2d 15, motion for leave to appeal denied, 89 NY2d 811 (1997)].

Second, however, when a committee consists solely of members of a public body, such as the Planning 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", and that phrase 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 planning 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, a quorum consists of a majority of the total membership of a body (see General Construction Law, §41). Therefore, if, for example, the Planning Board consists of seven, its quorum would be four; in the case of a committee consisting of three, its quorum would be two.

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)].

If indeed the Executive Committee is a standing body, with a specific membership that gathers on a routine or ongoing basis, in my view, it constitutes a public body subject to the Open Meetings Law. To suggest otherwise would, based on the information presented, exalt form over substance.

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

It is noted that the decision rendered by the Court of Appeals was precipitated by contentions made by public bodies that so-called "work sessions" 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, when a majority of the Committee gathers to discuss the business of the Committee or Planning Board processes, procedures, goals or policies, collectively as a body and in their capacities as Committee members, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law. In this instance, the Executive Committee met, in the words of Mr. McPherson, to engage in "an exchange of ideas on how to better serve the process." In consideration of the direction provided in Orange County Publications, assuming that the Executive Committee is a public body, I believe that the gathering was a "meeting" that fell within the coverage of the Open Meetings Law.

Lastly, Mr. Friedman raised the following question: "If the Town Ethics Board investigates this matter, can their meeting be closed under OML §105-1)(f)(employment history) or any other exemption to interview the parties involved." In my opinion, the application of the provision cited is dependent on the actual nature of the issues before or discussion by the Ethics Board.

Section 105(1)(f) of the Open Meetings Law authorizes a public body, such as a municipal ethics board, to enter into executive session to discuss:

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

Based on the foregoing, to apply the provision quoted above in the context of your question, the issue before a public body must involve one or more of the topics described in that provision in relation to a "particular person" or persons. I do not believe that members of a planning board could be characterized as employees or that, therefore, a discussion would involve "employment history." Insofar as the matter involves the possible "discipline, suspension, dismissal or removal" of one or more of the members, I believe that an executive session could validly be held.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

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July 31, 2002

Hon. Robert S. Thompson
Zoning Board of Appeals
Village of Massapequa
208 Fillmore Street
Massapequa Park, NY 11762-1512

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

Dear Mr. Thompson:

I have received your letter of July 18. In your capacity as a member of the Zoning Board of Appeals of the Village of Massapequa, you have raised a series of questions relating to meetings of the Board. Insofar as those issues involve matters pertaining to the Open Meetings or Freedom of Information Laws, I will attempt to respond. Some of the issues that you raised are, in my view, unrelated to those statutes and, therefore, are beyond the jurisdiction or expertise of this office. To obtain information concerning the powers and duties of village zoning boards of appeals and their chairpersons, it is suggested that you review §§7-712, 7-712-a, 7-712-b and 7-712-c of the Village Law. In the following remarks, I will attempt to combine some of the issues and respond, but not necessarily in the order in which you presented them.

First, significant in relation to several questions is consideration of what constitutes a valid meeting, and it is emphasized that the definition of "meeting" [see Open Meetings Law, §102(1)] has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be 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 Board business, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law.

Further, because the "pre-discussion" is a "meeting", it must be preceded by notice of the time and place given to the news media and by means of posting pursuant to §104 of the Open Meetings Law. Therefore, if a pre-discussion is scheduled to begin at 7:15, notice of the time and place must be given to that effect.

Second, with respect to voting by telephone, relatively recent amendments indicate, in my view, that meetings may be held and votes taken only when a majority of a public body has physically convened, or when a meeting is held by videoconference. 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, 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 Zoning Board of Appeals, 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 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, by mail, or by e-mail, would be inconsistent with law.

It is noted that the definition of the phrase "public body" [Open Meetings Law, §102(2)] 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 a series of telephone calls or, for example, by e-mail. I note, too, that in order to have a quorum, "reasonable notice" must be given to all the members.

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..."

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.

Third, with respect to the authority of the Chairman to make rules or take action unilaterally, unless such is authority is specifically conferred by law [see e.g., §7-712(11)(b) of the Village Law regarding the designation of an alternate member], based on §41 of the General Construction Law,

which was cited earlier, "not less than a majority of the whole number" of the Board may in my view exercise a power, authority or duty of the Board.

Next, there is nothing in the Open Meetings Law or any other statute of which I am aware that requires that meetings of public bodies be tape recorded. However, insofar as a tape recording is prepared, it would constitute a "record" that falls within the coverage of the Freedom of Information Law that must be made available for listening or copying (see Zaleski v. Hicksville Union Free School District, Supreme Court, Nassau County, NYLJ, December 27, 1978). If a transcript of a meeting has been prepared, again, I believe that it would be accessible. However, there would be no obligation to prepare a transcript of a tape recording of a meeting. I note, too, that it has been held that any person may record an open meeting of a public body, so long as the recording device is used in a manner that is neither disruptive nor obtrusive [Mitchell v. Board of Education of the Garden City Union Free School District, 113 AD2d 924 (1985)].

With respect to requests for records, the regulations promulgated by the Committee on Open Government pursuant to the Freedom of Information Law (21 NYCRR Part 1401) require that each agency, such as a village, designate one or more persons as "records access officer." The records access officer has the duty of coordinating an agency's response to requests for records. In most villages, the clerk is the records access officer. If that is so in the Village of Massapequa, or if a person other than the Chairman of the Zoning Board of Appeals has been so designated, that person as records access officer, not the Chairman, would have the responsibility of dealing with requests for records.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

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August 5, 2002

Ms. Nicolette Booream
[redacted]

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. Booream:

I have received your letter of July 22 and the exhibits attached to it. You have sought a "determination" relative to issues raised concerning your requests for records of the Town of Claverack and the ability of the Zoning Board of Appeals to conduct executive sessions.

In this regard, it is emphasized at the outset that this office does not have the authority to render "determinations" or compel a governmental entity to comply with either the Freedom of Information or Open Meetings Laws. However, based on my understanding of the matters described, I offer the following comments.

One of the issues appears to involve fees for copies of records and when they should be paid. Although agencies in many instances seek payment following the preparation of copies, it has been held that an agency may seek payment in advance of making copies (see e.g., Sambucci v. McGuire, Supreme Court, New York County, November 4, 1982).

Also relevant with respect to certain aspects of your requests for records may involve the extent to which they "reasonably described" 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, the state's highest court, that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

The Court in Konigsberg found that the agency could not reject the request due to its breadth and also stated that:

> "respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the Department's files were indexed in a manner that would enable the identification and location of documents in their possession (cf. National Cable Tel. Assn. v Federal Communications Commn., 479 F2d 183, 192 [Bazelon, J.] [plausible claim of nonidentifiability under Federal Freedom of Information Act, 5 USC section 552 (a) (3), may be presented where agency's indexing system was such that 'the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency'])" (id. at 250).

In my view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing or record-keeping system. In Konigsberg, it appears that the agency was able to locate the records on the basis of an inmate's name and identification number.

While I am unfamiliar with the recordkeeping systems of the Town, to extent that the records sought can be located with reasonable effort, I believe that the request would have met the requirement of reasonably describing the records. On the other hand, if the records are not maintained in a manner that permits their retrieval except by reviewing perhaps hundreds of records individually in an effort to locate those falling within the scope of the request, to that extent, the request would not in my opinion meet the standard of reasonably describing the records. If, for example, building permits are kept chronologically, it is likely that those issued following a certain date could be found easily. However, if they are kept by address and hundreds of records would have to searched, one by one, to retrieve those of your interest, the request likely would not meet the standard of reasonably describing the records.

Another series of issues appears to relate to minutes of meetings. The Open Meetings Law provides guidance and 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.e., motions, proposals, resolutions, action taken and the vote of the members, I believe that they would be appropriate and meet legal requirements. Most importantly, I believe that minutes must be accurate. There is nothing in the law dealing with the inclusion of the presence of a member of a town board in the minutes of a meeting of a zoning board of appeals.

Next, I believe that a zoning board of appeals may in limited circumstances enter into executive session. By way of background, numerous problems and conflicting interpretations arose under the Open Meetings Law as originally enacted with respect to the deliberations of zoning boards of appeals. In §108(1), the Law had exempted from its coverage "quasi-judicial proceedings". When a zoning board of appeals deliberated toward a decision, its deliberations were often considered "quasi-judicial" and, therefore, outside the requirements of the Open Meetings Law. As such, those deliberations could be conducted in private. Nevertheless, in 1983, the Open Meetings Law was amended. In brief, the amendment to the Law indicates that the exemption regarding quasi-judicial proceedings may not be asserted by a zoning board of appeals. As a consequence, zoning boards of appeals are required to conduct their meetings pursuant to the same requirements as other public bodies subject to the Open Meetings Law.

Due to the amendment, a zoning board of appeals must deliberate in public, except to the extent that a topic may justifiably be considered during an executive session or in conjunction with an exemption other than §108(1). Paragraphs (a) through (h) of §105(1) of the Open Meetings Law specify and limit the grounds for entry into an executive session. Unless one or more of those topics arises, a zoning board of appeals must conduct its business in public.

Lastly, the minutes that you attached indicate that executive sessions are held after meetings. Further, there is no reason given for conducting executive sessions. Here I point out 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. As suggested earlier, the ensuing provisions of §105(1) specify and limit the subjects that may appropriately be considered during an executive session. Therefore, a public body may not conduct an executive session to discuss the subject of its choice.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Hon. Mary Jean Hoose
Zoning Board of Appeals
Jonathan D. Nichols

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August 5, 2002

E-Mail

TO: Richard Steger [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. Steger:

I have received your inquiry in which you asked "whether a three member board of assessment review has to take minutes as to how they came to a conclusion and how each member voted as to the decision to deny a request."

In this regard, a board of assessment review is in my view clearly a "public body" required to comply with the Open Meetings Law [see Open Meetings Law, §102(2)]. While meetings of public bodies generally must be conducted in public unless there is a basis for entry into executive session, following public proceedings conducted by boards of assessment review, I believe that their deliberations could be characterized as "quasi-judicial proceedings" that would be exempt from the Open Meetings Law pursuant to §108(1) of that statute. It is emphasized, however, that even when the deliberations of such a board may be outside the coverage of the Open Meetings Law, its vote and other matters would not be exempt. As stated in Orange County Publications v. City of Newburgh:

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

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

Moreover, both the Freedom of Information Law and the Open Meetings Law impose record-keeping requirements upon public bodies. With respect to minutes of open meetings, §106(1) of the Open Meetings Law states that:

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

The minutes are not required to indicate "how they came to a conclusion"; however, I believe that the conclusion itself, i.e., a motion or resolution, must be included in minutes.

Lastly, since its enactment, the Freedom of Information Law has contained a related requirement in §87(3). The provision states in part that:

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

In sum, because an assessment board of review is a "public body" and an "agency", I believe that it is required to prepare minutes in accordance with §106 of the Open Meetings Law, including a record of the votes of each member in conjunction with §87(3)(a) of the Freedom of Information Law.

I hope that I have been of assistance.

RJF:jm

cc: Board of Assessment Review
Town Clerk

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August 5, 2002

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Tribune
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New York, NY 10017

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. Abrutyn:

I have received your letter in which you sought an advisory opinion concerning the "Omnibus Committee", a "bipartisan group of six legislators appointed by the Suffolk County Legislature's Presiding Officer." You indicated that the Omnibus Committee "makes use of the Legislature's staff", that the Legislature's attorney and a representative of the Legislative Budget Review Office attend all meetings of the Committee, and that the County's Budget Director also, at times, attends its meetings.

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

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

By way of background, when the Open Meetings Law went into effect in 1977, questions consistently arose with respect to the status of committees, subcommittees and similar bodies that had no capacity to take final action, but rather merely the authority to advise. Those questions arose

due to the definition of "public body" as it appeared in the Open Meetings Law as it was originally enacted. Perhaps the leading case on the subject also involved a situation in which a governing body, a school board, designated committees consisting of less than a majority of the total membership of the board. In Daily Gazette Co., Inc. v. North Colonie Board of Education [67 AD 2d 803 (1978)], it was held that those 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, and during that debate, questions were raised regarding the status of "committees, subcommittees and other subgroups." In response to those questions, the sponsor stated that it was his intent that such entities be included within the scope of the definition of "public body" (see Transcript of Assembly proceedings, May 20, 1976, pp. 6268-6270).

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

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

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

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

When a committee is subject to the Open Meetings Law, I believe that it has the same obligations regarding notice and openness, for example, as well as the same authority to conduct executive sessions, as a governing body [see Glens Falls Newspapers, Inc. v. Solid Waste and Recycling Committee of the Warren County Board of Supervisors, 195 AD 2d 898 (1993); County of Lewis v. O'Connor, Supreme Court, Lewis County, January 21, 1997].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Omnibus Committee

STATE OF NEW YORK
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August 5, 2002

E-MAIL

TO: Ray Isaman [redacted]

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Mr. Isaman:

I have received your letters of July 24. The first involves whether you, as a member of the Hinsdale Town Board, have the ability to tape record meetings of the Board, or whether the capacity to do so pertains only to members of the public. The second deals with a situation in which "the town supervisor designated two board members and himself to meet prior to the board meeting to audit the bills." When you mentioned that you planned to be there, you wrote that you were informed that "You won't get in until we're finished."

In this regard, I offer the following comments.

First, I believe that any person, including a member of a board, may record open meetings of that body, so long as the use of the recording device is not obtrusive or disruptive.

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 unanimously affirmed a decision which annulled a resolution adopted by a board of education prohibiting the use of tape recorders at its meetings and directed the board to permit the public to tape record public meetings of the board [Mitchell v. Board of Education of Garden City School District, 113 AD 2d 924 (1985)]. In so holding, the Court stated that:

> "While Education Law sec. 1709(1) authorizes a board of education to adopt by-laws and rules for its government and operations, this authority is not unbridled. Irrational and unreasonable rules will not be sanctioned. Moreover, Public Officers Law sec. 107(1) specifically provides that 'the court shall have the power, in its discretion, upon good cause shown, to declare any action *** taken in violation of [the Open Meetings Law], void in whole or in part.' Because we find that a prohibition against the use of unobtrusive

> recording goal of a fully informed citizenry, we accordingly affirm the judgement annulling the resolution of the respondent board of education" (id. at 925).

Further, I believe that the comments of members of the public, as well as public officials, may be recorded. As stated by the court in Mitchell.

> "[t]hose who attend such meetings, who decide to freely speak out and voice their opinions, fully realize that their comments and remarks are being made in a public forum. The argument that members of the public should be protected from the use of their words, and that they have some sort of privacy interest in their own comments, is therefore wholly specious" (id.).

With respect to the requirement that those present be informed in advance of a meeting of the intent to record, I note that the Court in Mitchell referred to "the unsupervised recording of public comment" (id.). In my view, the term "unsupervised" indicates that no permission or advance notice is required in order to record a meeting. Again, so long as a recording device is used in an unobtrusive manner, a public body cannot prohibit its use by means of policy or rule. Moreover, situations may arise in which prior notice or permission to record would represent an unreasonable impediment. For instance, since any member of the public has the right to attend an open meeting of a public body (see Open Meetings Law, §100), a reporter from a local radio or television station might simply "show up", unannounced, in the middle of a meeting for the purpose of observing the discussion of a particular issue and recording the discussion. In my opinion, as long as the use of the recording device is not disruptive, there would be no rational basis for prohibiting the recording of the meeting, even though prior notice would not have been given. Similarly, often issues arise at meetings that were not scheduled to have been considered or which do not appear on an agenda. If an item of importance or newsworthiness arises in that manner, what reasonable basis would there be for prohibiting a person in attendance, whether an employee, a member of the public, a member of the news media representing the public, or a board member, 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, as a board member, or any person, would have the right to record open meetings of the Board as long as the use of the recording device is neither disruptive nor obtrusive. Further, I do not believe that a person may be required to inform the Board of the intent to use a tape recorder at an open meeting.

Next, in my opinion, the gatherings that you described, which involve three of the five members of the Town Board, fall within the requirements of the Open Meetings Law.

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

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, irrespective of its characterization or the absence of an intent to take action. Moreover, §104 of the Open Meetings Law requires that notice of the time and place of meetings be given prior to every meeting to the news media and by means of posting.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
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August 14, 2002

Mr. Shmuel Gerber
Bldg. 1C Room 202
CSI Association
College of Staten Island
2800 Victory Boulevard
Staten Island, NY 10314

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

Dear Mr. Gerber:

I have received your letter in which you raised questions concerning "the so-called open voting requirement as it applies to elections of officers..."

You wrote that you are a student at the College of Staten Island, a unit of the City University of New York (CUNY), and that you were recently elected to serve on the Board of the College of Staten Island Association, Inc. ("the Association"). The Association "is in charge of overseeing the allocation and expenditure of student activity fees." You indicated that it has been advised that "the method of voting that best fulfills the requirements of the Open Meetings Law is a roll-call vote." However, you have contended that "it is not necessary for the vote to be announced exactly at the same time it is cast, but that the directors can pass a signed ballot to the secretary who then announces each vote." It is your view that an election carried out in that manner "would allow the directors to be less influenced by the vote of those called earlier in the roll call." To do so, you asked whether the following procedure would comply with law:

> "1) Every director (including the president) is handed a ballot which they fill in with their choice of candidate(s) and sign their (the voter's) name onto the ballot.
>
> 2) The ballots are all handed to the secretary, who announces who each director voted for.
>
> 3) Any director can ask for another ballot and change their vote, up until the time the president announces who has been elected (or that there is a failure to elect)."

In this regard, first, as you suggested in your letter, the Court of Appeals, the state's highest court, has held that an equivalent entity, an association at a CUNY community college authorized to review budgets and allocate student activity fees and disbursements, constitutes a "public body" required to comply with the Open Meetings Law [Smith v. CUNY, 92 NY2d 707 (1999)]. Since the Board of the Association is analogous to the entity found to be a "public body" subject to the Open Meetings Law in the decision cited above, I believe that it is required to comply with the Open Meetings Law. It is noted, too, that the same kind of entity, a CUNY student government association, has also been found to be subject to the Freedom of Information Law, and that in that decision, it was determined that its board could not elect its officers by secret ballot vote (Wallace v. City University of New York, Supreme Court, New York County, NYLJ, July 7, 2000).

Second, with respect to the "open voting" requirement, I direct your attention to the Freedom of Information Law. Section 87(3)(a) provides that:

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

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

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

There is nothing in either the Freedom of Information or Open Meetings Laws that specifies that a vote must be accomplished by means of a roll call or that a vote be "announced exactly as the same time it is cast." In my view, so long as a record is prepared that indicates the manner in which each member cast his or vote, an entity would be acting in compliance with the open vote requirements imposed by those statutes. I note that the decision cited above referred to "open voting" in the context of both open and executive sessions. Since the Open Meetings Law permits public bodies to vote in proper circumstances during an executive session [see §§105(1) and 106(2) and (3)], it is clear in my view that roll call voting in public is not required. That being so, I believe that the procedure that you proposed would be consistent with law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

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August 14, 2002

Mr. Shmuel Gerber
Bldg. 1C Room 202
CSI Association
College of Staten Island
2800 Victory Boulevard
Staten Island, NY 10314

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

Dear Mr. Gerber:

I have received your letter in which you questioned the propriety of certain provisions in the bylaws of the College of Staten Island Association, Inc. ("the Association").

