STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3569

Committee Members

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January 3, 2003

E-Mail

TO: Doug Goodrich [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. Goodrich:

I have received your inquiry pertaining to the status of an "airport advisory committee" designated by the mayor of the Village of Endicott to assist him in the performance of his duties.

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.).

In sum, since the functions of the committee in question are purely advisory, I do not believe that it is required to comply with the Open Meetings Law. This is not to suggest that it 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

cc: Village of Endicott

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO - 3570

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January 6, 2003

Ms. Ronda Roaring
New York State Coalition
for Animals

The staff of the Committee on 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. Roaring:

I have received your letter concerning minutes of meetings of the Conservation Fund Advisory Board (CFAB), their contents, approval and the time within which they must be prepared and made available.

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

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

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

In this instance, however, the CFAB performs statutory duties described in §11-0327(3) of the Environmental Conservation Law.

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

Among the statutory duties is a requirement that the CFAB:

> "...review the allocations and expenditures of the department for fish and wildlife purposes as provided in section 11-0303 of this title and report to the commissioner by July first of each year. The commissioner shall, by August first of each year, submit such report, in its entirety, to the governor, the legislature and interested individuals and organizations. Such report shall include the findings of the advisory board regarding such allocations and expenditures, including expenditures and appropriations from the conservation fund and the extent to which such expenditures and appropriations are consistent with the requirements of state law..."

Based on the foregoing, a function of the Commissioner of the Department of Environmental Conservation is contingent upon receipt of a report of the findings of the CFAB. In consideration of the duties imposed by law upon the CFAB, I believe that it constitutes a "public body" required to comply with the Open Meetings Law.

Second, §106 of the Open Meetings Law pertains to minutes of meetings and provides what might be viewed a minimum requirements concerning the contents of minutes. That section states that:

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

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

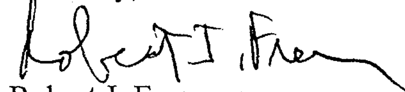
In view of the foregoing, it is clear in my opinion that minutes of open meetings must be prepared and made available "within two weeks of the date of such meeting." However, minutes are required to consist merely of a record or summary of motions, proposals, resolutions, action taken, and the vote of the members. While a public body may choose to do so, there is no obligation to include reference to comments or the nature of discussions.

Having reviewed minutes of CFAB meetings available on its website, its minutes are more expansive than the law requires and, in my view, are beneficial to the public in that form. In short, many who are interested in the work of the CFAB may not have the opportunity to attend its meetings, and the minutes provide an excellent description of what transpires at its meetings.

Lastly, 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.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Conservation Fund Advisory Board

STATE OF NEW YORK
DEPARTMENT OF STATE
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OML AO - 3571

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January 6, 2003

Ms. Ronda C. Roaring

The staff of the Committee on 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. Roaring:

I have received your correspondence and appreciate your kind words.

You wrote that you are a certified teacher and that you have been employed as a substitute teacher for several school districts in the vicinity of Ithaca. Since substitutes are typically approved by boards of education, minutes of meetings include names of substitutes or others hired by a district. According to your letter, the Lansing Central School District places minutes of meetings of its Board of Education on the District's website, "and that by searching [your] name, one can determine that [you] worked for the Lansing school district and make the association that [you are] working for districts in the area." You have objected to the inclusion of your name in a website and expressed the belief that its publication "is in violation of § 87.2 (b) and (f) and §89.2 (b) (i) of the Freedom of Information Law."

In this regard, I offer the following comments.

First, there is nothing in the Freedom of Information Law pertaining to the placement of records on the internet or an agency's website. In my experience, it is not unusual for a unit of local government to place minutes of meetings of public bodies on their websites. I note, too, that a recipient of minutes of a meeting could place the minutes or the contents of minutes on his or initiative on the internet, with or without approval or consent of the government agency that prepared those records. Further, when records are accessible under the Freedom of Information Law, it has been held that they should be made equally available to any person, regardless of one's status, interest or the intended use of the records [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. Moreover, the Court of Appeals, the State's highest court, has held that:

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

Second, when a board of education takes action during a meeting to employ a particular person or persons, I believe that §106(1) of the Open Meetings Law requires that the action be memorialized through the preparation of minutes.

Third, I disagree with your contention that disclosure of your name in minutes placed on website is "in violation" of the provisions of the Freedom of Information Law to which you referred. As you are likely aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. The provisions to which you referred deal with the ability of a government agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy" or "endanger the life or safety of any person."

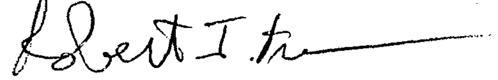
From my perspective, there is nothing secret about the names of substitute teachers; their identities are made known to students and, indirectly to parents and perhaps others. Further, payroll records required to be maintained by all agencies must include reference to the name, public office address, title and salary of every officer or employee of the agency [see Freedom of Information Law, §87(3)(b)]. While substitute teachers may not be "employees", they are paid by the District, and records of payments are public. For those reasons, I do not believe that disclosure of substitute teachers' names would constitute an unwarranted invasion of personal privacy or that it could be demonstrated that disclosure would endanger their lives or safety.