The issue involves provisions in the bylaws stating that all amendments to the bylaws must be approved by the president, that "the presiding officer shall be responsible for interpreting and enforcing all the provisions of these bylaws" and that "[h]e/she maybe overruled in his/her interpretation by a three-quarters vote the membership." You have asked whether there is any provision of law "that would disallow such authority to block action by the board, to be invested so disproportionately in one officer of the board."

From my perspective, the provisions to which you referred may be inconsistent with law. In this regard, I offer the following comments.

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

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

As indicated in another opinion recently sent to you, based on a decision rendered by the state's highest court, I believe that the Board of the Association clearly constitutes a "public body" required to comply with the Open Meetings Law.

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

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

Based upon the foregoing, a quorum is a majority of the total membership of a public body, notwithstanding absences or vacancies. Further, in order to carry a motion or take action, there must be an affirmative vote of a majority of the total membership of a public body. Therefore, if a public body consists of five members, three affirmative votes would be needed to approve a motion or take action.

Absent specific statutory authority, an entity's bylaws, in my opinion, cannot be inconsistent with a statute. A "statute" is an enactment of the State Legislature. In the context of the situation that you described, if a majority of the Board approves an action, I do not believe that any additional approval by the presiding officer is necessary or can be required to take action, or that his or her disapproval can serve to block action taken by the majority. Stated differently, although the presiding officer chairs a meeting, he or she has one vote, just as other members do. Similarly, if a matter is approved by a majority of the total membership of the Board, I believe that the approval would be effective, even if the majority in favor constitutes less than three quarters of the membership of the Board.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

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August 15, 2002

Ms. Lynette Burns
[redacted]

The staff of the Committee on 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. Burns:

I have received your letter and the materials attached to it. In brief, you described a series of issues relating to the implementation of the Freedom of Information Law by the Town of Somers, and you asked that this office "guide the Supervisor and the Town Attorney on the Rules and Regulations encompassing the Freedom of Information Law including Executive Session."

In this regard, I offer the following comments.

First, since some aspects of your correspondence deal with situations in which the Town Clerk did not have physical possession of records or in which records were not maintained by a Town official, I note that the Freedom of Information Law is expansive in its scope. That statute pertains to records of an agency, such as a town, and §86(4)defines the term "record" expansively to include:

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

Based upon the language quoted above, records, or as in one instance to which you referred, survey documentation, need not be in the physical possession of an agency to constitute agency records; so long as they are produced, kept or filed for an agency, the courts have held they constitute "agency records", even if they are maintained apart from an agency's premises.

It has been found that records maintained by an attorney retained by an industrial development agency were subject to the Freedom of Information Law, even though an agency did not possess the records and the attorney's fees were paid by applicants before the agency. The Court

determined that the fees were generated in his capacity as counsel to the agency, that the agency was his client, that "he comes under the authority of the Industrial Development Agency" and that, therefore, records of payment in his possession were subject to rights of access conferred by the Freedom of Information Law (see C.B. Smith v. County of Rensselaer, Supreme Court, Rensselaer County, May 13, 1993).

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

Second, under §30(1) of the Town Law, the clerk is the legal custodian of all town records, irrespective of who physically possesses the records or the location of the records.

Third, since there appears to be a degree of confusion regarding the functions of the "records management officer" and the "records access officer", I point out that those functions, although frequently carried out by the same person, are separate and distinct. The position of "records management officer" is a statutory creation and is described in Article 57-A of the Arts and Cultural Affairs Law, which is also known as the "Local Government Records Law." Section 57.19 of the Arts and Cultural Affairs Law states in relevant part that:

> "Each local government shall have one officer who is designated as records management officer. This officer shall coordinate the development of and oversee such program and shall coordinate legal disposition, including destruction of obsolete records. In towns, the town clerk shall be the records management officer."

With respect to the functions of the records access officer, by way of background, §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, such as a town, to adopt rules and regulations consistent those promulgated by the Committee and with the Freedom of Information Law. Further, §1401.2 of the regulations provides in relevant part that:

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

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

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

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

Based on the foregoing, the records access officer must "coordinate" an agency's response to requests. As part of that coordination, I believe that other Town officials and employees are required to cooperate with the records access officer in an effort to enable him or her to carry out his or her official duties. Because town clerks are both the legal custodians of town records under §30 of the Town Law and the records management officer, they are in most circumstances also designated as records access officer.

Fourth, reference was made to a situation in which an attorney seeking records was, according to your letter, informed that the request would not be honored until he identified his client. In my opinion, a condition of that nature cannot validly be imposed. In short, it has been held that accessible records should be made equally available to any person, without regard to status or interest [see e.g., Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976) and M. Farbman & Sons v. New York City, 62 NY 2d 75 (1984)].

Next, it is likely that some of the records that you requested may be withheld, likely in part. Several requests involved communications between government officers or employees, i.e., between Town officials or between Town and County officials.

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 respect to records described above is §87(2)(g), which enables an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

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

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

Lastly, the structure of the Open Meetings Law is similar to that of the Freedom of Information Law. Under that statute, every meeting of a public body, such as a town board or a board of ethics, must be convened as an open meeting. Section 102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. As such, it is clear that an executive session is not separate and distinct from an open meeting. Moreover, the Open Meetings Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into executive session. Specifically, §105(1) states in relevant part that:

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

As 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 you requested, and in an effort to enhance compliance with and understanding of the Freedom of Information and Open Meetings Laws, copies of this opinion will be forwarded to the Town Board, the Supervisor and the Town Attorney. In addition, copies of those statutes, the regulations promulgated by the Committee, and model regulations will be sent. The model regulations can be used by agencies as means of easily adopting proper procedures for the implementation of the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Hon. Mary Beth Murphy
Ken Powell

encs.

OML-AO-3505

From: Robert Freeman
To: [redacted]
Date: 8/16/02 10:28AM
Subject: Dear Mr. Male:

Dear Mr. Male:

I have received your inquiry concerning meetings of town boards. In this regard, the phrase "executive session" is defined in section 102(3) of the Open Meetings Law to mean a portion of open meeting during which the public may be excluded. Before an executive session can be held, a procedure must be accomplished in public pursuant to section 105(1). In short, a motion to enter into executive session must be made in public, the motion must indicate the subject or subjects to be discussed, and the motion must be carried by a majority vote of the total membership of the board. From there, paragraphs (a) through (h) of section 105(1) specify and limit the subjects that may be discussed in executive session.

Under section 105(2), the only people who have the right to attend the executive session are the members of the board. However, that provision provides the board with the ability to authorize the attendance of others. Typically, those others would be individuals who perform some sort of function for the board, i.e., the town clerk, or who have some knowledge or expertise to bring to the discussion.

The text of the Open Meetings Law is available on our website under "Publications", as is "Your Right to Know", which summarizes both the Freedom of Information and Open Meetings Laws. In addition, frequently asked questions and thousands of written advisory opinions are available online through our indices to opinions.

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

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

FOIL-AO-3506

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August 19, 2002

Mr. Kenneth Bartholomew
[redacted]

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. Bartholomew:

I have received your letter of August 5 concerning a gathering of a board of assessment review. You referred to our conversation in which it was advised that judicial and quasi-judicial proceedings are exempt from the Open Meetings Law, and you wrote that the "only 'judicial and quasi-judicial proceedings that [you are] aware the local board of assessment review could enter, is an executive session." You added that it is your belief that a public body may only enter into an executive session is "from a legally convened 'regular' meeting for which proper notice was posted."

While it appears that your understanding of the Open Meetings Law is accurate in some respects, I believe that it is inaccurate in others.

In this regard, there are two vehicles that may authorize a public body to discuss public business in private. One involves entry into an executive session. As you suggested, §102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded, and the Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. In short, prior to conducting an executive session, a motion must be made that includes reference to the subject or subjects to be discussed, and it must be carried by majority vote of a public body's membership.

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

Relevant to the situation is §108(1), which exempts from the Open Meetings Law:

"...judicial or quasi-judicial proceedings..."

After an assessment board of review has heard arguments and then deliberates in a manner akin to an appellate court, its deliberations would be "quasi-judicial" and, therefore, exempt from the Open Meetings Law.

While it is not my intent to be overly technical, it is reiterated an executive session is a portion of an open meeting. Further, every meeting must be convened as an open meeting and preceded by notice given in accordance with §104 of the Open Meetings Law. Conversely, if a board gathers solely for the purpose of considering a matter exempt from the Open Meetings Law, the gathering need not be preceded by notice, and there would be no obligation to follow the procedure applicable for entry into executive session or to give notice.

Lastly, in Orange County Publications v. City of Newburgh, it was held 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)].

Therefore, although an assessment board of review may deliberate in private, based upon the decision cited above, the act of voting or taking action must in my view occur during an open meeting held in accordance with the Open Meetings Law and preceded by notice.

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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OML-AO-3507

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August 19, 2002

Ms. Sharon L. Brin
[redacted]

The staff of the Committee on 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. Brin:

I have received your letter in which you raised a variety of issues relating to meetings of the Board of Education of the East Greenbush Central School District and access to District records. In consideration of your remarks and the materials attached to your letter, 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.

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.

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, in my view, the public does not have the right to speak at meetings of public bodies. Nevertheless, I believe that 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.

Second, according to the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), which govern the procedural aspects of the Freedom of Information Law, the District is required to accept requests during its regular business hours. If a person cannot personally submit a request, he or she may request records by mail.

Third, with respect to fees, since its enactment in 1974, the Freedom of Information Law has authorized agencies to charge up to twenty-five cents per photocopy up to nine by fourteen inches [see §87(1)(b)(iii)]. Although the District had charged five cents per photocopy, I believe that it has clearly had the authority to charge up to twenty-five cents and that its change in policy is, therefore, consistent with law.

Fourth, a response to a request indicating that an agency "will report to you shortly" is, according to the law, inadequate. 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.

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.

A relatively recent judicial decision cited and confirmed the advice rendered by this office. In Linz v. The Police Department of the City of New York (Supreme Court, New York County, NYLJ, December 17, 2001), it was held that:

> "In the absence of a specific statutory period, this Court concludes that respondents should be given a 'reasonable' period to comply with a FOIL request. The determination of whether a period is reasonable must be made on a case by case basis taking into account the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure. Such a standard is consistent with some of the language in the opinions, submitted by petitioners in this case, of the Committee on Open Government, the agency charged with issuing advisory opinions on FOIL."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, or if the acknowledgement of the receipt of a request fails to include an estimated date for granting or denying access, 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)].

Next, based on the decision rendered in Moore v. Santucci [151 AD2d 677 (1989)], if a record was made available to you or your representative, there must be a demonstration that neither you nor your representative possesses the record in order to successfully obtain a second copy. Specifically, the decision states that:

> "...if the petitioner or his attorney previously received a copy of the agency record pursuant to an alternative discovery device and currently possesses the copy, a court may uphold an agency's denial of the petitioner's request under the FOIL for a duplicate copy as academic. However, the burden of proof rests with the agency to demonstrate that the petitioner's specific requests are moot. The respondent's burden would be satisfied upon proof that a copy of the requested record was previously furnished to the petitioner or his counsel in the absence of any allegation, in evidentiary form, that the copy was no longer in existence. In the event the petitioner's request for a copy of a specific record is not moot, the agency must furnish another copy upon payment of the appropriate fee...unless the requested record falls squarely within the ambit of 1 of the 8 statutory exemptions" (id., 678).

Lastly, in consideration of certain aspects of your request, it is emphasized that the Freedom of Information Law pertains to existing records and that §89(3) states in part that an agency is not required to create a record in response to a request. Therefore, if, for example, there is no record indicating the "legal cost of cat dissection debate"during a particular time period, the District would not be required to prepare a record containing the information sought on your behalf.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Lawrence A. Edson, Jr.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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OML-AO-3508

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August 21, 2002

Mahlon R. Perkins, 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. Perkins:

I have received your letter of August 7 and the materials attached to it. You have sought an advisory opinion in your capacity as attorney for the Town of Caroline concerning the status of a volunteer ambulance corporation under the Freedom of Information and Open Meetings Laws.

By way of background, you wrote that:

> "The town has three fire districts which cover most, but not all of the town. For many years ambulance service was provided to the town by the Slaterville Volunteer Fire Co. Inc. Slaterville Volunteer Fire Co., Inc. is the fire department which provides fire protection to the Slaterville Fire District. The other two fire districts do not provide ambulance service.
>
> "In 2001 the members of Slaterville Volunteer Fire Co., Inc. formed Slaterville Ambulance, Inc. under the not-for-profit corporation law. Members of Slaterville Volunteer Fire Co., Inc. are also members of Slaterville Ambulance, Inc. Slaterville Ambulance, Inc. does not contract with any other municipality or fire district to provide ambulance service. I believe that the vast majority of their funding comes from the contract with Town."

In this regard, the Freedom of Information Law is applicable to agency records, and §86(3) defines the term "agency" to mean:

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

Based on the foregoing, the Freedom of Information Law generally pertains to records maintained by entities of state and local governments.

However, in Westchester-Rockland Newspapers v. Kimball [50 NYS 2d 575 (1980)], a case involving access to records relating to a lottery conducted by a volunteer fire company, the Court of Appeals, the state's highest court found that volunteer fire companies, despite their status as not-for-profit corporations, are "agencies" subject to the Freedom of Information Law. In so holding, the Court stated that:

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

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

Another decision 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."

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

In the only case of which I am aware on the subject, the Appellate Division, Second Department, held that a volunteer ambulance corporation performing its duties for an ambulance district is subject to the Freedom of Information Law. In so holding, the decision stated that:

> "The Court of Appeals has rejected any distinction between a volunteer organization on which a local government relies for the performance of an essential public service and an organic arm of government (*see, Matter of Westchester Rockland Newspapers v. Kimball,* 50 N.Y.2d 575, 579, 430 N.Y.S.2d 574, 408 N.E.2d 904).
>
> "The appellant performs a governmental function, and it performs that function solely for the Mastic Ambulance District, a municipal entity and a municipal subdivision of the Town of Brookhaven (hereinafter the Town). The appellant submits a budget to and receives all of its funding from the Town, and the allocation of its funds is scrutinized by the Town. Thus, the appellant clearly falls within the definition of an agency and is subject to the requirements of FOIL" [Ryan v. Mastic Ambulance Company, 212 AD 2d 716, 622 NYS 2d 795, 796 (1995)].

It is emphasized that the decision cited above pertained to an ambulance company performing its duties for an ambulance district, which is itself a public corporation. Although there appears to be no ambulance district in this instance, critical in my view is that Slaterville Ambulance, Inc. was formed by the volunteer fire company, which is clearly an agency, and that the members of the two

entities are the same. In consideration of those factors, I believe that the entity in question would be found to constitute an "agency" or, in the alternative, that its records would fall within the coverage of the Freedom of Information Law.

As you may be aware, 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."

Since the fire company is the corporate parent of the ambulance corporation, and particularly if the offices of the two corporations are in the same premises, their leadership and members are the same or overlap, and their records are overseen, used and administered by the same persons, it would appear that the records are kept by or for the fire company and, therefore, fall within the coverage of the Freedom of Information Law. In short, the ambulance corporation does not appear to stand alone, but rather is analogous to a subsidiary of the fire company.

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

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

While there is no judicial decision of which I am aware dealing with the status of the governing body of an ambulance corporation, the entity at issue appears to be subject to the Open Meetings Law. If, like the fire company, the ambulance company performs its functions exclusively for a municipality, I believe that it would be found that it conducts public business and performs a governmental function for a municipality and that, therefore, the meetings of its governing body would be subject to the Open Meetings Law.

Lastly, it has consistently been advised that portions of records identifiable to those in receipt of emergency services provided by a fire or ambulance company may be withheld.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Further, the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the grounds for denial that follow. The phrase quoted in the preceding sentence indicates that a single record or report may contain both accessible and deniable information. Moreover, that phrase in my opinion imposes an obligation upon agencies to review requested records in their entirety to determine which portions, if any, may justifiably be withheld.

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

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

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

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

From my perspective, a record of a medical emergency call consists in part of what might be characterized as a medical record or history relating to the person needing care or services [see Hanig v. NYS Department of Motor Vehicles, 79 NY2d 106 (1992)].

In my opinion, portions of records identifying those to whom medical services were rendered, their ages, and descriptions of their medical problems or conditions could be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy, for disclosure of a name coupled with those details in my view represents a personal and somewhat intimate aspect of the individual's life. However, I believe that other aspects of the records, such as the locations of calls, should be disclosed. In my view, an emergency call, particularly when sirens or flashing lights are used, is an event of a public nature. When a fire truck or ambulance travels to its destination, that destination is or can be known to those in the vicinity of the event. In essence, I believe that event is of a public nature and that disclosure of a location or a brief description of an event would not likely constitute an unwarranted invasion of personal privacy. Nevertheless, the personally identifiable details described earlier could in my view be withheld.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Bradley M. Pinsky

OML-AO-3509

From: Robert Freeman
To: Kathleen Hallock
Date: 8/22/02 11:17AM
Subject: Re: Question

Good morning - -

The issue, in my view, is whether the presence of three Town Board members, a majority of the Board, would constitute a "meeting" that falls within the coverage of the Open Meetings Law.

A "meeting", in brief, is a gathering of a majority of the members of a public body for the purpose of conducting public business, collectively, as a body. If the three members in attendance are merely members of an audience or large group, and particularly if one member sits in the front row or in the front of the room and the others are situated elsewhere, I do not believe that they would be functioning as a body or, therefore, that the Open Meetings Law would apply. On the other hand, if the three members sit at a table in the front of the room, for instance, and function as a board, it is likely that it would be a meeting subject to the Open Meetings Law.

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

Robert J. Freeman
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STATE OF NEW YORK
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OML-AO-3510

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August 22, 2002

Mr. Richard P. Monahan
[redacted]

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

Dear Mr. Monahan:

I have received your letter and the materials attached to it. You have sought my views concerning the procedure apparently used by the Mohawk Central School District Board of Education at its meetings. Specifically, although notice given prior to a meeting indicated that the meeting would begin at 7:45 p.m., the Board met at 7 p.m. and immediately entered into an executive session. You have sought a clarification involving "how a public meeting advertised to begin at 7:45 p.m. is then opened at the non-publicly advertised time of 7 p.m."

From my perspective, the Board's procedure is inconsistent with law. In this regard, I offer the following comments.

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 indicate that a meeting will commence at 7 p.m., for example, and 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. 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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

OML-AO-3511

From: Robert Freeman
To: Gerald Tucker
Date: 8/23/02 7:57AM
Subject: Re: Executive Session

Dear Mr. Tucker:

If a public body enters into executive session but takes no action, there is no requirement that minutes of the executive session be prepared. If action is taken, minutes must be prepared within one week indicating the nature of the action and the vote of each member; those minutes must be made available to the extent required by the Freedom of Information Law.

I note that a motion to enter into an executive session must describe the subject or subjects to be discussed. Further, as you may be aware, the Open Meetings Law specifies and limits the subjects that may properly be considered in executive session [see paragraphs (a) through (h) of section 105(1)].

The text of the law is available under "publications" on our website. In addition, hundreds of opinions are available through the index to advisory opinions rendered by this office under the Open Meetings Law. You might want to click on to "E" and scroll down to "Executive Session, Sufficiency of Motion" and "M" for "Minutes of Executive Session." The highest numbered opinions are available in full text.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
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OML-AO · 3512

From: Robert Freeman
To: Melissa
Date: 8/26/02 3:12PM
Subject: RE:

It's fairly common practice for clerks (and others) to tape record meetings, listen to the tapes, and prepare accurate minutes later. More often, however, I believe that clerks will take notes, concurrently record the meeting, and then listen to the tape in order to ensure the preparation of accurate minutes.

Also, the Open Meetings Law clearly does not require the preparation of a verbatim account of what is said. In essence, the minutes must include reference to the highlights (i.e., motions, actions taken and the vote of the members). They may be more expansive, but there is no requirement that they be lengthy or detailed. When verbatim minutes are prepared, problems may arise in attempting to locate the key aspects of the minutes. If, five years from now, a new mayor is trying to figure out what the board did regarding a controversial issue, he or she will may have to wade through pages of debate, now largely worthless, in order find the critical information.

In short, I think it's wise to take notes for the reason that you mentioned. However, there is no requirement to do so. I note, too, that opinions of the Comptroller and this office suggest that a tape recording of a meeting does not serve as a valid substitute for written minutes. Tapes tend to break down and become unusable relatively quickly.

Hope this helps.

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Freeman

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August 27, 2002

Mr. Donald Alford Weadon, Jr.
Chairman and President
The Delta Chi Association, Inc.
3340 N Street, N.W.
Washington, DC 20007

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

Dear Mr. Weadon:

I have received your letter of August 12 in which you sought an advisory opinion concerning the application of the Open Meetings Law to "Cornell University, its Officers, its Board of Trustees, Board committees, and on-campus advisory groups" when those entities "consider matters pertaining to parking and traffic."

You referred to §5708 of the Education Law, which states that Cornell University, through its Board of Trustees, is authorized, in brief, to engage in law enforcement functions through implementation of the Vehicle and Traffic Law, and to adopt rules and regulations relating to the control of traffic that have the force and effect of law. Further, §5709 authorizes the University to appoint "special deputy sheriffs", who have the powers of peace officers and must take an oath of office in the same manner as public officers and employees. You also noted that "there is a recital" at meetings of the Board of Trustees", in your words, that "deliberations and actions that concern the statutory colleges and the Board's oversight of law enforcement functions are subject to the OML."

The focus of your commentary relates to deliberations concerning "the siting of new parking lots and parking garages." It is your view that decisions pertaining to that issue are made pursuant to §5708, and that because that statute makes specific reference to parking and traffic control, "the OML should be broadly construed to extend to all parking and traffic regulation and not just the ministerial enforcement of the rules once promulgated."

As you are aware, there are several judicial decisions relating to access to records of Cornell University and to meetings of its Board of Trustees. From my perspective, the key element of those decisions involves whether a governmental function is being performed, either in terms of the functions that are exclusively within the purview of a "statutory" college that is treated by law as part

of the State University, or when the functions involve law enforcement activities that are typically governmental in nature.

The Open Meetings Law 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."

In my view, the determining factor in this instance is whether or the extent to which planning functions in relation to "the siting of new parking lots and parking garages" can be characterized as governmental functions that are being performed by Cornell University based on statutes conferring governmental authority.

In Holden v. Board of Trustees of Cornell University [80 AD2d 378 (1981)], the Appellate Division found that the Board of Trustees is a public body subject to the Open Meetings Law insofar as its deliberations involve the four statutory colleges of the State University, and by affirming the decision of the Supreme Court (Tompkins County, February 1980), the exercise of its governmental authority pursuant to §§5708 and 5709 of the Education Law. In Stoll v. NYS College of Veterinary Medicine at Cornell University [94 NY2d 162 (1999)], the Court of Appeals found that a particular function was not unique to a statutory college carrying out its governmental activities of a statutory college as an extension of the State University, and therefore, that the records sought were not subject to the Freedom of Information Law. However, in Alderson v. NYS College of Agriculture and Life Sciences (Supreme Court, Tompkins County, May 18, 2001), citing Stoll, it was determined that the records of a "facility fulfilling a State governmental function" do fall within the coverage of the Freedom of Information Law.

Section 5708 of the Education Law is entitled "Powers to police grounds and regulate traffic thereon." That statute authorizes Cornell University in paragraph (a) of subdivision (1) to "*adopt, make applicable and enforce*....such provisions of the vehicle and traffic law, and such rules of the state department of transportation *as control or regulate vehicular or pedestrian traffic, and parking*"; in paragraph (b), to "*adopt* and *enforce*....additional rules and regulations *for the control of the use of the streets and roads*..."; and in paragraph (c), to "*adopt* and *enforce* rules and regulations *controlling parking and pedestrian traffic*..." (emphasis mine).

From my perspective, planning the siting of new parking lots and parking garages involves functions that are largely distinct from those described in §5708. The functions described in that statute, which are governmental in nature, pertain to the development and enforcement of provisions that "control" or "regulate" traffic and parking. Insofar as discussions by public bodies do not include reference to law enforcement activities involved in controlling or regulating traffic or parking, I do not believe that the Open Meetings Law would be applicable. On the other hand, when

law enforcement functions relating to the control or regulation of traffic or parking are discussed by a public body, the Open Meetings Law, in my opinion, would be applicable.

Lastly, you referred to various councils and committees that participate in the deliberative process. Even when the discussions clearly relate to the control or regulation of traffic or parking, the Open Meetings Law would not necessarily apply.

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

However, when a committee consists solely of members of a public body, such as a committee consisting of members of the Board of Trustees, I believe that the Open Meetings Law is applicable.

By way of background, when the Open Meetings Law went into effect in 1977, questions consistently arose with respect to the status of committees, subcommittees and similar bodies that had no capacity to take final action, but rather merely the authority to advise. Those questions arose due to the definition of "public body" as it appeared in the Open Meetings Law as it was originally enacted. Perhaps the leading case on the subject also involved a situation in which a governing body, a school board, designated committees consisting of less than a majority of the total membership of the board. In Daily Gazette Co., Inc. v. North Colonie Board of Education [67 AD 2d 803 (1978)], it was held that those 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, and during that debate, questions were raised regarding the status of "committees, subcommittees and other subgroups." In response to those questions, the sponsor stated that it was his intent that such entities be included within the scope of the definition of "public body" (see Transcript of Assembly proceedings, May 20, 1976, pp. 6268-6270).

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

In view of the amendments to the definition of "public body", I believe that any entity consisting of two or more members of a public body, such as a committee or subcommittee consisting of members of the Board of Trustees, would fall within the requirements of the Open Meetings Law, when it discusses the statutory colleges or the law enforcement functions considered earlier [see Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984 (1981)]. Further, as a general matter, I believe that a quorum consists of a majority of the total membership of a body (see e.g., General Construction Law, §41). Therefore, if, for example, the Board of Trustees consists of seventeen, its quorum would be nine; in the case of a committee consisting of six, a quorum would be four.

When a committee is subject to the Open Meetings Law, I believe that it has the same obligations regarding notice and openness, for example, as well as the same authority to conduct executive sessions, as a governing body [see Glens Falls Newspapers, Inc. v. Solid Waste and Recycling Committee of the Warren County Board of Supervisors, 195 AD 2d 898 (1993); County of Lewis v. O'Connor, Supreme Court, Lewis County, January 21, 1997].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: General Counsel, Cornell University

STATE OF NEW YORK
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OML-AO-3514

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August 28, 2002

Mr. Kenneth Bartholomew
[redacted]

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

Dear Mr. Bartholomew:

I have received your letter in which you referred to a meeting held by the Whitehall Town Board during which the Board entered into executive session. Since there are apparently no facilities for the public to wait inside, you remained outside the town hall, with the "intention...to continue to observe them in their regular session when they came out of executive session." Nevertheless, you wrote that, after the executive session, "they all filed out the front door on their way home" and you asked that, in the future, you be notified when the executive session ends "so [you] might observe the end of the meeting and see them officially adjourn." You added that you informed the Board that "when the meeting is declared back in regular session they are required to allow the public back in to observe." One of the members asked that you "show him that in writing", and you have asked that I do so.

In this regard, §102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. Therefore, an executive session is not separate from a meeting, but rather is a part of a meeting. Further, as you may be aware, paragraphs (a) through (h) of the Open Meetings Law specify and limit the topics that may be considered in executive session.

If, after concluding its executive session, the Board continued the meeting with any other business, I believe that it would have been required to inform those members of the public who remained that the meeting was resuming and that they could once again be present at the meeting. Technically, if, after the executive session, the only additional activity involves a motion to adjourn, the motion should be made in public, during an open portion of the meeting, for there would be no basis for doing so during an executive session. However, I point out that there is not necessarily a requirement or need to introduce a motion to adjourn or to officially adjourn. If, for example, the

Board has five members, and the point is reached at which only two members remain present (the others are absent or have departed), there would be no quorum and the meeting would have ended, even if there was no action taken to adjourn.

I note, too, that many boards inform the public if an executive session is held at the end of the meeting that there will be no further discussion or business conducted when the executive session concludes. By so doing, they effectively inform the public that there may be no reason to stay at the meeting.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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August 28, 2002

Mr. John Kwasnicki
[redacted]

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

Dear Mr. Kwasnicki:

I have received your letter in which you raised issues concerning certain activities of members of the Sloatsburg Village Board of Trustees.

The first situation that you described involved a Rockland County conservative party caucus held for the purpose of nominating two trustees to serve on the Board of Trustees and during which a majority of the Board was present. You have questioned the legality of the gathering. You also referred to "meetings that go into Executive Session with Client/Privilege without announcing a reason for such action."

Both of the events that you described appear to involve matters that fall beyond the coverage of the Open Meetings Law. In this regard, I offer the following comments.

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

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

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

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

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

With respect to the party caucus, since the Open Meetings Law became effective in 1977, it has contained an exemption concerning political committees, conferences and caucuses. Section 108(2)(a) of the Law states that exempted from its provisions are: "deliberations of political committees, conferences and caucuses." Further, §108(2)(b) states that:

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

Based on the foregoing, the kind of gathering that you described appears to have been exempt from the coverage of the Open Meetings Law, even though a majority of the members of the Board might have attended.

With regard to the assertion of the attorney-client privilege, relevant is §108(3), which exempts from the Open Meetings Law:

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

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

In terms of background, it has long been held that a municipal board may establish a privileged relationship with its attorney [People ex rel. Updyke v. Gilon, 9 NYS 243 (1889); Pennock v. Lane, 231 NYS 2d 897, 898 (1962)]. However, such a relationship is in my opinion

operable only when a municipal board or official seeks the legal advice of an attorney acting in his or her capacity as an attorney, and where there is no waiver of the privilege by the client.

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

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

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

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

While it is not my intent to be overly technical, as suggested earlier, the procedural methods of entering into an executive session and asserting the attorney-client privilege differ. In the case of the former, the Open Meetings Law applies. In the case of the latter, because the matter is exempted from the Open Meetings Law, the procedural steps associated with conducting executive sessions do not apply. It has been suggested that when a meeting is closed due to the exemption under consideration, a public body should inform the public that it is seeking the legal advice of its attorney, which is a matter made confidential by law, rather than referring to an executive session.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees, Village of Sloatsburg

OML-AO-3516

From: Robert Freeman
To: [redacted]
Date: 8/29/02 8:26AM
Subject: Re: (no subject)

Good morning - -

As a general rule, the Board may take action during an executive session, so long as the action is not to appropriate public moneys and there is a proper basis for being in executive session. Based on the information that you provided, the Board clearly has the ability to discuss the matter in executive session and to take action during the executive session.

Section 105(1)(f) authorizes a public body to enter into executive session to discuss, among other items, the employment history of a particular person, as well as matters leading to the discipline, suspension, dismissal or removal of a particular person. When a vote is taken during executive session, there is an obligation to prepare minutes within one week indicating the nature of the action taken and the vote of the members, and to disclose the minutes to the extent required by the Freedom of Information Law. The minutes need not include great detail; section 106(2) refers to "a record or summary of the final determination of such action, and the date and vote thereon."

I hope that this offers the clarification you need.

All the best.

Robert J. Freeman
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August 29, 2002

Mr. John R. Cassone
[redacted]

Mr. Joseph A. Marciona
[redacted]

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. Cassone and Mr. Marciona:

I have received your letter of August 14 in which you requested an advisory opinion concerning the status of certain entities under the Open Meetings Law. In addition, your letter addressed to Ms. Grace Koh of the Office of the Lieutenant Governor, which relates to the same matter, has been forwarded to this office. For future reference, please note that the staff of the Committee on Open Government responds to inquiries on behalf of the Committee.

You referred to several advisory committees designated by the Board of Education of the Pelham Union Free School District to offer advice and guidance concerning the construction of a new school and the renovation of existing schools within the District. The committees generally consist of a number of private citizens, representatives of the administration, two or perhaps three members of the Board of Education, and experts such as architects.

Based on judicial decisions, it does not appear that the committees in question are required to comply with the Open Meetings Law. In this regard, I offer the following comments.

As you are aware, the Open Meetings Law is applicable to meetings of public bodies, and §102(2) 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. The definition refers to committees, subcommittees and similar bodies of a public body, and judicial interpretations indicate that if a committee, for example, consists solely of members of a particular public body, such as a board of education, it constitutes a public body [see e.g., Glens Falls Newspapers v. Solid Waste and Recycling Committee of the Warren County Board of Supervisors, 195 AD2d 898 (1993)]. For instance, in the case of a board of education consisting of seven members, four would constitute a quorum, and a gathering of that number or more for the purpose of conducting public business would constitute a meeting that falls within the scope of the Open Meetings Law. If that board designates a committee consisting solely of three of its members, the committee would itself be a public body; its quorum would be two, and a gathering of two or more, in their capacities as members of that committee, would be a meeting subject to the Open Meetings Law.

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, since the committees have no authority to take any final and binding action for or on behalf of a government agency, I do not believe that they constitute public bodies or, therefore, are obliged to comply with the Open Meetings Law.

The foregoing is not intended to suggest that the committees cannot hold open meetings. On the contrary, the Board may direct that they hold open meetings, 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: Board of Education
Grace Koh

OML-AO-3518

From: Robert Freeman
To: [redacted]
Date: 8/30/02 11:02AM
Subject: Indicating name and address at meeting

Dear Mr. Gunn:

I have received your letter in which you expressed objection to a requirement that those who choose speak at meetings of a village board of trustees must identify themselves by name and address. In this regard, I do not recall having prepared a written opinion dealing directly with the matter. However, others deal with related issues. It is suggested that you might review opinions on our website in the opinions rendered under the Open Meetings Law. You can click on to "P" and scroll down to "Public Participation"; advisory opinion #3295 is closest to the issue that you raised.

In brief, it has been advised that the Open Meetings Law is silent with respect to the ability of those in attendance to speak or otherwise participate. Therefore, a public body, such as a village board of trustees, is not obliged to permit the public to speak at its meetings. Many public bodies, however, authorize public participation, and in that event, it has been advised that they do so by means of reasonable rules that treat members of the public equally.

With respect to the possibility of distinguishing among those who may speak, since the Open Meetings Law provides the general public with the right to attend meetings, it has been advised that if a public body permits members of the public to speak, it must permit any person to do so, irrespective of the residence of the speaker. It follows in my view, that a person cannot be required to specify his or her residence as a condition that must be met before he or she may speak. Further, in many instances, individuals, due to concerns associated with safety, security and privacy, have valid reasons for choosing not to provide their residence addresses.

A similar contention may be offered in my opinion regarding the disclosure of the speaker's name. Again, if any person may attend a meeting and a public body cannot prohibit a person from atteding due to his or her status or interest, the names of those who attend are irrelevant to the right to attend. That being, so I do not believe that a person should be required to give his or her name as a condition precedent to speaking. There may be a variety of reasons for wanting to avoid identifying oneself. For instance, if a parent of a student wants to describe a problem before a board of education, providing a name would likely identify the student. If a member of the public seeks to bring forward a complaint or allegation to a village board, identifying himself or herself could result in personal hardship.

In short, I do not believe that a person can be compelled to identify himself or herself in order to speak in the same manner as others at meetings.

I hope that I have been of assistance.

Robert J. Freeman
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STATE OF NEW YORK
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September 5, 2002

E-Mail

TO: Beverly Padgett <bpadgett@w-haywoodburns.org>

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Ms. Padgett:

As you are aware, I have received your letter of August 21. Because you were informed that the City of Albany Neighborhood Advisory Group (NAG) is not required to conduct its meetings in accordance with the Open Meetings Law, you have sought a clarification concerning NAG's status in relation to that statute.

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

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

Based on the foregoing, a public body is, in my view, an entity required to conduct public business by means of a quorum that performs a governmental function and carries out its duties collectively, as a body. In order to constitute a meeting subject to the Open Meetings Law, a majority of the total membership of a public body, a quorum, must be present for the purpose of conducting public business. I note, too, that the definition refers to committees, subcommittees and similar bodies of a public body. Based on judicial interpretations, if a committee, for example, consists solely of members of a particular public body, it, too, would constitute a public body. For instance, in the case of a legislative body consisting of seven members, four would constitute a quorum, and a gathering of that number or more for the purpose of conducting public business would be a meeting that falls within the scope of the Law. If that body designates a committee consisting of three of its

members, the committee would itself be a public body; its quorum would be two, and a gathering of two or more, in their capacities as members of that committee, would be a meeting subject to the Open Meetings Law.

With specific respect to your area of concern, several judicial decisions indicate generally that advisory bodies, other than those consisting solely of the members of a governing body, that have no power to take final action fall outside the scope of the Open Meetings Law. As stated in those decisions: "it has long been held that the mere giving of advice, even about governmental matters is not itself a governmental function" [Goodson-Todman Enterprises, Ltd. v. Town Board of Milan, 542 NYS 2d 373, 374, 151 AD 2d 642 (1989); Poughkeepsie Newspaper v. Mayor's Intergovernmental Task Force, 145 AD 2d 65, 67 (1989); see also New York Public Interest Research Group v. Governor's Advisory Commission, 507 NYS 2d 798, aff'd with no opinion, 135 AD 2d 1149, motion for leave to appeal denied, 71 NY 2d 964 (1988)]. In one of the decisions, Poughkeepsie Newspaper, supra, a task force was designated by then Mayor Koch consisting of representatives of New York City agencies, as well as federal and state agencies and the Westchester County Executive, to review plans and make recommendations concerning the City's long range water supply needs. The Court specified that the Mayor was "free to accept or reject the recommendations" of the Task Force and that "[i]t is clear that the Task Force, which was created by invitation rather than by statute or executive order, has no power, on its own, to implement any of its recommendations" (id., 67). Referring to the other cases cited above, the Court found that "[t]he unifying principle running through these decisions is that groups or entities that do not, in fact, exercise the power of the sovereign are not performing a governmental function, hence they are not 'public bod[ies] subject to the Open Meetings Law..."(id.).

On the other hand, if an entity consisting of two or members that functions as a body has the authority to take action, i.e., through the power to allocate public monies or make determinations, the Court of Appeals, the state's highest court, has held that the entity would constitute a public body subject to the Open Meetings Law. In a case dealing with a student government body at a public educational institution ("the Association, Inc."), the Court provided guidance concerning the application of the Open Meetings Law, stating that:

> "In determining whether an entity is a public body, various criteria and 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.
>
> "This Court has noted that the powers and functions of an entity should be derived from State law in order to be deemed a public body for Open Meetings Law purposes (*see, Matter of American Socy. for Prevention of Cruelty to Animals v Board of Trustees of State Univ. of N.Y.*, 79 NY2d 927, 929). In the instant case, the parties do not dispute the CUNY derives its powers from State law and it surely is essentially a public body subject to the Open Meetings Law for almost any imaginable purpose. The Association, Inc. contends, on

> the other hand, that is a separate, distinct, subsidiary entity, and does not perform any governmental function that would render it also a public body.
>
> "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 receive merely perfunctory review or approval...This Association, Inc. possessed and exercised real and effective decision-making power. CUNY, through its by-laws, delegated to the Association, Inc. its statutory power to administer student activity fees (*see*, Education Law §6206[7][a]). The Association, Inc. holds the purse strings and the responsibility of supervising and reviewing the student activity fee budget. (CUNY By-Laws §16.5[a]). CUNY's by-laws also provide that the Association, Inc. 'shall disapprove any allocation or expenditure it finds does not so conform, or is inappropriate, improper, or inequitable,' thus reposing in the Association, Inc. a final decision-making authority... [Smith v. CUNY, 92 NY2d 707; 713-714 (1999)].