Lastly, it is emphasized that the Freedom of Information Law is permissive, and that the Court of Appeals, the state's highest court, has held that an agency may withhold records in accordance with the grounds for denial, but that it is not required to do so [Capital Newspapers v. Burns, 67 NY2d 562, 567 (1986)]. The only instance in which records must be withheld would involve the case in which a statute prohibits disclosure, and no such statute would be applicable in this instance.

In short, I believe that the name of a substitute teacher appearing in minutes of a meeting must be disclosed, and that there is no restriction regarding the publication of minutes on a school district's website.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Robert J. Service

OML-AO-3572

From: Robert Freeman
To: [redacted]
Date: 1/8/03 8:51AM
Subject: Dear Mr. Schultz:

Dear Mr. Schultz:

I have received your inquiry concerning "recourse" in the event that a public body fails to comply with the Open Meetings Law.

In this regard, section 107 of that statute deals with enforcement, and several advisory opinions on the subject are available via our website. In the index to advisory opinions rendered under the Open Meetings Law, you can click on to "E" and scroll down to "enforcement", and a number of opinions will be available in full text.

As a general matter, when a government agency or officer fails to perform a duty required by law to be performed (i.e., if no motion is made to enter into executive session) or acts unreasonably (in an "arbitrary and capricious" manner, i.e., by withholding records for no justifiable reason under the Freedom of Information Law), an an individual can bring a lawsuit. The vehicle is Article 78 of the Civil Practice Law and Rules, which is initiated in Supreme Court in your county.

Under section 107, if a public body takes action in private that should have been taken in public, a court has discretionary authority, "upon good cause shown", to nullify the action in taken in violation of the Open Meetings Law. Invalidation is not automatic; again, it is discretionary. Both the Freedom of Information and Open Meetings Laws also provide discretionary authority to a court to award attorney fees if certain conditions are present.

I note that the primary function of this office involves offering advice and opinions concerning those statutes. While the opinions rendered by this office are not binding, our hope is that they are educational and persuasive, and that they foster understanding of and compliance with law. You or anyone else may seek an opinion. Copies are routinely sent to the unit of government involved.

Although several state agencies may have some sort of role in relation to the activities of local governments, there is no agency that has general oversight of town government. In many instances, citizens individually, or especially in groups or coalitions, have the ability to influence the course of local government and encourage compliance with law.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-13821
OML-AO-3573

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January 13, 2003

Mr. Don Slovak

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. Slovak:

I have received your note in which you requested an advisory opinion. You have sought clarification under the Freedom of Information Law with respect to time limits for agencies to respond to requests for records, the degree of specificity required in a request for records, and the availability of "notices of claim." Under the Open Meetings Law, you sought clarification concerning "notice" requirements and the ability of a board member to disclose information acquired during an executive session.

In this regard, I offer the following comments.

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

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgment 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 acknowledgment of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

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

Second, by way of historical background, when the Freedom of Information Law was initially enacted in 1974, it required that an applicant request "identifiable" records. Therefore, if an applicant could not name the record sought or "identify" it with particularity, that person could not meet the standard of requesting identifiable records. In an effort to enhance its purposes, when the Freedom of Information Law was revised, the standard for requesting records was altered. Since 1978, §89(3) has stated that an applicant must merely "reasonably describe" the records sought. I point out that it has been held by the Court of Appeals that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

The Court in Konigsberg found that the agency could not reject the request due to its breadth and also stated that:

> "respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the Department's files were indexed in a manner that would enable the identification and location of documents in their possession (cf. National Cable Tel. Assn. v Federal Communications Commn., 479 F2d 183, 192 [Bazelon, J.] [plausible claim of nonidentifiability under Federal Freedom of Information Act, 5 USC section 552 (a) (3), may be presented where agency's indexing system was such that 'the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency'])" (id. at 250).

In my view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing or record-keeping system. In Konigsberg, it appears that the agency was able to locate the records on the basis of an inmate's name and identification number.

While I am unfamiliar with the record keeping systems of the Town, to the extent that the records sought can be located with reasonable effort, I believe that the request would have met the requirement of reasonably describing the records.

However, as indicated in Konigsberg, if it can be established that an agency maintains its records in a manner that renders its staff unable to locate and identify the records with reasonable effort, the request would have failed to meet the standard of reasonably describing the records.

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

It is possible that some records pertaining to litigation fall within the scope of the attorney-client privilege. Here I point out that the first basis 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." The courts have found that legal advice given by a municipal attorney to his or her clients, municipal officials, is privileged when it is prepared in conjunction with an attorney-client relationship [see e.g., People ex rel. Updyke v. Gilon, and Pennock v. Lane, supra Bernkrant v. City Rent and Rehabilitation Administration, 242 NYS 2d 752 (1963), aff'd 17 App. Div. 2d 392]. As such, I believe that a municipal attorney may engage in a privileged relationship with his or her client and that records prepared in conjunction with an attorney-client relationship are considered privileged under §4503 of the Civil Practice Law and Rules. Further, since the enactment of the Freedom of Information Law, it has also found that records may be withheld when the privilege can appropriately be asserted when the attorney-client privilege is read in conjunction with §87(2)(a) of the Law [see e.g., Mid-Boro Medical Group v. New York City Department of Finance, Sup. Ct., Bronx Cty., NYLJ, December 7, 1979; Steele v. NYS Department of Health, 464 NY 2d 925 (1983)]. Similarly, material prepared for litigation may be confidential under §3101 of the Civil Practice Law and Rules.

Nevertheless, legal papers filed against the Town would not have been prepared by the Town, its officials or its agents. As such, in my opinion, those papers would not be subject to the attorney-client privilege.

Fourth, regarding notices of meetings and special meetings, there is nothing in the Open Meetings Law that directly addresses the matter of notice of special meetings. Nevertheless, that statute requires that notice be posted and given to the news media prior to every meeting of a public body, such as a village board of trustees. Specifically, §104 of that statute provides that:

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

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

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

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

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

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

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

Lastly, you questioned the ability of a board member to disclose information obtained at an executive session of the board. In this regard, the Open Meetings Law requires that meetings of public bodies, 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 under §108(3).

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 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." In my opinion, 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 that context, I believe that a board of education, its members and school district employees would be prohibited from disclosing because a statute requires confidentiality.

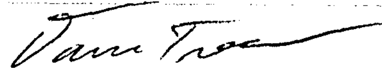
In a case in which the issue was whether discussions occurring during an executive session held by a school board could be considered "privileged", it was held that "there is no statutory

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. 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.

I hope that I have been of assistance.

Sincerely,



David Treacy
Assistant Director

DT:tt

cc: Town Board
Kimberly Pinkowski

OML-AO-3574

From: Robert Freeman
To: [redacted]
Date: 1/15/03 9:50AM
Subject: Dear Mr. Fort:

Dear Mr. Fort:

I have received your inquiry concerning the ability of an individual who is the subject of an executive session to attend the executive session with a person of his or her choice.

In short, there is no right to do so. Under section 105(2) of the Open Meetings Law, only the members of a public body (i.e., a school board, city council, town board, etc.) have the right to attend an executive session. A public body may authorize others to attend, but there is no obligation 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.

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 - 3575

From: David Treacy
To: Peterson, Elisha
Date: 1/15/03 2:21PM
Subject: Re: question re minutes

Elisha,

If a clerk does not prepare minutes and make them available as required by OML 106 and Town Law 30, he or she would have failed to carry out his or her statutory duties. As you are likely aware, OML 106(3) requires that minutes of open meetings be prepared and made available within two weeks. It would be suggested that the clerk be informed of legal requirements regarding the timely preparation of minutes. In addition, I believe that the Town Board has the ability under Town Law 63 to adopt rules and policies to effectuate legal requirements and that it could do so as a means of highlighting the clerk's responsibilities.

A legal remedy would involve the initiation of a proceeding under Article 78 of the CPLR to compel the clerk to carry out his or duties in a manner consistent with law.

The most drastic action that might be taken in my view would involve an effort to remove a public officer pursuant to Public Officers Law 36.

Under OML 107, the court has the authority to nullify any action taken in violation of OML. This office is not aware of any provision of law or judicial decision indicating that a failure to prepare appropriate minutes within the requisite time serves as a means of invalidating a decision made at a meeting of a public body. If no action is taken at a meeting, there would be nothing for the court to invalidate. However, I believe an aggrieved party could seek a declaratory judgment on the matter.

I hope this answers your questions.

David Treacy
Assistant Director
NYS Committee on Open Government
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(518) 474-2518

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO- 13837
OML-AO- 3576

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Kenneth J. Ringler, Jr.
Carole E. Stone
Dominick Tocci

Executive Director

Robert J. Freeman

January 24, 2003

Mr. Richard Hathaway

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

Dear Mr. Hathaway:

I have received your letter of December 30 and the materials attached to it. Having reviewed their contents, which in some instances are conflicting, I offer the following comments.

First, the Open Meetings Law contains direction concerning minutes of meetings and provides what might be viewed as minimum requirements pertaining to their contents. 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."

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 generally 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.

Second, it is emphasized that minutes of executive sessions need not include information that may be withheld under the Freedom of Information Law. From my perspective, when a public body makes a final determination during an executive session, that determination will, in most instances, be public. For example, although a discussion to hire or fire a particular employee could clearly be discussed during an executive session [see Open Meetings Law, §105(1)(f), a determination to hire or fire that person would be recorded in minutes and would be available to the public under the Freedom of Information Law. 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 the context of the matter as I understand it, §87(2)(e) of the Freedom of Information Law may have been pertinent. That provision permits an agency, such as a town, to withhold records that:

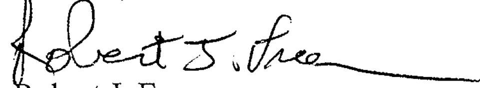
> "are compiled for law enforcement purposes and which if disclosed would:
>
> i. interfere with law enforcement investigation or judicial proceedings'
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation ; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures;"

If, for example, disclosure of action taken by the Town Board, if indeed action was taken, would have interfered with an investigation, I do not believe that the minutes would have to have included that information.

Lastly, with respect to rights of access to records of the investigation, since I am unaware of the specific contents of the records in question, I do not believe that I can offer comments additional to those appearing in the letter addressed to you on December 23.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

Enc.

From: Robert Freeman
To: chenspvr@stny.rr.com

Dear Supervisor Turna:

I have received your inquiry in which you asked whether a volunteer fire company must comply with the Open Meetings Law.