In sum, since the functions of the NAG are purely advisory, I do not believe that it is required to comply with the Open Meetings Law. This is not to suggest that the NAG cannot give effect to or hold meetings in a manner consistent with the Open Meetings Law. On the contrary, citizens advisory bodies and similar entities may and frequently do so.

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.

RJF:jm

OML-AO-3520

From: Robert Freeman
To: [redacted]
Date: 9/19/02 8:37AM
Subject: Re:

Good morning - - I hope that you are well.

I agree with your contention that verbatim or detailed minutes are unnecessary. Section 106 of the Open Meetings Law provides minimum requirements concerning the contents of minutes and states that minutes must consist of a record or summary of motions, proposals, resolutions, action taken, the date and the vote of each member. There is no obligation to include more, such as reference to comments made or the content of a debate.

From my perspective, particularly in view of the direction provided in the law, minutes should essentially reflect the highlights of a meeting. A debate or discussion may go on for hours, but what matters is the outcome - - the action finally taken by the board, and that is what should be memorialized. Further, problems have arisen when minutes are expansive. The more detail there is, the greater is the likelihood of error; allegations have arisen that reference to some comments are longer than reference to others, or that there is favoritism for those associated with a certain political party or point of view. Perhaps more importantly, when you or any person attempts a year, or two or ten from years from now to find out what action the Board took, it may be difficult to locate that information when you have to wade through pages and pages of what will become irrelevant commentary. You may recall, too, that the Open Meetings Law requires that minutes be prepared and made available within two weeks of a meeting. If minutes are lengthy, it is often difficult for the clerk or secretary to prepare minutes in a timely manner that is consistent with law.

Rather than preparing expansive minutes, it has been suggested that meetings be tape recorded. A tape recording obviously reflects an accurate and complete rendition of what was expressed. If there is a controversy or litigation following a meeting, the tape recording, in my view, serves as the best source of information regarding a meeting.

Certainly you should feel free to share this advice with the Chairman. In addition, there are numerous opinions on the subject available through our index to opinions rendered under the Open Meetings Law. Several categories appear relating to minutes, and many of the opinions will likely be useful.

I hope that this helps.

Robert J. Freeman
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October 7, 2002

Mr. Richard 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 information presented in your correspondence.

Dear Mr. Quaglietta:

I have received your letter in which you expressed concern "about breaches of both the Freedom of Information Law and the Open Meetings Law" by certain officials of the Town of Kent.

You wrote that a motion to enter into executive session was made at a recent meeting that identified "[t]wo specific departmental, personnel issues" that would be discussed. Nevertheless, you indicated that "shouting" occurred during the executive session and that it became "apparent that the subject matter had nothing to do with the publicly indicated issues." One of the subjects discussed involved complaints made against officials of the Kent Recycling Commission; another involved consideration of a request made under the Freedom of Information Law. You have sought assistance in the matter.

In this regard, first, the Open Meetings Law prescribes a procedure that must be accomplished in public before an executive session may be held. Specifically, §105(1) states in relevant part that:

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

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

In the context of the matter that you described, it appears that the motion for entry into executive session failed to make reference to the subjects that were actually discussed. That being so, it appears that the Board failed to comply with §105(1) of the Open Meetings Law.

Second, however, insofar as the Board discussed complaints pertaining to particular individuals, I believe that, had the procedure been followed correctly, there would have been a basis for discussion of that issue. Section §105(1)(f) 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..."

I note that it has been advised that a motion to enter into executive session pursuant to § 105(1)(f) should be based on the terms of that provision. For instance, a proper motion might be: "I move to enter into an executive session to discuss the employment history of a particular person (or persons)". Such a motion would not in my opinion have to identify the person or persons who may be the subject of a discussion. By means of the kind of motion suggested above, members of a public body and others in attendance would have the ability to know that there is a proper basis for entry into an executive session.

Lastly, I do not believe that consideration of an appeal made following a denial of access under the Freedom of Information Law could, as you described the situation, have validly been considered during an executive session. In short, none of the grounds for entry into executive session would apparently have applied. I point out, too, that the Freedom of Information Law is applicable to all records of an agency, such as a town, and that §86(4) of that statute defines the term record expansively to include "any information....in any physical form whatsoever" maintained by or for an agency. Therefore, assuming that the Town maintained a list of the members of a certain commission, it would have constituted a "record" that fell within the coverage of the Freedom of Information Law. Further, in my view, there would have been no basis for a denial of access to such a record.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board, Town of Kent

STATE OF NEW YORK
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October 7, 2002

E-MAIL

TO: Gary J. Sluzar[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. Sluzar:

I have received your letter and apologize for the delay in response. You have requested opinions concerning certain actions of the Town Board of the Town of West Monroe in relation to the Open Meetings Law. The first involved the sufficiency of a motion to enter into executive session to discuss, in your words, "possible litigation and safety matters"; the second pertains to action taken by the Board by means of a series of phone calls.

In this regard, I offer the following comments.

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

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

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

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

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

I note, too, that the courts have provided direction with respect to the sufficiency of a motion to discuss litigation. It has been held that:

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

Further, in a decision rendered by the Appellate Division, one of the issues involved the adequacy of a motion to conduct an executive session to discuss what was characterized as "a personnel issue", and it was held that:

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

> Matter of Plattsburgh Publ. Co., Div. of Ottaway Newspapers v City of Plattsburgh, 185 AD2d §18), and these exceptions, in turn, 'must be narrowly scrutinized, lest the article's clear mandate be thwarted by thinly veiled references to the areas delineated thereunder' (Weatherwax v Town of Stony Point, 97 AD2d 840, 841, quoting Daily Gazette Co. v Town Bd., Town of Cobleskill, supra, at 304; see, Matter of Orange County Publs., Div. of Ottaway Newspapers v County of Orange, 120 AD2d 596, lv dismissed 68 NY2d 807)" [Gordon v. Village of Monticello, 207 AD 2d 55, 58 (1994)].

Second, with respect to action taken by phone, there is nothing in the Open Meetings Law that would preclude members of a public body from conferring individually, by telephone, via mail or e-mail. However, a series of communications between individual members or telephone calls among the members which results in a collective decision, a meeting held by means of a telephone conference, or a vote taken by mail or e-mail would in my opinion be inconsistent with law.

From my perspective, voting and action by a public body may be carried out only at a meeting during which a quorum has physically convened, or during a meeting held by videoconference. It is noted that the Open Meetings Law pertains to public bodies, and §102(2) defines the phrase "public body" to mean:

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

Further, §102(1) of the Open Meetings Law defines the term "meeting" to mean "the official convening of a public body for the purpose of conducting public business, including the use of videoconferencing for attendance and participation by the members of the public body." Based upon an ordinary dictionary definition of "convene", that term means:

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

In view of that definition and others, I believe that a meeting, i.e., the "convening" of a public body, involves the physical coming together of at least a majority of the total membership of such a body, i.e., the Board of Education, or a convening that occurs through videoconferencing. I point out, too, that §103(c) of the Open Meetings Law states that "A public body that uses videoconferencing to conduct its meetings shall provide an opportunity to attend, listen and observe at any site at which a member participates."

The provisions in the Open Meetings Law concerning videoconferencing are newly enacted (Chapter 289 of the Laws of 2000), and in my view, those amendments clearly indicate that there are only two ways in which a public body may validly conduct a meeting. Any other means of

conducting a meeting, i.e., by telephone conference, by mail, or by e-mail, would be inconsistent with law.

As indicated earlier, the definition of the phrase "public body" refers to entities that are required to conduct public business by means of a quorum. The term "quorum" is defined in §41 of the General Construction Law, which has been in effect since 1909. The cited provision, which was also amended to include language concerning videoconferencing, states that:

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

Based on the foregoing, again, a valid meeting may occur only when a majority of the total membership of a public body, a quorum, has "gathered together in the presence of each other or through the use of videoconferencing." Moreover, only when a quorum has convened in the manner described in §41 of the General Construction Law would a public body have the authority to carry out its powers and duties. Consequently, it is my opinion that a public body may not take action or vote by means of a series of telephone calls.

In the only decision dealing with a vote taken by phone, the court found the vote to be a nullity. In Cheevers v. Town of Union (Supreme Court, Broome County, September 3, 1998), which cited and relied upon an opinion rendered by this office, the court stated that:

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

> business are subject to the provisions of the statute in the same manner was formal votes (see, Matter of Orange County Publs. v. Council of City of Newburgh, 60 AD2d 309, 415 Affd 45 NY2d 947).
>
> "The issue was the Town's policy concerning tax assessment reductions, clearly a matter of public business. There was no physical gathering, but four members of the five member board discussed the issue in a series of telephone calls. As a result, a quorum of members of the Board were 'present' and determined to publish the Dear Resident article. The failure to actually meet in person or have a telephone conference in order to avoid a 'meeting' circumvents the intent of the Open Meetings Law (see e.g., 1998 Advisory Opns Committee on Open Government 2877). This court finds that telephonic conferences among the individual members constituted a meeting in violation of the Open Meetings Law..."

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

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

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

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

I hope that I have been of assistance.

RJF:jm

cc: Town Board
Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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October 8, 2002

Mr. Robert Friedman
Town Attorney
Town of Clarence
One Town Place
Clarence, NY 14031

Dear Mr. Friedman:

It was a pleasure to see you in Clarence, and I hope that you found the session to be of value.

You have asked whether, in my view, the decision rendered in Hill v. Planning Board [140 AD2d 967 (1988)] may be distinguished from or is superceded by Orange County Publications, Inc. v. City of Newburgh [60 AD2d 409, aff'd 45 NY2d 947 (1978)]. I view Orange County Publications as the seminal decision regarding the Open Meetings Law and Hill as something of an aberration. As you aware, the court in Hill determined that a gathering of public body did not constitute a meeting because "no determinations were made at the July 21 assembly which affected the public...." In contrast, as indicated in the opinion addressed to you on July 30, the Appellate Division in Orange County Publications focused specifically on the scope of the definition of the term "meeting" and dealt expansively with the matter, stating 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.).

Since the Court of Appeals later unanimously affirmed the holding of the Appellate Division, I believe that the direction provided in Orange County Publications, rather than that offered in Hill, is persuasive and, in essence, the law of the land.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
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October 10, 2002

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 Ms. Zajaczkowski:

I have received your inquiry and apologize for the delay in response. You wrote that the public is "allowed to speak on all agenda items" at meetings of the Kent Town Board, but that the public was not permitted to speak on a particular issue "because it involved volunteers", i.e., persons who serve without pay on a variety of town entities.

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

Although public bodies have the right to adopt rules to govern their own proceedings (see e.g., Town Law, § 63), the courts have found in a variety of contexts that such rules must be reasonable. For example, although a board of education may "adopt by laws and rules for its government and operations", in a case in which a board's rule prohibited the use of tape recorders at its meetings, the Appellate Division found that the rule was unreasonable, stating that the authority to adopt rules "is not unbridled" and that "unreasonable rules will not be sanctioned" [see Mitchell v. Garden City Union Free School District, 113 AD 2d 924, 925 (1985)]. Similarly, if by rule, a public body chose to permit certain citizens to address it for ten minutes while permitting others to address it for three, or not at all, such a rule, in my view, would be unreasonable.

I note that there are federal court decisions indicating that if commentary is permitted within a 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, but that expressions of opinion concerning "the shortcomings" of a law school professor could not be restrained.

I know of no judicial decision that focuses on the issue that you raised. However, I would conjecture that a town board could by rule, prohibit commentary by the public concerning "volunteers" who serve on town entities. However, as suggested above, if a board permits the public to express praise relating to those persons during open meetings, I believe that it also must permit criticism. Further, if a rule has been adopted to permit people to speak regarding only agenda items, but not others, such a rule, in my view, would be valid.

I hope that I have been of assistance.

RJF:tt

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3525

41 State Street, Albany, New York 12231
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October 11, 2002

Mr. Donald M. Stiglmeier
Clarence Senior Citizens, Inc.
4600 Thompson Road
Clarence, NY 14031

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

Dear Mr. Stiglmeier:

I have received your letter of August 26 and apologize for the delay in response. You have sought guidance concerning the status of standing committees designated by and generally consisting of members of the Board of Directors of Clarence Senior Citizens, Inc. As indicated in previous correspondence, because Clarence Senior Citizens Inc. was created by the Town of Clarence and the members of its Board are appointed by Town officials, it is my view that meetings of the Board are subject to the Open Meetings Law.

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

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

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

body, a school board, designated committees consisting of less than a majority of the total membership of the board. In Daily Gazette Co., Inc. v. North Colonie Board of Education [67 AD 2d 803 (1978)], it was held that those 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, and during that debate, questions were raised regarding the status of "committees, subcommittees and other subgroups." In response to those questions, the sponsor stated that it was his intent that such entities be included within the scope of the definition of "public body" (see Transcript of Assembly proceedings, May 20, 1976, pp. 6268-6270).

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

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

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

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

When a committee is subject to the Open Meetings Law, I believe that it has the same obligations regarding notice and openness, for example, as well as the same authority to conduct executive sessions, as a governing body [see Glens Falls Newspapers, Inc. v. Solid Waste and Recycling Committee of the Warren County Board of Supervisors, 195 AD 2d 898 (1993); County of Lewis v. O'Connor, Supreme Court, Lewis County, January 21, 1997].

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-3526

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October 15, 2002

Mr. Elmer Robert Keach, III
One Steuben Place
Albany, NY 12207

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. Keach:

I have received your letter in which you sought an advisory opinion concerning your right to speak at a meeting of the Board of Education of the Greater Johnstown School District.

By way of brief background, you represent a teacher who was denied tenure, and in an effort to encourage the Board to reconsider its decision, you sought to address the Board at a meeting held on July 9. You were "precluded from doing so" by the Board's attorney, Patrick Fitzgerald, who indicated that it is the "policy" of the Board "not to discuss personnel matters in open session." You expressed the view that your client "had a Constitutional right to address the Board in this context" through you, her representative, and I have reviewed the videotaped portion of the meeting during which you asked to speak on behalf of your client.

In this regard, I offer the following comments.

First, as you suggested during your remarks to Mr. Fitzgerald and the Board, you and your client have a constitutional right of free speech. However, I do not believe that you necessarily enjoy that right during a meeting of a board of education. It is noted that there is no constitutional right to attend meetings of public bodies. The right to do so is conferred by statute, i.e., by legislative action, in laws enacted in each of the fifty states. In the absence of a statutory grant of authority to attend such meetings, I do not believe that the public would have the right to attend.

In the case of the New York Open Meetings Law, in a statement of general principle and intent, that statute confers upon the public the right to attend meetings of public bodies. 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.

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

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

With regard to your comments, 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, but that expressions of opinions concerning "the shortcomings" of a law school professor could not, under the circumstances, be restrained.

I am unaware of the rules or policies of the Board in question. As suggested above, if the Board permits commentary regarding the performance of its employees, I believe that it must permit both positive and negative comments. However, in my view, the Board could, as a matter of policy, preclude all commentary, whether it be laudatory, negative or neutral, pertaining to its employees by the public during meetings.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Education
Patrick Fitzgerald

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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October 15, 2002

Ms. Sandra G. Mallah
Superintendent of Schools
Greenburgh Eleven Union Free School District
P.O. Box 501
Dobbs Ferry, NY 10522-0501

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

Dear Ms. Mallah:

I have received your letter and apologize for the delay in response. You referred to meetings of the Board of the Greenburgh Eleven Union Free School District and its duty to comply with the Open Meetings Law, and you indicated that the Board has held meetings at a facility of the Southern Westchester County Board of Cooperative Educational Services (BOCES).

In this regard, you wrote that the BOCES requires that all visitors to its facility must sign in and that you were informed that "the sign-in requirement is the result of New York State's SAVE legislation that followed the bombing of the Federal building in Oklahoma City". According to BOCES staff, there is a need "to know if people are in the building, and where they could be located", and that "this is the sole purpose of the sign-in requirement." Further, this BOCES policy, which appears in its handbook, specifies that "All visitors must wear identification and sign in." It is your view, particularly in consideration of "the heightened concern for security and emergency preparedness", that the BOCES requirement "advances a compelling government interest and does not unduly restrict the rights of persons attending public meetings at the facility." You have asked whether the Board "may continue to hold its public meetings at the BOCES facility if visitors are required to sign in."

In my view, the Board may do so.

First, the "sign-in requirement" was not created or drafted by the Board; rather, it reflects the policy of the BOCES.

Second and more importantly in my opinion, the policy does not distinguish among visitors; it imposes certain requirements whether visitors seek to attend a meeting or engage in any other

activity within the facility. In my experience, there have often been instances in which security concerns resulted in a requirement that all visitors sign in and wear identification badges of some sort. Particularly in privately owned or large government buildings, visitors must often do so, irrespective of the nature of their business or activity.

When those who want to assert their right to attend a meeting open to the public are not distinguished based on their desire to do so or treated differently from others, I do not believe that the requirements to which you referred "unduly restrict the rights of [those] persons", for they must merely abide by the same requirements as all other visitors who want to enter the facility.

Lastly, again, the requirements at issue were adopted by the BOCES, not the Board. I note, however, that the Board, like other public bodies, has the right to adopt rules to govern its own proceedings (see e.g., Education Law, §1709). In this regard, the courts have found in a variety of contexts that such rules must be reasonable. For example, although a board of education may "adopt by laws and rules for its government and operations", in a case in which a board's rule prohibited the use of tape recorders at its meetings, the Appellate Division found that the rule was unreasonable, stating that the authority to adopt rules "is not unbridled" and that "unreasonable rules will not be sanctioned" [see Mitchell v. Garden City Union Free School District, 113 AD 2d 924, 925 (1985)]. Similarly, if by rule, a public body chose to permit certain citizens to address it for ten minutes while permitting others to address it for three, or not at all, such a rule, in my view, would be unreasonable. In this circumstance, all visitors are being treated in the same manner. That being so, I do not believe that the requirements may be characterized as unreasonable or that they infringe upon the public's right to attend meetings of the Board.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

FOIL-AO-3528

From: Robert Freeman
To: Bob and Jenny Petrucci
Date: 10/17/02 7:53AM
Subject: Re: Accuracy or PR re FOIL

Minutes, first and foremost, should reflect what actually transpired at a meeting. However, I note that the Open Meetings Law, section 106, contains what might be viewed as minimum requirements concerning the contents of minutes. At a minimum, they must consist of a record or summary of motions, proposals, resolutions, action taken and the vote of each member. The minutes need not include reference to comments made either by members of the public body or others in attendance.

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

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OML-AO-3529

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October 17, 2002

Ms. Lynne E. Eckardt
[redacted]

The staff of the Committee on 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. Eckardt:

I have received your letter in which you raised a variety of questions relating to access to records and meetings of the Architectural Review Board (hereafter "the Board") created by the Town of Southeast in August of 2000.