In this regard, it was held more than twenty years ago by the Court of Appeals, the state's highest court, that a volunteer fire company, despite its status as a not-for-profit corporation, performs an essential governmental function and, therefore, falls within the coverage of the Freedom of Information Law (FOIL). While there is no decision of which I am aware involving a volunteer fire company in relation to the Open Meetings Law, due to the precedent concerning the application of FOIL, it has been advised that the same conclusion would be reached concerning the application of the OML.

For a more detailed consideration of the matter, you can go to the index to advisory opinions rendered under the OML on our website, click on to "V" and scroll down to "Volunteer fire company." The three highest numbered opinions are available on line in full text.

I hope that I have been of assistance.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3578

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January 29, 2003

E-MAIL

TO: Elizabeth Clock, <LISARWORK@aol.com

FROM: Robert J. Freeman, Executive Director

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

Dear Ms. Clock:

As you are aware, I have received your letter in which you sought an opinion concerning the propriety of holding a meeting "with no public notice if the official one is canceled" and whether certain matters considered by the Board of Education, upon which you serve, were "appropriate topics for a Board retreat." The topics discussed appear to have included:

> "1. Board relationships communication log, 2. officers representing the Board with the Superintendent, 3. the communication log, 4. future items to be worked such as SDM/CDEP (Shared Decision Making/Comprehensive District Education Plan), 5. employee forums, 6. developing a policy in which all committees report to the BOE on a regular basis giving the Board the power to red or green light the continuation of the proceedings."

You were informed by a Board member who attended that he/she does not recall that the gathering included any discussion of Board relationships.

In this regard, I offer the following comments.

First, the Open Meetings Law applies to meetings of public bodies, and a board of education clearly constitutes a public body required to comply with that statute. Section 102(1) of the Open Meetings Law defines the term "meeting" to mean "the official convening of a public body for the purpose of conducting public business". It is emphasized that the definition of "meeting" has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be convened open to the public, whether or not there is an intent to take

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

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

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

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

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

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

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

From my perspective, if indeed a portion of the gathering involved "Board relationships", i.e., consideration personal interaction or relations among Board members, that portion, in my view, would likely have fallen beyond the coverage of the Open Meeting Law, for the purpose would not have involved conducting public business. However, I believe that the other five areas of discussion

clearly involved matters of public business and constituted a "meeting" that fell within the coverage of that statute.

Second, every meeting, including a rescheduled meeting, must be preceded by notice given in accordance with §104 of the Open Meetings Law. That section 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, rescheduled or emergency meetings, if, for example, there is a need to convene quickly, the notice requirements can generally be met by telephoning or faxing notice of the time and place of a meeting to the local news media and by posting notice in one or more designated locations.

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

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

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

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

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL AO- 13848
OML AO-3579

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January 29, 2003

E-MAIL

TO: Dan Trachman<

FROM: Robert J. Freeman RJF

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

Dear Mr. Trachman:

As you are aware, I have received your letter concerning the status of the New York Public Library under the Freedom of Information Law.

In this regard, I offer the following comments.

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

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

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

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

> "The term 'public' library as used in this chapter shall be construed to mean a library, other than professional, technical or public school

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

The leading decision concerning the issue was rendered by the Appellate Division in French v. Board of Education, in which the Court stated that:

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

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

Having reviewed a variety of information on the New York Public Library's website, <www.nypl.org>, it is clear that that entity is a private, not-for-profit institution. It was founded in 1895 by the Astor, Lenox and Tilden foundations to provide "private philanthropy for the public good." That being so, I do not believe that it is subject to the Freedom of Information Law.

It is noted that confusion concerning the application of the Freedom of Information Law to non-governmental libraries open to the public has arisen in several instances, perhaps because its companion statute, the Open Meetings Law, is applicable to meetings of their boards of trustees. The Open Meetings Law, which is codified as Article 7 of the Public Officers Law, is applicable to

public and association libraries due to direction provided in the Education Law. Specifically, §260-a of the Education Law states in relevant part that:

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

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

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

RJF:jm

From: Robert Freeman
To: [redacted]

Dear Ms. Harris:

I have received you inquiry concerning the status of the board of a condominium under the Open Meetings Law.

In this regard, that law applies to public bodies, and the phrase "public body" is defined to mean "any entity, for 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...." A public corporation is a county, city, town, village, school district, etc.

In short, the Open Meetings Law applies only to governmental bodies; it does not apply to meetings of a condominium board or other private entity.

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3581

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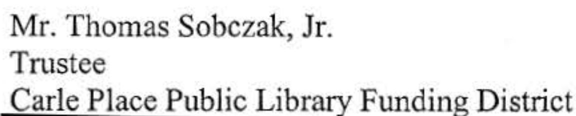
February 4, 2003

Mr. Thomas Sobczak, Jr.
Trustee
Carle Place Public Library Funding District



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

Dear Mr. Sobczak:

As you are aware, I have received your correspondence concerning whether or the extent to which the Board of Trustees of the Carle Place Public Library Funding District may exclude the public from its meetings. You indicated that you are a new trustee and that the District's sole function involves contracting for public library services.

"When discussing the terms of a proposed contract with a neighboring library", you asked whether the Board could enter into executive session. You also asked whether "reports by counsel" must be given in public. 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.

As you described the subject of discussion, discussion of a contract with a neighboring library, none of the grounds for entry into executive session could, in my view, justifiably be asserted. I note that one of the grounds, §105(1)(e), relates to contract negotiations, but it is limited to consideration of collective bargaining negotiations with a public employee union.

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 reports from counsel, 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 stress 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.

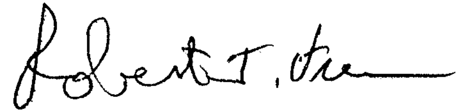
While it is not my intent to be overly technical, as suggested earlier, the procedural methods of entering into an executive session and asserting the attorney-client privilege differ. In the case of the former, the Open Meetings Law applies. In the case of the latter, because the matter is exempted 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.

It is noted that there is no obligation on the part of the Board to seek or receive legal advice in private. On the contrary, the Board may waive the privilege and engage in a discussion with its attorney in public.

Lastly, you asked what the "ramifications" might be if an executive session is improperly held. Pursuant to §107(1) of the Open Meetings Law, any "aggrieved person" may bring suit for review of an alleged violation of law. That provision indicates that if action is taken during an executive session that should have been taken in public, a court may, upon good cause shown, invalidate the action. In addition, subdivision (2) gives a court discretionary authority to award attorney's fees to the successful party in such a proceeding. Aside from the initiation of a lawsuit, ignorance of the law or a pattern of failure to comply may create a climate of distrust among the public.

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-13880
OML-AO-3582

Committee Members

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February 12, 2003

Mr. Jerry Ravnitzky

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

Dear Mr. Ravnitzky:

As you are aware, I have received your letter in which you requested an advisory opinion.

You referred to a recommendation offered some time ago by the Town of Carmel Board of Ethics that the Chairman of the Zoning Board of Appeals recuse himself when applicants before the Board are represented by a particular law firm. You wrote that the Town Board, "at an executive work session", voted to reject the recommendation of the Ethics Board.

In this regard, unless it has adopted its own rule to the contrary, the Board may engage in the same activities during a work session as a regular meeting.

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

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

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

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

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

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

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

With respect to minutes of work sessions, 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 on the foregoing, if an executive session has been properly convened, a public body may take action during the executive session, unless the action is to appropriate public money. If action is taken, minutes indicating the nature of the action taken, the date, and the vote of each member, must be prepared and made available within one week to the extent required by the Freedom of Information Law.

In your second area of inquiry, you wrote that the Town Ethics Code states that the "complaint records and other proceedings related thereto shall remain confidential until the Board of Ethics makes a recommendation for action to the Town Board or dismisses the complaint." You have asked whether the "entire record of this complaint" must be disclosed.

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, an assertion or claim of confidentiality, unless it is based upon a statute, is likely meaningless. When confidentiality is conferred by a statute, records fall outside the scope of rights of access pursuant to §87(2)(a) of the Freedom of Information Law, which states that an agency may withhold records that "are specifically exempted from disclosure by state or federal statute". If there is no statute upon which an agency can rely to characterize records as "confidential" or "exempted from disclosure", the records are subject to whatever rights of access exist under the Freedom of Information Law [see Doolan v.BOCES, 48 NY 2d 341 (1979); Washington Post v. Insurance Department, 61 NY 2d 557 (1984); Gannett News Service, Inc. v. State Office of Alcoholism and Substance Abuse, 415 NYS 2d 780 (1979)]. As such, an assertion of confidentiality without more, would not in my opinion guarantee or require confidentiality.

Moreover, it has been held by several courts, including the Court of Appeals, that an agency's regulations or the provisions of a local enactment, such as an administrative code, local law, charter or ordinance, for example, do not constitute a "statute" [see e.g., Morris v. Martin, Chairman of the State Board of Equalization and Assessment, 440 NYS 2d 365, 82 Ad 2d 965, reversed 55 NY 2d 1026 (1982); Zuckerman v. NYS Board of Parole, 385 NYS 2d 811, 53 AD 2d 405 (1976); Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)]. For purposes of the Freedom of Information Law, a statute would be an enactment of the State Legislature or Congress. Therefore, a local enactment cannot confer, require or promise confidentiality. This not to suggest that many of the records used, developed or acquired in conjunction with an ethics code must be disclosed; rather, I am suggesting that those records may in some instances be withheld in accordance with the grounds for denial appearing in the Freedom of Information Law, and that any local enactment that is inconsistent with that statute in relation to the obligation to disclose would be void to the extent of any such inconsistency. I point out that the Freedom of Information Law permits an agency to disclose record, even though it may have the authority to deny access [see Capital Newspaper v. Burns, 109 AD3d 92, aff'd 67 NY2d 562 (1986)].

It is likely in my view that two the grounds for denial would be particularly relevant with respect to records maintained by a board of ethics.

Section 87(2)(b) of the Freedom of Information Law authorizes an agency to withhold records when 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 officers or 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. The courts have found that, as a general rule, records that are relevant to the performance of a public officer's or employee's official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

Several of the decisions cited above, for example, Farrell, Sinicropi, Geneva Printing, Scaccia and Powhida, dealt with situations in which determinations indicating the imposition of some sort of disciplinary action pertaining to particular public employees were found to be available. However, when allegations or charges of misconduct have not yet been determined or did not result in disciplinary action, the records relating to such allegations may, in my view, be withheld, for disclosure would result in an unwarranted invasion of personal privacy [see e.g., Herald Company v. School District of City of Syracuse, 430 NYS 2d 460 (1980)]. Further, to the extent that charges are dismissed or allegations are found to be without merit, I believe that they may be withheld.