In consideration of the issues that you raised, I offer the following comments.

First, you indicated that in response to a request made under the Freedom of Information Law, you were informed that no minutes of meetings of the Board "had ever ben turned in to the Town Clerk."

Here I point out that the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) require the governing body of a municipality, i.e., the Town Board, to designate one or more persons as "records access officer." The records access officer has the duty of coordinating an agency's response to requests for records. In most towns, the clerk is the records access officer, for the clerk is also the legal custodian of town records, irrespective of where the records are kept [see Town Law, §30(1)].

Second and in a related vein, the Freedom of Information Law pertains to all government agency records, and §86(4) defines the term "record" broadly to mean:

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

Therefore, insofar as the Board has produced, acquired or maintained records, I believe that they are Town records, again, irrespective of where the records may be located. That records have not been "turned over" to the Clerk is irrelevant; the records access officer, in my view, has the duty to direct the person in possession of requested records to disclose them in a manner consistent with law or obtain them in order to determine the extent to which they must be disclosed.

Third, it appears that the Board is a creation of law and constitutes a public body required to comply with the Open Meetings Law. Section 102(2) of that statute defines the phrase "public body" to mean:

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

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

In the decisions cited earlier, none of the entities was designated by law to carry out a particular duty and all had purely advisory functions. I would conjecture that more analogous to the matter 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 most instances, architectural review boards and similar bodies do not make final decisions relating to construction in a municipality. However, they typically perform a necessary function in the process of reaching a decision. If that is so in this case, I believe that the Board is a public body required to comply with the Open Meetings Law.

The same conclusion can likely be reached by viewing the definition of "public body" in terms of its components. The Board is an entity consisting of more than two members; it is apparently required in my view to conduct its business subject to quorum requirements (see General

Construction Law, §41); and, based upon the preceding commentary, it conducts public business and performs a governmental function for a public corporation, i.e., a town.

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

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

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

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

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

Based upon the direction given by the courts, if a majority of a public body gathers to discuss public business, any such gathering, in my opinion, would ordinarily constitute a "meeting" subject to the Open Meetings Law that must be preceded by notice given in accordance with §104 of the Law.

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

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

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

Lastly, assuming that the Board is a public body, it is and has been required to prepare minutes of its meetings. Section 106 of the Open Meetings Law provides direction concerning the contents of minutes and the time within which they must be prepared and disclosed. Specifically, that provision states that:

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

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

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

In an effort to enhance their understanding of an ability to comply with open government statutes, copies of this opinion will be forward to Town officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Architectural Review Board
Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3530

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October 17, 2002

Mr. Kenneth Bartholomew
[redacted]

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. Bartholomew:

I have received your letter in which you raised questions concerning an advisory opinion addressed to you on August 28, as well as related matters.

In consideration of your remarks, first, I point out there is nothing in the Open Meetings Law that makes reference or pertains directly to adjournment of a meeting of a public body.

Second, it appears that you may have misconstrued certain of my comments. As you are likely aware, a "meeting" involves a gathering of a quorum of a public body for the purpose of conducting public business [§102(1)]. An executive session, according to §102(3), is a portion of a meeting during which the public may be excluded. Further, a procedure must be accomplished in public before an executive session may be held. With respect to the termination of a meeting, there are often instances in which a quorum is present and a meeting is being conducted, either in public or perhaps in executive session, when a member or members must leave the meeting to engage in other appointments, to catch a scheduled train, etc. In these situations, when a sufficient number of the members of a public body depart that there is no longer a quorum present, the meeting has ended, even if there is no motion or official action to adjourn. Absent a quorum, the Open Meetings Law is no longer applicable, and no motion to take any sort of action, even to adjourn, could effectively be made and carried.

With respect to my statement that public bodies often inform those in attendance that no business will be conducted following an executive session, my intent was not to suggest or, to use your word, "imply", that the public has no right to remain present until the meeting has ended. On the contrary, the kind of statement that I described is typically made out of consideration and a desire to be courteous to those who attend meetings. Many are grateful to be informed that no further business will be conducted after an executive session; with that information, they can choose to

move onto another activity. However, if they see fit to do so, certainly they have the right to remain until the meeting has ended.

Lastly, you referred at the end of your letter to the possibility of raising issues with the "Committee on Professional Standards." I am unfamiliar with any such entity. Nevertheless, I hope that the preceding commentary serves to clarify the remarks offered in the August 28 opinion.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13658
OML-AO-3531

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October 17, 2002

Mr. Harold Scudder
[redacted]

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. Scudder:

I have received your letter and the correspondence attached to it. In brief, the matter involves your inability to gain access to a variety of records from the Town of Bombay relating to the assessment of real property. In a request made to the Town Clerk on August 7, you sought the following:

> "1. The reason for the BAR decision on my property.
>
> 2. Where and when I can file a petition for judicial review of my assessment.
>
> 3. A copy of all minutes of the BAR held in May of this year for all complainants, whether written or tape recorded.
>
> 4. The recorded vote of each member per decision for all complainants."

As of the date of your letter to this office, it appears that you had received no response. In this regard, I offer the following comments.

First, while I am not an expert concerning the assessment review process, I believe that you may seek review of your assessment in small claims court, the justice court in the Town. To obtain additional information pertaining to the process it is suggested that you contact the Office of Real Property Services, 16 Sheridan Ave., Albany, NY 12210-2714, or contact that office by phone at (518) 474-5446.

Second, pursuant to regulations promulgated by the Committee on Open Government that deal with the implementation of the Freedom of Information Law (21 NYCRR Part 1401), the Town Board is required to designate one or more persons as " records access officer." The records access officer has the duty coordinating the Town's response to requests. In most towns, the clerk is the records access officer. I note, too, that the clerk is also the legal custodian of all town records [see Town Law, §30(1)].

Third, if a record exists indicating the reason or reasons for the assessment of your property, I believe that such a record would be accessible under §87(2)(g)(iii) of the Freedom of Information Law. That provision requires that final agency determinations be disclosed.

Next, the Open Meetings Law is pertinent to the matter, for a board of assessment review is a "public body" required to comply with that statute [see Open Meetings Law, §102(2)]. While meetings of public bodies generally must be conducted in public unless there is a basis for entry into executive session, following public proceedings conducted by boards of assessment review, I believe that their deliberations could be characterized as "quasi-judicial proceedings" that would be exempt from the Open Meetings Law pursuant to §108(1) of that statute. It is emphasized, however, that even when the deliberations of such a board may be outside the coverage of the Open Meetings Law, its vote and other matters would not be exempt. As stated in Orange County Publications v. City of Newburgh:

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

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

Moreover, both the Freedom of Information Law and the Open Meetings Law impose record-keeping requirements upon public bodies. With respect to minutes of open meetings, §106(1) of the Open Meetings Law states that:

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

Further, since its enactment, the Freedom of Information Law has contained a related requirement in §87(3). The provision states in part that:

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

In my opinion, because an assessment board of review is a "public body" and an "agency", it is required to prepare minutes in accordance with §106 of the Open Meetings Law, including a record of the votes of its members in conjunction with §87(3)(a) of the Freedom of Information Law.

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

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied [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 Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed 57 NY2d 774 (1982)].

In an effort to enhance their understanding of compliance with law, copies of this opinion will be forwarded to Town officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board
Hon. Tammy Tuper
Board of Assessment Review

OML-AO-3532

From: Robert Freeman
To: [redacted]
Date: 10/17/02 3:40PM
Subject: Re:

Hi - -

You won't be jailed! The term "meeting" is defined to mean a gathering of a public body for the purpose of conducting public business. Inherent in the definition is the notion of intent, and if there was no intent that majority would gather, there is nothing that you could have done, and there would have been no obligation to provide notice.

My suggestion has been that if a majority of the board is present, perhaps by chance, and a discussion of public business seems to be beginning, one of those present should remind the group that a majority of the board gathered together to discuss public business could be construed as a meeting of the board, and that any such discussion should occur at a meeting held in compliance with the requirements of the Open Meetings Law. In other words, the discussion of public business should stop (or never begin), or one of the three should leave, ensuring that less than a majority is present.

I hope that this is helpful.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
Albany, NY 12231
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Website - www.dos.state.ny.us/coog/coogwww.html

Mullen, V.C

STATE OF NEW YORK
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OML-AO-3533

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October 18, 2002

Mr. Peter Henner
Attorney and Counselor at Law
P.O. Box 326
Clarksville, NY 12041-0326

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

Dear Mr. Henner:

I have received your letter in which you sought an advisory opinion concerning the propriety of certain actions of the Cherry Valley Planning Board in relation to the Open Meetings Law.

You indicated that you represent an organization opposed to a proposal by Global Winds Harvest to construct windfarms in the town of Cherry Valley and wrote that:

> "It has been reported that members of the Town Planning Board have been discussing this proposal during telephone calls, and during private meetings. In addition, my clients are concerned that members of the Town Planning Board may be meeting with representatives of Global Winds, and with representatives of various interested state agencies and authorities."

In this regard, I offer the following comments.

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

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

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

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

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

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

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

Second, 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 telephone calls, or a vote taken by phone, 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. 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."

A town planning board, based on the foregoing, is clearly a public body. Further, as recently amended, §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 Planning Board, 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, 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 a series of telephone calls or, for example, by e-mail.

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.

As you requested, a copy of this opinion will be sent to the Chairman of the Planning Board.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Christopher Ottman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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October 21, 2002

E-Mail

TO: Barbara Osterman [redacted]

FROM: Robert J. Freeman, Executive Director

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

Dear Ms. Osterman:

I have received your letter in which you questioned the actions of the Pittsford Central School District Board of Education in relation to the Open Meetings Law.

According to your letter, following a discussion held in public, the Assistant Superintended announced, in your words, that "an executive session would be convened to address a legal matter." The Board then entered into executive session with its two environmental attorneys, and later, when you asked the Assistant Superintendent about the subject matter of the closed door discussion, he said that "the Board can, at its discretion, meet with its attorneys at any time."

In this regard, I offer the following comments.

First, 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.

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

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

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

In my view, only to the extent that the Board discusses its litigation strategy may an executive session be properly held under §105(1)(d).

I note, too, that the courts have provided direction with respect to the sufficiency of a motion to discuss litigation, it has been held that:

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

Third, with respect to the Board's ability to meet with its attorneys in private, relevant 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.

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

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

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

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

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

Lastly, while it is not my intent to be overly technical, as suggested earlier, the procedural methods of entering into an executive session and asserting the attorney-client privilege differ. In the case of the former, the Open Meetings Law applies. In the case of the latter, because the matter is exempted from the Open Meetings Law, the procedural steps associated with conducting executive sessions do not apply. It has been suggested that when a meeting is closed due to the exemption under consideration, a public body should inform the public that it is seeking the legal advice of its attorney, which is a matter made confidential by law, rather than referring to an executive session.

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

RJF:jm

cc: Board of Education
Assistant Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OMC-AO-3535

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October 21, 2002

Alderman Frank P. Coccho, Sr.
City of Corning
[redacted]

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 Alderman Coccho:

As you are aware, I have received your letter of September 20. Please accept my apologies for the delay in response.

You have asked that I "cite for [you] where in the NYS Freedom of Information Law, a public body is permitted to conduct an 'executive' session for the purpose of discussing 'personnel'." You also requested that copies of my reply be sent to members of the Corning-Painted Post Board of Education.

In this regard, I believe, in the context of your correspondence, that you intended to refer to the Open Meetings Law. Based on that assumption, I offer the following comments.

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

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

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

Second, despite its frequent use, 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).

Third, 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 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)].

As you requested, copies of this response will be sent to those designated in your letter. I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Susan C. Aiello
Kenneth D. Burmeister
Richard C. Park
James. F. Young, Esq.
Frank Anastasio
Judith H. Dwyer
Thomas F. Regan
Rebecca Baker
Thomas O'Brien, Esq.
Dr. Dale R. Wexell

OML-AO-3536

From: Robert Freeman
To: David W. Quist
Date: 11/4/02 9:16AM
Subject: Re: committee listserves and open meetings law

Hi - -

If indeed communications are made via a listserve, the recipients open their mail at different times; I see no difference between the listserve and the old-fashioned interoffice memo, and there would be no Open Meetings Law implications. On the other hand if a majority of the members of a public body get together through a chat room or via instant messaging, it would be a "virtual" meeting that I believe would run afoul of the Open Meetings Law.

You might want to take a look at an opinion in our index under "E-Mail Meeting or Voting."

I hope that this helps.

All the best.

Bob

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- 3537

From: Robert Freeman
To: [redacted]
Date: 11/5/02 12:16PM
Subject: Dear Sir/Madam:

Dear Sir/Madam:

I have received your email in which you asked whether a town board may conduct an executive session "to discuss pay raises for elected officials including themselves."

In this regard, the only provision of significance in my view is section 105(1)(f) of the Open Meetings Law, which authorizes a public body, such as a town board, 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."

If, for instance, the discussion involves an across the board increase for elected officials, it would not involve or focus upon a "particular person" or individual performance. In that situation, there would be no basis for entry into executive session. On the other hand, if, for example, the discussion focuses on the town clerk and whether he or she merits an increase based on his or her performance, the matter would relate to a particular person, and to that extent, I believe that an executive session could validly be held.

I hope that I have been of assistance.

Robert J. Freeman
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OML-AO-3538

From: Robert Freeman
To: saizl@mail.sunyocc.edu
Date: 11/6/02 9:29AM
Subject: Dear Ms. Saiz:

Dear Ms. Saiz:

I have received your inquiry regarding the status of the Onondaga Student Services Association, Inc. at Onondaga Community College under the Open Meetings Law.

As you are likely aware, that statute typically applies to governmental entities and would not ordinarily apply to not-for-profit corporations. However, in a situation which appears to be virtually the same as that which you described, the Court of Appeals, the state's highest court, determined that an entity associated with a public educational institution having the authority to review budgets and allocate student activity fees and disbursements constitutes a "public body" that falls within the coverage of the Open Meetings Law [see Smith v. CUNY, 92 NY2d 707 (1999)]. That being so, I believe that the meetings of the Association must be held in accordance with the Open Meetings Law.

If you need additional information or a copy of the decision, please feel free to contact me.

I hope that I have been of assistance.

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

OML-AO-3539

Committee Members

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

November 6, 2002

Mr. Harry D. 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 September 25 and the materials attached to it. You have requested an advisory opinion concerning certain practices of the Pelham Board of Education in relation to the Open Meetings Law.

You indicated that the Board conducts executive sessions and then moves to a different location to hold the remainder of its meetings, and that there is no notice specifying the location of the executive sessions. Consequently, you asked whether the Board "must give public notice of the date, time, and place of the 'open meeting' in advance of its executive sessions, as well as of the 'public meetings' themselves." In this regard, the question appears to based on a mistaken assumption that executive sessions, "open meetings" and "public meetings" are in some way distinct. According to §102(1) of the Open Meetings Law, a "meeting" is a gathering of a majority of a public body, such as a board of education, for the purpose of conducting public business. I note that it was held more than twenty years ago that "work sessions", "study sessions" and similar gatherings held solely for the purpose of discussion and with no intent to take action constitute "meetings" that fall within the framework of the Open Meetings Law [see Orange County Publications v. Council of the City of Newburgh, 60 AD2d 409, aff'd 45 NY2d 947 (1978)]. Section 102(3) defines the phrase "executive session" to mean a portion of a meeting during which the public may be excluded. Therefore, an executive session is not separate from a meeting, but rather is a part of a meeting.

I note that there is nothing in the Open Meetings Law that refers to agendas or requires that an agenda be prepared. However, §104 of that statute specifies that "[p]ublic notice of the time and place of a meeting" must be given to the news media and to the public prior to every meeting by means of posting in one or more designated, conspicuous, public locations. 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 at least seventy-two hours prior to the meeting; if the meeting is scheduled less than a week advance,

notice of the time and place must be given, again, to the news media and by means of posting, at a reasonable time prior to the meeting. Therefore, if the Board intends to convene in a certain conference room, its notice must indicate that location as the site of the meeting.

Next, you asked how specific a motion for entry into executive session must be. 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)]

Another exception that is frequently cited relates to litigation, and §105(1)(d) permits a public body to enter into an executive session to discuss "proposed, pending or current litigation". In construing the language quoted above, it has been held that:

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

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

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

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

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

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

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

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

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

Lastly, with respect to a failure to comply with the Open Meetings Law, §107(1) states in part that:

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

In addition, subdivision (2) authorizes a court to award attorney's fees to the successful party in a suit brought under the Open Meetings Law.

In an effort to avoid litigation, it is my hope that this opinion will serve to educate, persuade and enhance compliance with the Open Meetings Law, and a copy will be sent to the Board of Education.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3540

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November 8, 2002

E-Mail

TO: Rose Mancuso <rmancuso@do.hpcsd.dcboces.org>

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Ms. Mancuso:

I have received your letter in which you raised issues concerning a subcommittee of a board of education that will be "touring various locations as possible sites for relocating of the District Office." You have asked whether you can indicate in the notice of the tour that "the matter is confidential."

In this regard, I offer the following comments.

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

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

The last clause of the definition refers to any "committee or subcommittee or similar body of [a] public body." Based on that language and judicial decisions, when a public body, such as a county legislature, creates or designates its own members to serve as a committee or subcommittee, the committee or subcommittee would constitute a public body subject to the requirements of the Open Meetings Law. Therefore, committees of the 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)].

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

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

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

Second, the 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 subcommittee 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. Further, the notice might indicate that, immediately after convening, a motion will be made to enter into executive session to discuss the acquisition of real property.

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

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

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

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

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

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

Notwithstanding the foregoing, there is case law dealing with might have been characterized as a "tour" or site visit. In that situation, the members of a public body were in a van, and it was held that "the Open Meetings Law was not violated" [City of New Rochelle v. Public Service Commission, 450 AD 2d 441 (1989)]. In that case, members of the Public Service Commission toured the proposed route of a power line in order to acquire a greater understanding of evidence previously presented. Based upon the court's conclusion, a site visit or tour by a public body, particularly on private property, would apparently not constitute a meeting, if the members merely observe and do not deliberate regarding their observations. It has been advised, however, that site visits or tours by public bodies should be conducted solely for the purpose of observation and acquiring information, and that any discussions or deliberations regarding such observations should occur in public during meetings conducted in accordance with the Open Meetings Law. The conclusion, as presented in an opinion rendered by this office was recently confirmed in Riverkeeper v. Planning Board of the Town of Somers (Supreme Court, Westchester County, June 14, 2002).

I hope that I have been of assistance.

RJF:jm

OML-AO-3541

From: Robert Freeman
To: [redacted]
Date: 11/13/02 5:21PM
Subject: Dear Ms. Harrington:

Dear Ms. Harrington:

If I understand your comments accurately, the confusion involves the distinction between a "meeting" and "hearing."

A "meeting", as you know, is a gathering of a quorum (a majority) of a public body for the purpose of conducting public business, deliberating and potentially taking action. If less than a quorum is present, the gathering would not be a meeting and no action could be taken.

A "hearing" typically involves a situation in which the public, by law, is given the opportunity to speak with particular matter, i.e., a town preliminary budget. While the entire town board usually attends, I know of no provision that requires that the whole board, or even a quorum of the board, must attend. If that is so, a hearing could validly be held, even though a quorum of the board is not present.

Since I am not an expert regarding the Town Law, I suggest that you might contact the Association of Towns for unequivocal guidance. The Association can be reached at (518)465-7933.

I hope that I have been of assistance.

Robert J. Freeman
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Website - www.dos.state.ny.us/coog/coogwww.html

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3541

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

November 15, 2002

Mr. William Bosley
[redacted]

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

Dear Mr. Bosley:

I have received your letter in which you asked whether you "are allowed to have a court reporter record the deliberations of the Planning Board" or "record those deliberations on videotape."

In this regard, it is noted at the outset that neither the Open Meetings Law nor any other statute of which I am aware deals specifically with the presence of a court reporter or the use of audio or video recording devices at open meetings of public bodies. However, there are judicial decisions pertaining to the use of audio and video equipment at open meetings. From my perspective, the decisions consistently apply certain principles. One is that a public body has the ability to adopt reasonable rules concerning its proceedings. The other involves whether the use of the equipment would be disruptive.

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

Notwithstanding Davidson, however, the Committee advised that the use of tape recorders should not be prohibited in situations in which the devices are unobtrusive, for the presence of such devices would not detract from the deliberative process. In the Committee's view, a rule prohibiting the use of unobtrusive tape recording devices would not be reasonable if the presence of such devices would not detract from the deliberative process.

This contention was initially confirmed in a decision rendered in 1979. That decision arose when two individuals sought to bring their tape recorders at a meeting of a school board in Suffolk

County. The school board refused permission and in fact complained to local law enforcement authorities who arrested the two individuals. In determining the issues, the court in People v. Ystueta, 418 NYS 2d 508, cited the Davidson decision, but found that the Davidson case:

> "was decided in 1963, some fifteen (15) years before the legislative passage of the 'Open Meetings Law', and before the widespread use of hand held cassette recorders which can be operated by individuals without interference with public proceedings or the legislative process. While this court has had the advantage of hindsight, it would have required great foresight on the part of the court in Davidson to foresee the opening of many legislative halls and courtrooms to television cameras and the news media, in general. Much has happened over the past two decades to alter the manner in which governments and their agencies conduct their public business. The need today appears to be truth in government and the restoration of public confidence and not 'to prevent star chamber proceedings'...In the wake of Watergate and its aftermath, the prevention of star chamber proceedings does not appear to be lofty enough an ideal for a legislative body; and the legislature seems to have recognized as much when it passed the Open Meetings Law, embodying principles which in 1963 was the dream of a few, and unthinkable by the majority."

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).

Further, I believe that the comments of members of the public, as well as public officials, may be recorded. As stated by the court in Mitchell.

> "[t]hose who attend such meetings, who decide to freely speak out and voice their opinions, fully realize that their comments and remarks are being made in a public forum. The argument that

> members of the public should be protected from the use of their words, and that they have some sort of privacy interest in their own comments, is therefore wholly specious" (id.).

In view of the judicial determination rendered by the Appellate Division, I believe that a member of the public may tape record open meetings of public bodies, so long as tape recording is carried out unobtrusively and in a manner that does not detract from the deliberative process.

The same conclusion was reached in Peloquin v. Arsenault [616 NYS 2d 716 (1994)], which cited Mitchell, as well as opinions rendered by this office. In that case, a village board of trustees, by resolution, banned the use of video recording devices at its meetings. In its determination, the court held that:

> "Hand held audio recorders *are* unobtrusive (*Mitchell*, supra); camcorders may or may not be depending, as we have seen, on the circumstances. Suffice it to say, however, in the fact of *Mitchell*, the Committee on Open Government's (Robert Freeman's) well-reasoned opinions supra and the court system's pooled video coverage rules/options, a blanket ban on all cameras and camcorders when the sole justification is a distaste for appearing on public access cable television is unreasonable. While 'distraction' and 'unobtrusive' are subjective terms, in the
> face of the virtual presumption of openness contained in Article 7 of the Public Officers Law and the insufficient justification offered by the Village, the 'Recording Policy' in issue here must fall" (id., 718).

In consideration of the foregoing, I believe that the public may use stenographic devices or audio or video recorders at open meetings of public bodies, so long as their use is not obtrusive or disruptive.

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-3943

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November 15, 2002

Mr. Thomas Sheppard
[redacted]

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

Dear Mr. Sheppard:

I have received your letter in which you requested an advisory opinion concerning the status of the Town of Cornwall's Comprehensive Plan Committee.

Based on judicial decisions, unless the Comprehensive Planning Committee consists solely of the members of a particular public body or has some sort of decision-making authority, it would not be subject to the Open Meetings Law.

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

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

In consideration of 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. The definition refers to committees, subcommittees and similar bodies of a public body, and judicial interpretations indicate that if a committee, for example, consists solely of members of a particular public body, it constitutes a public body [see e.g., Glens Falls Newspapers v. Solid Waste and Recycling Committee of the Warren County Board of Supervisors, 195 AD2d 898 (1993)]. For instance, in the case of a board of education consisting of seven members, four would constitute a quorum, and a gathering of that number or more for the purpose of conducting public business would be a meeting that falls within the scope of the Law. If that board designates a committee consisting of three of its members, the committee would itself be a

public body; its quorum would be two, and a gathering of two or more, in their capacities as members of that committee, would be a meeting subject to the Open Meetings Law.

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, if the Committee has no authority to take any final and binding action for or on behalf of a government agency, I do not believe that it constitutes a public body or, therefore, is obliged to comply with the Open Meetings Law.

The foregoing is not intended to suggest that the Committee cannot hold open meetings. On the contrary, it may choose to conduct meetings in public, and similar entities have done so, even though the Open Meetings Law does not require that they do so.

I hope that the preceding commentary serves to enhance your understanding of the Open Meetings Law and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. James Sollami
Town Board
James Loeb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3544

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November 15, 2002

E-MAIL

TO: Kevin Bluett [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. Bluett:

I have received your letter in which you questioned the propriety of executive sessions conducted by the Board of Trustees of the Village of Ilion. You also asked whether an "investigation" would be conducted concerning the matter.

In this regard, the Committee on Open Government is authorized to offer advice and opinions concerning the Open Meetings Law. The Committee has neither the resources nor the power to conduct an investigation. Nevertheless, in an effort to assist you and provide guidance to the Board, I offer the following remarks.

First and perhaps most significantly, in relation to the restrictions that you described, the Open Meetings Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Section 105(1) states in relevant part that:

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

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed, and the motion must be carried by majority vote of a public body's 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. That being so, a public body, such as a village board of trustees, cannot enter into an executive session to discuss the subject of its choice.

Second, from my perspective, the issues that were the subjects of executive sessions, "dissolving the natural gas program", "replacing a vehicle" and the purchase of new equipment, could not likely have been validly discussed in executive session. In short, it does not appear that any of the grounds for entry into executive session would have applied.

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

I regret that I cannot be of greater assistance.

RJF:tt

cc: Board of Trustees

OML-AO-3545

From: Robert Freeman
To: [redacted]
Date: 11/18/02 5:08PM
Subject: Dear Ms. Lancaster:

Dear Ms. Lancaster:

I have received your inquiry. In short, the courts have held that anyone may use a tape recorder at an open meeting of public body, so long as the use of the machine is not disruptive or obtrusive. When that is so, consent by the board is not a condition precedent to the use of the recording device.

To obtain additional, detailed information on the subject, go to our website (address is below), then to the advisory opinions rendered under the Open Meetings Law. Click on to "T" and scroll down to "tape recorders, use of". The higher numbered opinions are the most recent, and many will be accessible online in full text. They will include the kind of detail that you need.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
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STATE OF NEW YORK
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November 26, 2002

Mr. Harry D. 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 and the materials attached to it. You have questioned the propriety of delays in the preparation of minutes of meetings of the Pelham Board of Education.

In this regard, I offer the following comments.

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

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

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

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

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

Those circumstances would arise, for example, when a board initiates charges against a tenured person pursuant to §3020-a of the Education Law, which requires that a vote to do so be taken during an executive session. The other instance would involve a situation in which action in public could identify a student. When information derived from a record that is personally identifiable to a student, the federal Family Educational Rights and Privacy Act (20 USC §1232g) would prohibit disclosure absent consent by a parent of the student. Since §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 unproven charges and records identifiable to students may be withheld, minutes containing those kinds of information would not be accessible to the public.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3947

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November 26, 2002

Mr. Harry D. 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 in which you asked whether certain committees created by the Board of Education of the Pelham Union Free School District are subject to the Open Meetings Law.

As I understand the matter, the Board of Education consists of seven members, and the committees in question consist of two or three board members, as well as one District employee serving as administrative chair and one or perhaps two additional District employees.

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

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

Based on the foregoing, 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. The definition refers to committees, subcommittees and similar bodies of a public body, and judicial interpretations indicate that if a committee, for example, consists solely of members of a particular public body, it constitutes a public body [see e.g., Glens Falls Newspapers v. Solid Waste and Recycling Committee of the Warren County Board of Supervisors, 195 AD2d 898 (1993)]. For instance, in the case of a board of education consisting of seven members, four would constitute a quorum, and a gathering of that number or more for the purpose of conducting public business would be a meeting that falls within the scope of the Law. If that board designates

a committee consisting of three of its members, the committee would itself be a public body; its quorum would be two, and a gathering of two or more, in their capacities as members of that committee, would be a meeting subject to the Open Meetings Law.

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.).

The foregoing is not intended to suggest that an entity that is not subject to the Open Meetings Law cannot hold open meetings. On the contrary, it may choose to conduct meetings in public, and many entities have done so, even though the Open Meetings Law does not require that they do so.

In the context of your inquiry, it is unclear whether, for example, an "administrative chair" is a voting member of a committee, or whether other District employees are liaisons or voting members. If the only voting members are Board members, I believe that the committees in question would be subject to the Open Meetings Law. In that event, they would be required to provide notice of their meetings in the same manner as the Board of Education. On the other hand, if the committees' voting members include all of those identified, Board members and District employees, although the answer is unclear, the judicial decisions cited earlier suggest that they would not be subject to the Open Meetings Law.

I hope that I have been of assistance.

Sincerely,

Robert J . Freeman
Executive Director

RJF:tt

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3548

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November 26, 2002

Ms. Sheila Barr
[redacted]

The staff of the Committee on 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. Barr:

I have received your letter and the article attached to it. You have asked whether certain gatherings held within the Springville-Griffith Institute Central School District fell within the coverage of the Open Meetings Law.

You described a situation in which problems that have arisen in the District were discussed at a gathering attended by the Assistant District Superintendent, two members of the Board of Education, an attorney who serves an impartial hearing officer, District administrators, teachers and the director of a not-for-profit group that trains parents.

From my perspective, unless the Board of Education consists of three or fewer members, the Open Meetings Law would not have applied. In short, that statute pertains to meetings of public bodies, such as boards of education. A "meeting" is a gathering of a majority, a quorum, of a public body for the purpose of conducting public business, collectively, as a body. A quorum, according to §41 of the General Construction Law, which deals with matters involving quorum and majorities, is a majority of the total membership of a public body, notwithstanding absences, vacancies or the incapacity of members. Therefore, if, for example, a board of education consists of five members, its quorum would be three; if it consists of seven, its quorum would be four. I note that it has been held judicially that, in the absence of a quorum, the Open Meetings Law does not apply [Mobil Oil Corp. v. City of Syracuse Industrial Development Agency, 646 NYS2d 741, 224 AD2d 15, leave to appeal denied, 89 NY2d 811 (1997)].

Assuming that the two Board members who attended represent less than a quorum of the Board, the gathering would not have constituted a "meeting" for purposes of the Open Meetings Law, and that statute would not have conferred a right on the part of the public to attend. Further, if the gathering was not and was not intended to be a meeting of the Board of Education, there would have been no requirement that notice be given to the news media or posted.

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: Assistant District Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-13720
OML-AO-3519

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November 26, 2002

E-MAIL

TO: Kevin Bluett<[redacted]

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Mr. Bluett:

As you are aware, I have received your letter concerning the contents and accuracy of minutes of meetings of the Board of Trustees of the Village of Ilion. You indicated that you are seeking the minutes in an effort to ascertain the amount of wages earned by a Village official.

In this regard, I offer the following comments.

First, §106 of the Open Meetings Law deals specifically with minutes of meetings and states that:

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

Based on the foregoing, it is clear that minutes need not consist of a verbatim account of what is said. Rather, at a minimum, minutes must consist of a record or summary of motions, including a motion

to amend minutes, proposals, resolutions, action taken and the vote of each member. I note, too, that §4-402 (b) of the Village Law states that the clerk shall "act as clerk of the board of trustees and of each board of village officer and shall keep a record of their proceedings."

In my opinion, inherent in the provisions cited is an intent that they be carried out reasonably, fairly, with consistency, and that minutes be accurate. If, for instance, a member of the Village Board was not present, the minutes could not validly indicate that he or she introduced a motion or voted. If there is concern regarding the accuracy of minutes or a desire to have a verbatim account of statements made at a meeting, it has been suggested that a public body direct that a meeting be tape recorded.

Second, if the matter involves payments made to or wages earned by a particular Village officer or employee, I believe that the Freedom of Information Law would require the Village to disclose records insofar as the records include reference to gross wages.

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.

Although tangential to the matter, I point out that §87(3)(b) of the Freedom of Information Law states in relevant part that:

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

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

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

Based on the foregoing, a record identifying agency employees by name, public office address, title and salary must in my view be maintained and made available.

It has been contended that W-2 forms are specifically exempted from disclosure by statute on the basis of 26 USC 6103 (the Internal Revenue Code) and §697(e) of the Tax Law. In my

opinion, those statutes are not applicable in this instance. In an effort to obtain expert advice on the matter, I contacted the Disclosure Litigation Division of the Office of Chief Counsel at the Internal Revenue Service to discuss the issue. I was informed that the statutes requiring confidentiality pertain to records received and maintained by the Internal Revenue Service; those statutes do not pertain to records kept by an individual taxpayer [see e.g., Stokwitz v. Naval Investigation Service, 831 F.2d 893 (1987)], nor are they applicable to records maintained by an employer, such as a village. In short, the attorney for the Internal Revenue Service said that the statutes in question require confidentiality only with respect to records that it receives from the taxpayer.

In conjunction with the previous commentary concerning the ability to protect against unwarranted invasions of personal privacy, I believe that portions of W-2 forms could be withheld, such as social security numbers, home addresses and net pay, for those items are largely irrelevant to the performance of one's duties. However, for reasons discussed earlier, those portions indicating public officers' or employees' names and gross wages must in my view be disclosed. Further, in a recent decision, the same conclusion was reached judicially, and the court cited an advisory opinion rendered by this office (Day v. Town of Milton, Supreme Court, Saratoga County, April 27, 1992).

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3850

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

November 27, 2002

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, unless otherwise indicated.

Dear Mr. Kwasnicki:

I have received your letter in which you contended that a "secrete" [sic] meeting was held in the Village of Sloatsburg and that certain Village officials may have engaged in "misconduct."

As I understand the situation, the Open Meetings Law would not have applied, and the gathering at issue would not have been required to have been conducted in public, nor would there have been a requirement that it be preceded by public notice.

Based on §102(1) of the Open Meetings Law, a "meeting" is a gathering of a majority, or quorum, of a public body for the purpose of conducting public business collectively, as a body. In consideration of the facts that you provided, two of the five members of the Board of Trustees met with persons other than Board members to discuss certain matters. While the Mayor, a member of the Board of Trustees, appears to have been present for a moment, you wrote that he left the gathering. Having discussed the matter with a person who attended the gathering, I was informed that the Mayor departed immediately in order to ensure that there would be no hint of misconduct or suggestion that a quorum of the Board had gathered to conduct public business.

In short, I do not believe that the gathering in question constituted a "meeting" that fell within the coverage of the Open Meetings Law.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Hon. Carl Wright, Mayor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 13713
OML-AO - 3551

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December 2, 2002

E-MAIL

TO: William J. Schimpf<mayor@warwick.net>

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Mr. Schimpf:

As you are aware, I have received your inquiry concerning minutes of meetings of a village board of trustees.

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

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

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

If a more detailed or perhaps verbatim account of a meeting is desired, I note that the courts have held that anyone may record an open meeting, so long as the use of the recording device is unobtrusive and non-disruptive.

Second, although as a matter of practice, policy or tradition, many public bodies approve minutes of their meetings, there is nothing in the Open Meetings Law or any other statute of which I am aware that requires that minutes be approved. In an opinion of the State Comptroller, it was found that there is no statutory requirement that a town board approve minutes of a meeting, but that it was "advisable" that a motion to approve minutes be made after the members have had an opportunity to review the minutes (1954 Ops.St.Compt. File #6609). While it may be "advisable" for a board to review and approve minutes, there is no obligation to do so.

Lastly, you questioned whether the "official minutes are the sole property of one individual." In my view, minutes of meetings, like all village records, are the property of the village and subject to the control of the board of trustees [see Village Law, §4-412(1)]. While that is so, §4-402 of the Village Law states that the clerk "shall...have custody of the corporate seal, books, records and papers of the village..." From my perspective, the foregoing indicates that the minutes are the property of the village, not the clerk, but that the clerk has custody of those and all other village records. I note, too, that all village records, regardless of where or by whom they are kept or held, are subject to rights of access conferred by the Freedom of Information Law

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

RJF:tt

cc: Board of Trustees, Village of Maybrook
Village Clerk

OML-AO -3552

From: Robert Freeman
To: Regina W. Daly
Date: 12/2/02 9:19AM
Subject: Re: Concerned Citizens Against Crossgates v. Guilderland ZBA

Hi - -

Happy holidays to you, too!

Sorry...but your attorney is behind the times. The Crossgates case involved a provision in the Open Meetings Law, section 108(1), which pertains to an "exemption". When an exemption applies, the Open Meetings Law does not; it is as though that law does not exist. The exemption at issue states that judicial and quasi-judicial proceedings are exempt from the coverage of the Open Meetings Law, and the Crossgates decision indicated that the deliberations of a zoning board of appeals were quasi-judicial and, therefore, beyond the coverage of that statute. However, perhaps in response to the decision, the Open Meetings Law was amended soon after. For nearly twenty years, it has stated that quasi-judicial proceedings are exempt from the Open Meetings Law, "except proceedings of...zoning boards of appeals." That being so, unless there is a basis for entry into executive session, which is unlikely, the deliberations of the Board should be conducted in public.

I will send you a more detailed opinion providing some background regarding the change in the law and the brochure that you requested.

All the best,
Bob

Robert J. Freeman
Executive Director
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December 2, 2002

Ms. Cindy Lanzetta
[redacted]

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. Lanzetta:

I have received your letter in which you requested an advisory opinion concerning restrictions proposed by the Town of Marlboro concerning the ability to videotape meetings of the Town Board and the Planning Board. The proposed resolution states that:

> "1. Notice needs to be given on who is going to do the taping, what group or organization they represent, what is the intended use of the tape, and if copies of the tape will be available.
>
> 2. The area designated for taping will be in the rear of the meeting room as marked.
>
> 3. The video recording equipment is to be stationary, and there is to be no altering of lenses, panning of audience or any other alteration of the equipment during the meeting.
>
> 4. No accessory equipment shall be placed outside the designated area.
>
> 5. Additional lighting is prohibited.
>
> 6. All emergency exits will be free of any obstructions cables, tripods, people, etc.
>
> 7. The Town of Marlborough is not liable for any equipment used for the taping of the meetings.

> 8. The Town designated Chairperson of the public meeting may alter this policy at his or her discretion."

In this regard, although you indicated that you are familiar with opinions rendered by this office that relate to the matter, since a copy of this response will be sent to the Town Board, I would like to provide background information for the benefit of the Board by describing the history of judicial decisions involving the use of recording devices at meetings, as well as a focus on particular issues relating to the proposal. Several elements of the proposal are of questionable validity, and in this regard, I offer the following comments.