There may also be privacy considerations concerning persons other than those who may be subjects of a board's inquiries. For instance, I believe that the name of a complainant or witness could be withheld in appropriate circumstances as an unwarranted invasion of personal privacy.

The other provision of relevance, §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

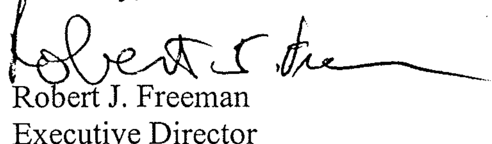
iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

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. Records prepared in conjunction with an inquiry or investigation would in my view constitute intra-agency materials. Insofar as they consist of opinions, advice, conjecture, recommendations and the like, I believe that they could be withheld. Factual information would in my view be available, except to the extent, under the circumstances, that disclosure would result in an unwarranted invasion of personal privacy.

It is unclear whether or the extent to which there have been public disclosures relating to the matter. If little or nothing has been disclosed, it is likely that the records in question could be withheld in great measure as an unwarranted invasion of personal privacy. However, the more that records or other information have been made available to the public, less is the ability to deny access based on consideration of privacy.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Board of Ethics

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3583

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February 12, 2003

TO: Dolores Allt

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. Allt:

I have received your inquiry concerning the legality of "private meetings" described in a news article. The article indicates that the Hyde Park Town Supervisor was involved in "addressing some concerns in private meetings with a group of residents, officials, surveyors and attorneys representing Hyde Park landowners..." Several "private Saturday meetings" were held.

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

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

Based on the foregoing, the Town Board, a planning board, a zoning board of appeals or similar body would constitute a "public body" required to comply with the Open Meetings Law.

The definition of "public body" makes reference to quorum, which according to §41 of the General Construction Law, is a majority of the total membership of a public body. Therefore, if a town board consists of five members, three would constitute a quorum.

A "meeting", according to §102(1) of the Open Meetings Law, is a gathering of a quorum, a majority of a public body, for the purpose of conducting public business.

In the context of your inquiry, if the Supervisor held the "private meetings" on his own and without the presence of two or more other members of the Town Board, those gatherings would not have involved a quorum of the Board, and the Open Meetings Law would not have applied. If that was so, the general public, in my view, would have had no right to attend.

On the other hand, if a majority of the Board attended and participated as a body, I believe that any such gathering would have constitute a meeting of a public body subject to the Open Meetings Law and required to have been held open to the public.

I note further that the term "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)].

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

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

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

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

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

Again, however, if less than a quorum of a public body participates, the Open Meetings Law would not apply.

I hope that I have been of assistance.

RJF:jm

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 13869
OML-AO-3584

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February 12, 2003

Mr. Walter Pasternak

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. Pasternak:

As you are aware, I have received your letter of January 16 in which you raised a series of questions relating to the Open Meetings Law and public access to certain information.

Your first area of inquiry pertains to executive sessions held for "personnel reasons."

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. 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.

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

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

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

> see, Matter of Orange County Publs., Div. of Ottaway Newspapers v County of Orange, 120 AD2d 596, lv dismissed 68 NY 2d 807).
>
> "Applying these principles to the matter before us, it is apparent that the Board's stated purpose for entering into executive session, to wit, the discussion of a 'personnel issue', does not satisfy the requirements of Public Officers Law § 105 (1) (f). The statute itself requires, with respect to personnel matters, that the discussion involve the 'employment history of a particular person" (id. [emphasis supplied]). Although this does not mandate that the individual in question be identified by name, it does require that any motion to enter into executive session describe with some detail the nature of the proposed discussion (see, State Comm on Open Govt Adv Opn dated Apr. 6, 1993), and we reject respondents' assertion that the Board's reference to a 'personnel issue' is the functional equivalent of identifying 'a particular person'" [Gordon v. Village of Monticello, 620 NY 2d 573, 575; 209 AD 2d 55, 58 (1994)].

In short, the characterization of an issue as a "personnel" 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.

The other area of inquiry relates to closed sessions held to discuss property tax litigation and whether a public body is required to disclose the details of a settlement of the litigation "at the subsequent reconvened regular meeting if requested to do so."

Here, I point out that public body (other than a board of education) may take action during a properly convened executive session. If action is taken, §106 of the Open Meetings Law requires that minutes of the executive session reflective of the nature of the action taken, the date and the vote of each member must be prepared and made available to the public to the extent required by the Freedom of Information Law within one week of the executive session.

From my perspective, the minutes, as well as the actual terms of such a settlement must be disclosed under the Freedom of Information Law.

I note that it has been held in variety of circumstances that a promise or assertion of confidentiality cannot be upheld, unless a statute specifically confers confidentiality. In Gannett News Service v. Office of Alcoholism and Substance Abuse Services [415 NYS 2d 780 (1979)], a state agency guaranteed confidentiality to school districts participating in a statistical survey concerning drug abuse. The court determined that the promise of confidentiality could not be sustained, and that the records were available, for none of the grounds for denial appearing in the Freedom of Information Law could justifiably be asserted. In a decision rendered by the Court of Appeals, the state's highest court, it was held that a state agency's:

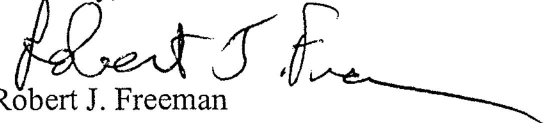
> "long-standing promise of confidentiality to the intervenors is irrelevant to whether the requested documents fit within the Legislature's definition of 'record' under FOIL. The definition does not exclude or make any reference to information labeled as 'confidential' by the agency; confidentiality 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)].