It is noted at the outset that neither the Open Meetings Law nor any other statute of which I am aware deals with the use of audio or video recording devices at open meetings of public bodies. As you inferred, there is a recent judicial decision pertaining to the use of video equipment, and there are several concerning the use of audio tape recorders at open meetings. From my perspective, the decisions consistently apply certain principles. One is that a public body has the ability to adopt reasonable rules concerning its proceedings. The other involves whether the use of the equipment would be disruptive.

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

Notwithstanding Davidson, however, the Committee advised that the use of tape recorders should not be prohibited in situations in which the devices are unobtrusive, for the presence of such devices would not detract from the deliberative process. In the Committee's view, a rule prohibiting the use of unobtrusive tape recording devices would not be reasonable if the presence of such devices would not detract from the deliberative process.

This contention was initially confirmed in a decision rendered in 1979. That decision arose when two individuals sought to bring their tape recorders at a meeting of a school board in Suffolk County. The school board refused permission and in fact complained to local law enforcement authorities who arrested the two individuals. In determining the issues, the court in People v. Ystueta, 418 NYS 2d 508, cited the Davidson decision, but found that the Davidson case:

> "was decided in 1963, some fifteen (15) years before the legislative passage of the 'Open Meetings Law', and before the widespread use of hand held cassette recorders which can be operated by individuals without interference with public proceedings or the legislative process. While this court has had the advantage of hindsight, it would have required great foresight on the part of the court in Davidson to foresee the opening of many legislative halls and courtrooms to television cameras and the news media, in general.

> Much has happened over the past two decades to alter the manner in which governments and their agencies conduct their public business. The need today appears to be truth in government and the restoration of public confidence and not 'to prevent star chamber proceedings'...In the wake of Watergate and its aftermath, the prevention of star chamber proceedings does not appear to be lofty enough an ideal for a legislative body; and the legislature seems to have recognized as much when it passed the Open Meetings Law, embodying principles which in 1963 was the dream of a few, and unthinkable by the majority."

More recently, the Appellate Division, unanimously affirmed a decision which annulled a resolution adopted by a board of education prohibiting the use of tape recorders at its meetings and directed the board to permit the public to tape record public meetings of the board [Mitchell v. Board of Education of Garden City School District, 113 AD 2d 924 (1985)]. In so holding, the Court stated that:

> "While Education Law sec. 1709(1) authorizes a board of education to adopt by-laws and rules for its government and operations, this authority is not unbridled. Irrational and unreasonable rules will not be sanctioned. Moreover, Public Officers Law sec. 107(1) specifically provides that 'the court shall have the power, in its discretion, upon good cause shown, to declare any action *** taken in violation of [the Open Meetings Law], void in whole or in part.' Because we find that a prohibition against the use of unobtrusive recording goal of a fully informed citizenry, we accordingly affirm the judgement annulling the resolution of the respondent board of education" (id. at 925).

Further, I believe that the comments of members of the public, as well as public officials, may be recorded. As stated by the court in Mitchell:

> "[t]hose who attend such meetings, who decide to freely speak out and voice their opinions, fully realize that their comments and remarks are being made in a public forum. The argument that members of the public should be protected from the use of their words, and that they have some sort of privacy interest in their own comments, is therefore wholly specious" (id.).

In view of the judicial determination rendered by the Appellate Division, I believe that a member of the public may tape record open meetings of public bodies, so long as tape recording is carried out unobtrusively and in a manner that does not detract from the deliberative process.

The same conclusion was reached in Peloquin v. Arsenault [616 NYS 2d 716 (1994)], which cited Mitchell, as well as opinions rendered by this office. In that case, a village board of trustees,

by resolution, banned the use of video recording devices at its meetings. In its determination, the court held that:

> "Hand held audio recorders *are* unobtrusive (*Mitchell*, supra); camcorders may or may not be depending, as we have seen, on the circumstances. Suffice it to say, however, in the fact of *Mitchell*, the Committee on Open Government's (Robert Freeman's) well-reasoned opinions supra and the court system's pooled video coverage rules/options, a blanket ban on all cameras and camcorders when the sole justification is a distaste for appearing on public access cable television is unreasonable. While 'distraction' and 'unobtrusive' are subjective terms, in the face of the virtual presumption of openness contained in Article 7 of the Public Officers Law and the insufficient justification offered by the Village, the 'Recording Policy' in issue here must fall" (id., 718).

Section 1 of the resolution would require that notice be given prior to taping, as well as the intended use of the tape. Based on judicial decisions, I do not believe that a board could require that advance notice of an intent to record can be required or that taping can be conditioned on the intended use of a tape. I note that the Court in Mitchell referred to "the unsupervised recording of public comment" (supra). In my view, the term "unsupervised" indicated that no permission or advance notice is required in order to record a meeting. The Court also stated that:

> "Nor are we persuaded by the appellants' contention that since recordings can be edited, altered, or used out of context, the Board was justified in forbidding their use altogether. Clearly if the Board were to prohibit the use of pen, pencil and paper, because of the potential for misquotation, such a restriction would be unreasonable and arguably violative of the 1st Amendment. A contemporaneous recording of a public meeting is undoubtedly a more reliable, accurate and efficient means of memorializing what is said at the proceeding. Once the information and comments are conveyed to the public, it should be of no consequence that they may subsequently be repeated, by means of replay, to those who were unable to attend" (id.).

Situations often arise in which prior notice or permission to record would represent an unreasonable impediment. 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, or a resident of the Town, 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 the agenda. If an item of importance or newsworthiness arises in that manner, what reasonable basis would there be for prohibiting a person in attendance, whether an employee, a

member of the public or a member of the news media representing the public, from recording that portion of the meeting so long as the recording is carried out unobtrusively? In my view, there would be none.

In short, so long as a recording device is used in an unobtrusive manner, I do not believe that a public body could prohibit its use by policy or rule. That principle would also apply with respect to the "panning" of the audience. If a camera can capture on tape those in attendance without being disruptive or obtrusive, that aspect of section 3 of the policy would, in my view, be inconsistent with law.

Lastly, the last section of the policy indicates that the chairperson at a meeting may alter the policy at his or her discretion. Typically a chairperson presides at meetings and attempts to ensure that the rules or policies of a public body are followed. However, since the chairperson is one among a number of members, i.e., one among five members of a town board, I believe that only the board or other public body may, by means of a majority vote of its total membership, alter a rule or policy. Consistent with this view is §63 of the Town Law, which provides in part that the supervisor presides at meetings of a town board, but that the board prescribes the rules of procedure.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 2, 2002

E-MAIL

TO: Pamela Stiegman <pstiegman@peoplepc.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 Ms. Steigman:

As you are aware, I have received your correspondence. In your capacity as Town Clerk, you have sought to convince the Town Board that its "workshops" and "unannounced meetings" must be held in accordance with the Open Meetings Law. It appears that the Board has held and taken action at those gatherings without informing you or the public, thereby effectively precluding you from preparing minutes and carrying out your statutory duties.

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

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

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

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

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

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

Based upon the direction given by the courts, if a majority of a public body gathers to discuss public business, any such gathering, in my opinion, would ordinarily constitute a "meeting" subject to the Open Meetings Law. Since a workshop held by a majority of a public body is a "meeting", it would have the same responsibilities in relation to notice and the taking of minutes as in the case of a formal meeting, as well as the same ability to enter into executive sessions.

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

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

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

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

Second, §30(1) of the Town Law states in relevant part that the town clerk:

> "Shall have the custody of all the records, books and papers of the town. He shall attend all meetings of the town board, act as clerk thereof, and keep a complete and accurate record of the proceedings of each meeting..."

Although that provision requires that the clerk be present at each meeting of the town board for the purpose of taking minutes, it might not be reasonable to construe §30(1) to require the presence of a clerk at a "workshop" during which there are no motions, proposals, resolutions or votes taken. Section 30 of the Town Law was enacted long before the Open Meetings Law went into effect. Consequently, the drafters of §30 could not likely have envisioned the existence of an extensive Open Meetings Law analogous to the statute now in effect. I believe that §30 was likely intended to require the presence of a clerk to take minutes in situations in which motions and resolutions are introduced and in which votes are taken. If those actions clearly will not occur during a workshop, it is in my view unnecessary that a town clerk be present to take minutes. However, if there is a likelihood or possibility that motions will be made or action taken, I believe that the clerk should be present so that she may carry out her statutory duties. Again, it is emphasized that the gatherings at issue constitute meetings that must be preceded by notice given to the public and the media and held open to the public as required by the Open Meetings Law.

I hope that I have been of assistance.

RJF:tt

OML-AO-3555

From: Robert Freeman
To: [redacted]
Date: Mon, Dec 2, 2002 3:31 PM
Subject: Re: Help?

Hi - -

In my view, unless the action taken includes specificity to the contrary or includes a particular effective date, it becomes effective immediately. Also, there is nothing in the Open Meetings Law or any other law that requires that minutes be approved. In most instances, boards do approve their minutes, but they do so based on tradition, policy or internal rule, not pursuant to law.

You may recall, too, that minutes must, according to section 106 of the Open Meetings Law, be prepared and made available within two weeks. If it is the practice is to approve the minutes but they have not been approved within two weeks of a meeting, it has been suggested that the clerk (or whoever prepares the minutes) should prepare and disclose them within that time and mark or stamp them as "unapproved", "draft", or "preliminary", for example. By so doing, there would be compliance with law and, at the same time, a warning to the recipients that the minutes are subject to change.

I hope that this helps and that you and your family will be well and happy.

Robert J. Freeman
Executive Director
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December 3, 2002

Mr. William C. Tountas
[redacted]

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

Dear Mr. Tountas:

I have received your letter and the materials attached to it. You have raised a variety of issues relating to the implementation of the Open Meetings Law by the Board of Education of the Herricks Union Free School District. Based on a review of the materials, I offer the following comments.

First, a focus of your concern relates to a "retreat" conducted by the Board. The initial portion of that gathering involved "Building and Strengthening our Relationship" and "The Importance of Teamwork and Communication"; the later session involved "Board Goals and Objectives for 2002-03." From my perspective, the initial portion might not have been subject to the Open Meetings Law; the latter, however, which was held open to the public, would have fallen within the coverage of that statute.

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

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

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

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

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

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

Based upon the direction given by the courts, when a majority of a public body gathers to discuss public business, in their capacities as members of the body, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law. However, if there is no intent that a majority of public body will gather for purpose of conducting public business, but rather for the purpose of gaining education, training, to develop or improve team building or communication skills, or to consider interpersonal relations, I do not believe that the Open Meetings Law would be applicable.

In that event, if the gathering is to be held solely for those purposes rather than conducting public business, and if the members in fact do not conduct or intend to conduct public business collectively as a body, the activities occurring during that event would not in my view constitute a meeting of a public body subject to the Open Meetings Law. On the other hand, a gathering held for the purpose of discussing goals and objectives would, in my view, clearly involve the conduct of public business and would constitute a "meeting" that must be held in a manner consistent with the Open Meetings Law.

If the initial portion of the retreat was not subject to the Open Meetings Law, I do not believe that the Board would have been required to have given notice. When a meeting subject to that statute is scheduled, notice must be given in accordance with §104 of the Open Meetings Law, which states that:

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

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

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

As you are aware, many public bodies prepare agendas as a matter of practice or policy and include them with notices of meetings, but there is no legal obligation to do so. Further, unless an entity has established a policy or rule to the contrary, there is no requirement that public body adhere to its agenda.

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

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

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. Ct., 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.

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

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

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

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

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

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

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

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

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

> "...the public body must identify the subject matter to be discussed (See, Public Officers Law § 105 [1]), and it is apparent that this must be accomplished with some degree of particularity, i.e., merely reciting the statutory language is insufficient (see, Daily Gazette Co. v Town Bd., Town of Cobleskill, 111 Misc 2d 303, 304-305). Additionally, the topics discussed during the executive session must remain within the exceptions enumerated in the statute (see generally, Matter of Plattsburgh Publ. Co., Div. of Ottaway Newspapers v City of Plattsburgh, 185 AD2d §18), and these exceptions, in turn, 'must be narrowly scrutinized, lest the article's clear mandate be thwarted by thinly veiled references to the areas delineated thereunder' (Weatherwax v Town of Stony Point, 97 AD2d 840, 841, quoting Daily Gazette Co. v Town Bd., Town of Cobleskill, supra, at 304; see, Matter of Orange County Publs., Div. of Ottaway Newspapers v County of Orange, 120 AD2d 596, lv dismissed 68 NY 2d 807).
>
> "Applying these principles to the matter before us, it is apparent that the Board's stated purpose for entering into executive session, to wit, the discussion of a 'personnel issue', does not satisfy the requirements of Public Officers Law § 105 (1) (f). The statute itself requires, with respect to personnel matters, that the discussion involve the 'employment history of a particular person" (id. [emphasis supplied]). Although this does not mandate that the individual in question be identified by name, it does require that any motion to enter into executive session describe with some detail the nature of the proposed discussion (see, State Comm on Open Govt Adv Opn dated Apr. 6, 1993), and we reject respondents' assertion that the Board's reference to a 'personnel issue' is the functional equivalent of identifying 'a particular person'" [Gordon v. Village of Monticello, 620 NY 2d 573, 575; 207AD 2d 55, 58 (1994)]

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

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

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

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

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

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

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

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

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

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

Lastly, with respect to delays in responding to requests for records, 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.

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, or if they are readily retrievable, there may be no basis for a lengthy delay in disclosure. A recent judicial decision cited and confirmed the advice rendered by this office. In Linz v. The Police Department of the City of New York (Supreme Court, New York County, NYLJ, December 17, 2001), it was held that:

> "In the absence of a specific statutory period, this Court concludes that respondents should be given a 'reasonable' period to comply with a FOIL request. The determination of whether a period is reasonable must be made on a case by case basis taking into account the volume of documents requested, the time involved in locating the material, and the complexity of the issues involved in determining whether the materials fall within one of the exceptions to disclosure. Such a standard is consistent with some of the language in the opinions, submitted by petitioners in this case, of the Committee on Open Government, the agency charged with issuing advisory opinions on FOIL."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, or if the acknowledgement of the receipt of a request fails to include an estimated date for granting or denying access, 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)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3557

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

December 5, 2002

E-Mail

TO: Laurel Saiz <saizl@mail.sunyocc.edu>

FROM: Robert J. Freeman, Executive Director

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

Dear Ms. Saiz:

As you are aware, I have received your letter in which you sought an opinion concerning the status under the Open Meetings Law of the Onondaga Student Services Association, Inc. ("the Association"), a not-for-profit corporation that "receives and administers all funding for student activities generated by the student fee at Onondaga Community College." The Association's Board of Directors, according to your letter, consists of "faculty, students and administrators."

In this regard, a decision rendered by the Court of Appeals, the state's highest court, dealt with virtually the same issue in Smith v. CUNY [92 NY2d 707 (1999)]. That case involved whether the Fiorello H. LaGuardia Community College Association, Inc. is a "public body" subject to the Open Meetings Law. In describing its nature and functions, the Court wrote that:

> "The Association, Inc. is an organization comprised of administrators, faculty members and students. It is authorized to review proposed budgets, to allocate student activity fees and to authorize disbursements. CUNY collects a student activity fee from all students as a condition of enrollment. The Association, Inc. maintains the student activity fees in an account in its name" (id., 711).

The issue in Smith and in the situation that you presented is whether the entities in question constitute public bodies that fall within the scope of the Open Meetings Law. Section 102(2) of that statute defines the phrase "public body" to mean:

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

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

Nevertheless, in view of its functions and its relationship to a community college, The Court of Appeals found in Smith that the entity analogous to the Association is subject to the Open Meetings Law. Specifically, 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 Association is clearly "not just a club or extracurricular activity". On the contrary, if the description of its functions is accurate, it administers all funding for student activities based on moneys generated by student fees. Based on

the holding in Smith, therefore, I believe that the Board of the Association is a public body required to comply with and conduct its meetings in accordance with the Open Meetings Law.

I hope that I have been of assistance.

RJF:jm

cc: Board of Trustees, Onondaga Community College
Board of Directors, Onondaga Student Services Association, Inc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3558

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December 5, 2002

Hon. Raymond Doran
Village Trustee
Village of Lindenhurst
[redacted]

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

Dear Trustee Doran:

I have received your letter in which you sought an advisory opinion concerning the conduct of meetings of the Board of Trustees of the Village of Lindenhurst, upon which you serve. In an effort to respond to your remarks, I offer the following comments.

First, there is nothing in the Open Meetings Law or any other statute of which I am aware that pertains to or requires the preparation of an agenda. Similarly, unless a public body, such as a board of trustees, has established a rule or policy to the contrary, there is no obligation to follow an agenda that has been prepared, nor is there a prohibition against discussing matters that do not appear on an agenda.

Second, §102(1) of the Open Meetings Law defines the term "meeting" to mean "the official convening of a public body for the purpose of conducting public business". It is emphasized that the definition 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 Village 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.

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

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

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

Next, I do not believe that a public body may take action by phone; on the contrary, 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 Trustees, 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, 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 a series of telephone calls or, for example, by e-mail. I note, too, that in order to have a quorum, "reasonable notice" must be given to all the members. According to the materials that you provided, one of the members received no notice.

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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

OML-AO-3559

From: Robert Freeman
To: [redacted]
Date: 12/6/02 12:28PM
Subject: Dear Ms. Gardner:

Dear Ms. Gardner:

I have received your inquiry concerning the ability of members of the public to express their views and engage in debate at meetings held in the Saugerties School District.

While I agree that debate is healthy and that there should be a forum for the exchange of ideas, the Open Meetings Law deals with meetings of public bodies (i.e., boards of education) and it is silent with respect to public participation at meetings. In short, although any person has the right to attend an open meeting of a public body, the law confers no public right to speak at a meeting.

I note that most public bodies authorize public participation of some sort. It has been suggested in those instances that they do so by adopting reasonable rules that treat members of the public equally (i.e., to avoid enabling some to speak for ten minutes but others for only two or perhaps not at all).

It is also noted that the Board of Education is the governing body and that it has the authority to adopt rules; the Superintendent is not the rulemaker. I suggest that you and others might approach Board members, either individually or as a group, and express your views concerning what you believe to be an appropriate format, perhaps one in which all of those present can hear all of the questions and answers at the same time.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
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December 10, 2002

E-MAIL

TO: Ron Johnson <[redacted]

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Mr. Johnson:

Your inquiry sent to the Department of State concerning site visits made by the Town of Massena Planning Board has been forwarded to the Committee on Open Government. The Committee, a unit of the Department, is authorized to offer advisory opinions relating to the Open Meetings Law.

As Chair of the Board, you indicated that the purpose of the site visits is to "get a better understanding of the site", that they are "of an educational nature" and that "no planning board business is conducted during these visits." From my perspective, based on the language of the Open Meetings Law and judicial decisions, the site visits as you described them likely fall outside the coverage of the Open Meetings Law.

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

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

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

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

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

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

There is case law, however, dealing with might have been characterized as a field trip or site visit. In the first decision, the members of a public body were in a van, and it was held that "the Open Meetings Law was not violated" [City of New Rochelle v. Public Service Commission, 450 AD 2d 441 (1989)]. In that case, members of the Public Service Commission toured the proposed route of a power line in order to acquire a greater understanding of evidence previously presented. More recently, in Riverkeeper v. The Planning Board of the Town of Somers (Supreme Court, Westchester County, June 14, 2002), it was concluded that a site visit by a Planning Board does not constitute a meeting subject to the Open Meetings Law so long as its purpose is not "for anything other than to 'observe and acquire information.'" The court in that decision cited and apparently relied on advisory opinion rendered by this office in which it was suggested that:

> "...site visits or tours by public bodies should be conducted solely for the purpose of observation and acquiring information, and...any discussions or deliberations regarding such observations should occur in public during meetings conducted in accordance with the Open Meetings Law."

I hope that the foregoing will be useful to you and the Board and that I have been of assistance.

RJF:tt

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December 11, 2002

Ms. Dale C. Mangan
[redacted]

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. Mangan:

I have received your letter and the materials attached to it. You have raised a variety of issues relating to a request made under the Freedom of Information Law and the implementation of the Open Meetings Law by the Southern Cayuga School District Board of Education.

Having reviewed the materials, I offer the following comments.

First, your request involved "a list of all employees, past & present for whom the District paid for the fingerprinting process - Including the date it was done & their title." In response to the request, you were informed that "Record is not maintained by this school." Here I point out that the Freedom of Information Law pertains to existing records, and that §89(3) states in relevant part that an agency is not required to create a record in response to a request. In the context of the situation that you described, I would conjecture that there is no "list" that contains the items that you requested. If that is so, the District would not be required to prepare a list containing those items on your behalf. In the future, rather than seeking a "list" that may not exist, it is suggested that you request records, i.e., records identifying those employees who were fingerprinted by or for the District.

Second, with respect to meetings of the Board, the minutes attached to your letter indicate that the Board may schedule a meeting to begin at certain time in the Superintendent's office for the purpose of conducting a "proposed executive session", to be followed by an open session in a different location. From my perspective, assuming that the initial gathering is convened open to the public, that the Board complies with the procedure for entry into executive session and in fact discusses matters that may properly be discussed in private, it would be acting in compliance with law.

In this regard, it is noted that the definition of "meeting" [see Open Meetings Law, §102(1) has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be 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 District business, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law. Further, I believe that the Board's discussion of its agenda is itself a meeting.

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

> "Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of

> the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

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

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

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

For the reasons expressed in the preceding commentary, a public body cannot in my view schedule an executive session in advance of a meeting. In short, because a vote to enter into an executive session must be made and carried by a majority vote of the total membership during an open meeting, technically, it cannot be known in advance of that vote that the motion will indeed be approved. However, an alternative method of achieving the desired result that would comply with the letter of the law has been suggested in conjunction with similar situations. Rather than scheduling an executive session, the Superintendent or the Board on its agenda or notice of a meeting could refer to or schedule a motion to enter into executive session to discuss certain subjects. Reference to a motion to conduct an executive session, or as in this instance, a "proposed" 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. In my view, indicating that an executive session is "proposed" would not be inconsistent with law.

The primary issue concerning the executive sessions is whether or the extent to which they are properly held. Paragraphs (a) through (h) of §105(1) specify and limit the subjects that may properly be considered during an executive session. Therefore, a public body cannot enter into an

executive session to discuss the subject of its choice. If indeed executive sessions are held to develop or review the agendas, the authority to enter into executive session may rarely arise.

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

Even when information might have been obtained during an executive session properly held or from records marked "confidential", I note that the term "confidential" in my view has a narrow and precise technical meaning. For records or information to be validly characterized as confidential, I believe that such a claim must be based upon a statute that specifically confers or requires confidentiality.

For instance, if a discussion by a board of education concerns a record pertaining to a particular student (i.e., in the case of consideration of disciplinary action, an educational program, an award, etc.), the discussion would have to occur in private and the record would have to be withheld insofar as public discussion or disclosure would identify the student. As you may be aware, the Family Educational Rights and Privacy Act (20 USC §1232g) generally prohibits an educational agency from disclosing education records or information derived from those records that are identifiable to a student, unless the parents of the student consent to disclosure. In the context of the Open Meetings Law, a discussion concerning a student would constitute a matter made confidential by federal law and would be exempted from the coverage of that statute [see Open Meetings Law, §108(3)]. In the context of the Freedom of Information Law, an education record would be specifically exempted from disclosure by statute in accordance with §87(2)(a). In both contexts, I believe that a board of education, its members and school district employees would be prohibited from disclosing, because a statute requires confidentiality.

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

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

Lastly, you asked what recourse you might have when you are the subject of discussion in executive session. That question in my view cannot be answered via the provisions of the Freedom of Information or Open Meetings Laws, and, therefore, I cannot effectively respond.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

STATE OF NEW YORK
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December 16, 2002

Mr. Ted Rejman
[redacted]

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. Rejman:

As you are aware, I have received your letter in which you raised a series of questions concerning your role as a member of the Southern Cayuga Central School Board of Education. Having reviewed the questions, I note that the duties of this office involve offering advice pertaining to the Freedom of Information and Open Meetings Laws. That being so, my remarks will be limited to matters to which those statutes relate.

You wrote that the Board has "scheduled executive sessions at every meeting prior to open session." 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.

As suggested above, a public body cannot conduct an executive session to discuss the subject of its choice. Paragraphs (a) through (h) of §105(1) specify and limit the subjects that can properly be considered during an executive session. One of your questions involves the propriety of executive sessions "for the purposes of interrogating a Board member about his actions as a Board Member." In my view, it is unlikely that there would be a basis for entry into executive session in that situation. The only provision that may be pertinent, paragraph (f), authorizes a public body to enter into executive session to discuss:

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

From my perspective, the "interrogation" of a board member concerning his actions would not likely fall within the subject areas appearing in the language quoted above.

With regard to your ability to speak, disclose or discuss issues relating to your duties, I believe, in general, that elected government officials should do so in order to represent the public, and to enable the public to know how they approach or feel about issues of significance. As your questions relate to matters involving open government statutes, I note that both the Open Meetings Law and the Freedom of Information Law are permissive. While the Open Meetings Law authorizes public bodies to conduct executive sessions in circumstances described in paragraphs (a) through (h) of §105(1), there is no requirement that an executive session be held even though a public body has right to do so. Further, the introductory language of §105(1), which prescribes a procedure that must be accomplished before an executive session may be held, clearly indicates that a public body "may" conduct an executive session only after having completed that procedure. If, for example, a motion is made to conduct an executive session for a valid reason, and the motion is not carried, the public body could either discuss the issue in public, or table the matter for discussion in the future. Similarly, although the Freedom of Information Law permits an agency to withhold records in accordance with the grounds for denial, it has been held by the Court of Appeals, the state's highest court, that the exceptions are permissive rather than mandatory, and that an agency may choose to disclose records even though the authority to withhold exists [Capital Newspapers v. Burns], 67 NY 2d 562, 567 (1986)].

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

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

In a case in which the issue was whether discussions occurring during an executive session held by a school board could be considered "privileged", it was held that "there is no statutory provision that describes the matter dealt with at such a session as confidential or which in any way

restricts the participants from disclosing what took place" (Runyon v. Board of Edcuation, West Hempstead Union Free School District No. 27, Supreme Court, Nassau County, January 29, 1987).

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Education

STATE OF NEW YORK
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December 18, 2002

Mr. Frank Ioli
[redacted]

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

Dear Mr. Ioli:

I have received your letter in which you indicated that you are "confused" with respect to the obligation imposed on a public body, such as a zoning board of appeals, to prepare minutes of meetings.

In this regard, the Open Meetings Law contains what might be viewed as minimum requirements concerning the contents of minutes. Specifically, §106 of the Open Meetings Law states that:

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

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

Lastly, since the Open Meetings Law does not require the preparation of detailed or expansive minutes, I point out that it has been held that a member of the public may record an open meeting, so long as the recording device is used in an inconspicuous and unobtrusive manner [see e.g., Mitchell v. Board of Education of the Garden City Union Free School District, 113 AD2d 924 (1985); Peloquin v. Arsenault, 616 NYS2d 716 (1994)].

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: Charles L. Kelsey
Zoning Board of Appeals

STATE OF NEW YORK
DEPARTMENT OF STATE
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December 18, 2002

Ms. Judith Mirbegian
[redacted]

The staff of the Committee on 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. Mirbegian:

I have received your letter in which you sought an advisory opinion concerning the application of the Open Meetings Law to "pre-meeting gatherings" held in private. You wrote that "[t]hese meetings constitute a quorum of [your] Board of Legislators and all people involved are Republicans", and that the "express intent of these members is to exclude the members who are Democrats and to exclude the public."

From my perspective, assuming that the "pre-meeting gatherings" are characterized as political caucuses, the Open Meetings Law would not apply. In this regard, I offer the following comments.

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 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 of Legislators is present to discuss County business, such a gathering, in my opinion, would ordinarily constitute a "meeting" subject to the Open Meetings Law, unless the meeting or a portion thereof is exempt from the Law.

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

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

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

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

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

In my view, there is currently no legal means of requiring the majority caucus to discuss public business in public. It is suggested that you and others express your feelings to the majority members in an effort to encourage them to refrain from conducting public business in private or that you express your views to your representatives in the State Legislature.

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 Legislators

STATE OF NEW YORK
DEPARTMENT OF STATE
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December 19, 2002

E-MAIL

TO: Gerard K. Hannon <[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. Hannon:

I have received your letter in which you sought guidance concerning the notice requirements imposed by the Open Meetings Law.

You referred to the recent creation of library district and the designation of a board of trustees. The first meeting of the board was scheduled for November 26, "but the only way some would know this is if they visited one of our four school buildings in, as a notice of the meeting [was] posted on the door." You contend that posting notice in that manner "seems inherently unfair as residents who have no cause to visit the schools on a daily basis would not see such a notice." More appropriate in your view would be posting notice "on a large message board, at the entrance to the high school."

From my perspective, the posting of notice at four schools appears to have reflected compliance with the Open Meetings Law, even if notice posted elsewhere might be more visible.

In this regard, §104 of the Open Meetings Law pertains to notice of meetings of public bodies and states that:

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

> 2. Public notice of the time and place of every other meeting shall be given to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.
>
> 3. The public notice provided for by this section shall not be construed to require publication as a legal notice.
>
> 4. If videoconferencing is used to conduct a meeting, the public notice for the meeting shall inform the public that videoconferencing will be used, identify the locations for the meeting, and state that the public has the right to attend the meeting at any of the locations."

The language quoted above imposes a dual requirement, for notice must be posted in one or more "designated" conspicuous, public locations, and in addition, notice must be given to the news media. The term "designated" in my opinion involves a requirement that a public body, by resolution or through the adoption of policy or a directive, must select one or more specific locations where notice of meetings will consistently and regularly be posted. If, for instance, a bulletin board located at the entrance of a school district's or library's administrative offices has been designated as a location for posting notices of meetings, the public has the ability to know where to ascertain whether and when meetings of a school board will be held.

With respect to notice to the news media, subdivision (3) of §104 specifies that the notice given pursuant to the Open Meetings Law need not be legal notice. That being so, a public body is not required to pay to place a legal notice prior to a meeting; it must merely "give" notice of the time and place of a meeting to the news media. Moreover, when in receipt of notice of a meeting, there is no obligation imposed on the news media to publish the notice.

Lastly, I believe that every law, including the Open Meetings Law, must be implemented in a manner that gives reasonable effect to its intent. In that vein, to give effect to intent of the Open Meetings Law, I believe that notice of meetings should be given to news media organizations that would be most likely to make contact with those who may be interested in attending. Similarly, for notice to be "conspicuously" posted, I believe that it must be posted at a location or locations where those who may be interested in attending meetings have a reasonable opportunity to see the notice.

I hope that I have been of assistance.

RJF:tt

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December 19, 2002

Ms. Maria Peterson
[redacted]

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. Peterson:

I have received your letter in which you sought opinions concerning several matters relating to the Highland Central School District Board of Education.

The first area of inquiry pertains to your request for "two written statements that were read aloud" by the Board President at an open meeting. Although the request was initially denied because, according to your letter, they "were not considered part of the Official Board of Education minutes", you were informed later that "anything read aloud...becomes part of the official board minutes." Nevertheless, you were told that the Board President did not retain copies of the documents and your request, therefore, was denied. You expressed the belief that "all official Board of Education minutes must be maintained indefinitely."

In this regard, in an effort to offer clarification, I offer the following comments.

I note that, in my view, there is a distinction between the minutes and the documents read aloud at the meeting; they are separate records. While I am unaware of the policy of the Board concerning the contents of minutes of its meetings, subdivision (1) of §106 of the Open Meetings Law provides what might be characterized a s minimum requirements regarding their contents. That provision states that:

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

Based on the foregoing, it is clear that minutes need not consist of a verbatim account of the statements made during a meeting. They must at a minimum, however, consist of a record or summary of all motions, proposals, resolutions, action taken and the vote of the members. In short,

there is nothing in the law that would require that the material read aloud by the Board President be included in the minutes. Further, if those statements are included in the minutes, again, the minutes would be records separate and distinct form the documents prepared by the President that were read aloud.

The foregoing is not intended to suggest that the documents read by the Board President should not have been disclosed. On the contrary, the Freedom of Information Law pertains to all District records, and §86(4) of that statute defines the term "record" expansively to mean:

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

In consideration of the language quoted above, documents need not be in the physical possession of an agency to constitute agency records; so long as they are produced, kept or filed for an agency, the courts have held they constitute "agency records", even if they are maintained apart from an agency's premises.

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

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

Since the documents at issue were prepared by the Board President in his capacity as a District Official, I believe that they clearly constitute District records that fall within the scope of the Freedom of Information Law. If they continue to exist, even on his home personal computer, I believe that they are subject to rights of access.

Provisions concerning the retention of records are found in Article 57-A of the Arts and Cultural Affairs Law, which is administered by the State Archives, a unit of the State Education Department. While I believe that minutes of meetings must be retained permanently, I am unaware of the minimum retention period regarding the documentation prepared by the Board President. To obtain information concerning the required period of retention, it is suggested that you contact the State Education Department at (518) 474-6948.

I note, too, 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.

Second, you questioned the propriety of an executive session held, by the Board "for the purpose of self-evaluation." As you may be aware, paragraphs (a) through (h) of §105(1) of the Open Meetings Law specify and limit the subjects that may properly be considered during an executive session.

The only provision that appears to be relevant is paragraph (f), which authorizes a public body to enter into executive session to discuss:

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

In my view, it is unlikely that a "self-evaluation", would have involved the matters described in language quoted above. If that is so, there would have been no basis for conducting an executive session.

Lastly, you wrote that it is your understanding that minutes of meetings must be made available within two weeks, and you asked whether there is "a time limit imposed as to when [you] can expect the official "approved" Board minutes." Subdivision (3) of the Open Meetings Law states that:

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

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.

In short, so long as matters are prepared and made available to the public within two weeks of meetings, I believe that the Board would be complying with law. There is neither a requirement that minutes be approved, nor a time limit within which they must be made "official."

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Education
Joanne Loewenthal
Paul Kandeztke
Margo May

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December 19, 2002

Mr. Terry Williams
[redacted]

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

Dear Mr. Williams:

I have received your letter in which you raised a series of issues relating to the implementation of the Open Meetings Law by the Board of Education of the Greenburgh Central School District.

In this regard, I offer the following comments.

First, by way of background, it is noted that the definition of "meeting" has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be convened open to the public, whether or not 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 work session held by a majority of a board of education is a "meeting", it would have the same responsibilities in relation to notice and the taking of minutes as in the case of a formal meeting, as well as the same ability to enter into executive sessions.

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

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

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

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

> "The respondent Board prepared an agenda for each of the five designated regularly scheduled meetings in advance of the time that those meetings were to be held. Each agenda listed 'executive

> session' as an item of business to be undertaken at the meeting. The petitioner claims that this procedure violates the Open Meetings Law because under the provisions of Public Officers Law section 100[1] provides that a public body cannot schedule an executive session in advance of the open meeting. Section 100[1] provides that a public body may conduct an executive session only for certain enumerated purposes after a majority vote of the total membership taken at an open meeting has approved a motion to enter into such a session. Based upon this, it is apparent that petitioner is technically correct in asserting that the respondent cannot decide to enter into an executive session or schedule such a session in advance of a proper vote for the same at an open meeting" [Doolittle, Matter of v. Board of Education, Sup. Ct., 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 law has been suggested in conjunction with similar situations. Rather than scheduling an executive session, the Superintendent or the Board on its agenda or notice of a meeting could refer to or schedule a motion to enter into executive session to discuss certain subjects. Reference to a motion to conduct an executive session would not represent an assurance that an executive session would ensue, but rather that there is an intent to enter into an executive session by means of a vote to be taken during a meeting.

Third, as suggested above, a public body cannot conduct an executive session to consider the subject of its choice. On the contrary, paragraphs (a) through (h) of §105(1) specify and limit the grounds for entry into executive sessions. There is no indication in your letter of the basis for consideration of a grant in private, and it is unclear whether any of the grounds for entry into executive session would have applied.

Lastly, you wrote that a reporter informed the Board, in you words, "that she had a story to write and needed to know how the members voted." Aside from her needs, I note that, even before the Open Meetings Law was enacted, the Freedom of Information Law has required that a record must be prepared indicating how each member voted in every instance in which a final vote is taken [see Freedom of Information Law, §87(3)(a)]. Typically, the record of votes of each member is recorded and included in the minutes of a meeting. Similarly, it has been held that both the Freedom of Information Law and the Open Meetings Law preclude secret ballot voting by members of public bodies [see Smithson v. Ilion Housing Authority, 130 AD2d 965 (1987), aff'd 72 NY2d 1034 (1988)].

In an effort to enhance compliance with and understanding of the Open Meetings and Freedom of Information Laws, a copy of this opinion will be sent to the Board of Education.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

STATE OF NEW YORK
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December 26, 2002

Ms. Linda A. Mangano
[redacted]

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

Dear Ms. Mangano:

I have received your letter of December 14 and appreciate your kind words.

Your initial questions relate to the notice requirements imposed by the Open Meetings Law. Section 104 of that statute pertains to notice of meetings and states that:

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

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

Although §104 does not specify where notices of meetings must be posted, it requires that notice be "conspicuously posted in one or more designated public locations." Consequently, I believe that a public body must designate, presumably by resolution, the location or locations where it will routinely post notice of meetings. To meet the requirement that notice be "conspicuously posted", notice must in my view be placed at a location that is visible to the public.

With respect to notice given to the news media, subdivision (3) of §104 specifies that a public body is not required to pay to place a legal notice in a newspaper prior to a meeting. Notice must merely be "given" to the news media; whether a newspaper, for example, chooses to print notice of a meeting is within the discretion of its management. In my view, the State Legislature intended to ensure that the Open Meetings Law would not create financial hardship to public bodies or newspapers, and the provision indicating that notice of a meeting need not be legal notice is intended to ensure that public bodies should not have to pay place a legal notice in a newspaper prior to every meeting. In terms of the news media, in many instances, there may be hundreds of public bodies within the coverage area of a newspaper, and requiring a newspaper to print notices of meetings relating to perhaps dozens of meetings on a particular day would be financially burdensome.

In short, I do not believe that the Legislature intended to force public bodies to publish notice of their meetings or to require newspapers to publish notice of meeting.

Lastly, I agree that both the Open Meetings and Freedom of Information Laws should be strengthened and made more meaningful for the public, and the Committee on Open Government continually attempts to do so. As you are likely aware, the Committee includes a series of legislative proposals in an annual report to the Governor and the State Legislature. A copy of the latest report is enclosed, and I hope that you find it to be interesting and constructive.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.