Finally, I believe that any such settlement agreement must be disclosed. 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. Unless records may justifiably be withheld in accordance with one or more of the grounds for denial, a claim, a promise or an agreement to maintain confidentiality would, based on judicial decisions, be meaningless.

From my perspective, none of the grounds for denial could apparently be asserted to withhold a record reflective of a settlement between a local government and a property owner.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13873
OML-AO-3585

Committee Members

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February 12, 2003

Ms. Nancy Holiday

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. Holiday:

I have received materials concerning your request for a tape recording of a meeting of the Wyandanch Union Free School District. You were apparently informed that the tape would not be available until the minutes of the meeting were approved. Further, although you were told by the Business Manager that the fee for a copy would involve the cost of a cassette, in a memorandum to him, the Board President asked "who will pay for the time the District Clerk works copying audio tapes" and "who will take care of the wages?"

In this regard, first, it is noted that §106 of the Open Meetings Law requires that minutes of meetings must be prepared and made available within two weeks. Further, there is nothing in the Open Meetings Law or other statute that requires minutes to be approved. While most public bodies do approve their minutes, they do so based on policy or tradition, not because any provision of law requires that the minutes be approved.

Second, the Freedom of Information Law pertains to records of an agency, such as a school district, 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."

Therefore a tape recording of a meeting constitutes a "record" subject to the Freedom of Information Law.

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

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

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

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

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

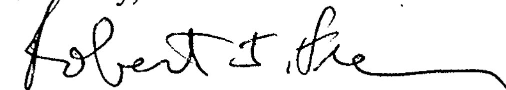
Based upon the foregoing, the fee for reproducing a tape recording as suggested by the business manger, would involve the cost of a cassette.

Although compliance with the Freedom of Information Law involves the use of public employees' time and perhaps other costs, the Court of Appeals, the state's highest court, has found that the Law is not intended to be given effect "on a cost-accounting basis", but rather that "Meeting the public's legitimate right of access to information concerning government is fulfillment of a

governmental obligation, not the gift of, or waste of, public funds" [Doolan v. BOCES, 48 NY 2d 341, 347 (1979)].

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Rev. Michael Talbert
Calvin Wilson

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-13872
OML-AO-3586

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
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Carole E. Stone
Dominick Tocci

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February 12, 2003

E-MAIL

TO: Mary Thill <mthill@adirondacklife.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. Thill:

As you are aware, I have received your inquiries concerning what you described as a denial of access to certain records and the propriety of an executive session held by the Village of Saranac Lake Planning Board.

With respect to the first inquiry, you wrote that residents requested a map larger than nine by fourteen inches relating to a proposed subdivision. In response, you were informed that the Village does not have the equipment to copy the maps "in house" and that the maps cannot be removed until action on the proposal is taken by the Planning Board. You asked whether the maps are subject to the Freedom of Information Law.

In this regard, the Freedom of Information Law is applicable to records maintained by or for 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, the maps in my view clearly constitute Village records that fall within the coverage of the Freedom of Information Law.

Section 87(2) of the Freedom of Information Law provides that accessible records must be made available for inspection and copying. In addition, §87(1)(b)(iii) authorizes an agencies to charge up to twenty-five cents per photocopy for records up to nine by fourteen inches, or the actual cost of reproducing other records, i.e., computer tapes or disks, or records in excess of nine by fourteen inches.

In situations similar that described several possibilities have been suggested. First, the maps may be inspected at no charge. Second, a person could photograph the maps with his or her own camera equipment at no charge. Or third, several photocopies of a large map could be made and thereafter cut and pasted together.

Your second question concerns a meeting held by the Planning Board concerning the same proposal during which an executive session was held with the developer.

Here, I refer to the Open Meetings Law, which applies to meetings of public bodies, including planning boards. In brief, the Open Meetings Law is based on a presumption of openness. Stated differently, meetings of public bodies must be held open to the public, except to the extent that an executive session may properly be held. 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 paragraphs (a) through (h) of §105(1) specify and limit the subjects that may be considered in executive session.

In my view, unless the Village owned the property under consideration, it is unlikely that there would have been any basis for conducting an executive session. In that event, the only ground of possible significance would have been §105(1)(h), which authorizes a public body to enter into executive session to discuss:

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

If the issue involved property owned by a private person or entity, I do not believe that §105(1)(h) would have applied. If the property was owned by the Village, only to the extent that publicity would have substantially affected the value of the property could an executive session, in my opinion, have validly been held.

I hope that I have been of assistance.

RJF:tt

cc: Building Officer
Planning Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3587

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
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February 14, 2003

Mr. Dennis J. Winter

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

Dear Mr. Winter:

I have received your letter concerning rights of access to letters transmitted between the Mayor of the Village of Bronxville and the Counsel to the Village Ethics Board. As I understand the matter, although your initial request for those documents was denied, you later obtained them because they had been attached to minutes of meetings. That being so, I believe that the controversy is now moot. Nevertheless, in an effort to provide guidance, I offer the following comments.

In short, I do not believe that the kinds of records at issue ordinarily must be disclosed, included in or appended to minutes of meetings.

First, the Open Meetings Law contains what might be characterized as minimum requirements concerning the contents of minutes. Section 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, even if an item of correspondence or a letter is referenced during a meeting or relates to action taken, there is no obligation to include a document of that nature as part of or appended to minutes.

Second, two of the grounds for withholding records would typically be pertinent in consideration of the kind of communication to which you referred. As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

The first ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute, §4503 of the Civil Practice Law and Rules, codifies the attorney-client privilege. When a municipal official communicates with an attorney retained or employed by the municipality who is acting in his or her capacity as an attorney, I believe that such communication would fall within the scope of the attorney-client privilege and therefore would be exempt from disclosure unless the privilege is waived.

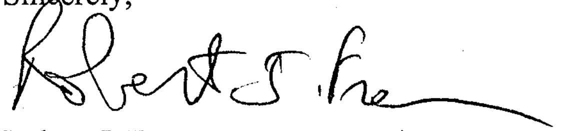
The other ground for denial of significance is §87(2)(g). That provision states that an agency may withhold records that:

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

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

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Nancy D. Hand
William T. Regan

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-13891
OML-AO-3588

Committee Members

Randy A. Daniels
Mary O. Donohue
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February 19, 2003

Mr. Gary A. Bennett, Sr.

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. Bennett:

I have received your letter and the materials attached to it. You described a series of difficulties in gaining access to certain records of the Town of Minisink.

Specifically, you requested a letter prepared by the Town Engineer and his staff "read into the minutes" of a meeting of the Planning Board held on November 27. Following your request for the letter, he characterized the document as an "inter-office memo" that need not be made available to the general public. Later, having requested minutes of the meeting, you were told that they are not available until they are read and corrected and "signed off" by the Planning Board Secretary. You added that Planning Board meetings are tape recorded, but that the tapes are not available to the public.

In this regard, I offer the following comments.

First, when a record is read aloud at an open meeting, even if the record may ordinarily be withheld in accordance with§87(2) of the Freedom of Information Law, I believe that it must be disclosed, for the public disclosure of the record 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 apparently purposeful and intentional rather than inadvertent. If that is so, even though there may have been a basis for withholding prior to a public reading of the record, that activity in my view precludes the Town from withholding any portion of the letter that was read aloud.

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

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals,

resolutions and any other matter formally voted upon and the vote thereon.

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

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

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

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

Lastly, the Freedom of Information law pertains to agency records, such as those of a Town, 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."

In a case involving notes taken by the Secretary to the Board of Regents that he characterized as "personal" in conjunction with a contention that he took notes in part "as a private person making personal notes of observations...in the course of" meetings. In that decision, the court cited the definition of "record" and determined that the notes did not consist of personal property but rather

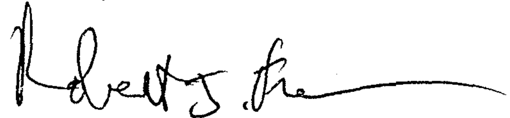
were records subject to rights conferred by the Freedom of Information Law [Warder v. Board of Regents, 410 NYS 2d 742, 743 (1978)].

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

Moreover, since a person present at an open meeting of a public body could have tape recorded the proceedings [see Mitchell v. Board of Education of the Garden City Union Free School District, 113 AD 2d 924 (1985)], I do not believe that there would be a valid basis for withholding the tape, particularly since you were present.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Planning Board
Hon. Carol Van Buren
Town Engineer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3589

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
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February 19, 2003

E-MAIL

TO: Jeff Greenfield <JeffG@nglgroup.com

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Mr. Greenfield:

I have received your letter in which you raised questions concerning certain procedures of the Board of Education of the Rockville Centre School District.

The initial issue pertains to the "practice of the ...Board to adjourn for executive session and return to public session later on in a room other than where they started the public session." You added that "By coincidence they wait until the public has left and then resume the meeting in their board room without the public having an opportunity to know that they are having a public meeting in a different location."

From my perspective, a basic requirement of the Open Meetings Law is that the public has the right to know when and where a public body is or will be conducting a meeting. In the circumstance that you described, I believe that Board would be required to provide a notice, presumably by means of posting, indicating where the Board will continue its meeting following an executive session or recess.

The other issue involves limitations on the public's ability to speak at meetings.

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 to address it for three, or not at all, such a rule, in my view, would be unreasonable.

In my view, the Board may limit members of the public to "one turn at the microphone", so long as its practice is implemented equally and reasonably.

I hope that I have been of assistance.

RJF:tt

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3590

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
Warren Mitofsky
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
Carole E. Stone
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February 19, 2003

Ms. Alberta Fiori-Gazda

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. Fiori-Gazda:

I have received your letter in which you questioned whether it is "legal for a Mayor and Board of Trustees to enter into executive session during a scheduled work session."

From my perspective, there is no legal distinction between a "meeting" and a "work session." In this regard, I offer the following comments.

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

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

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

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

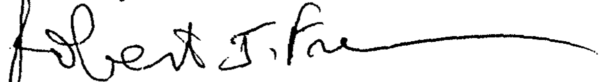
The court also dealt with the characterization of meetings as "informal," stating that:

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

Based upon the direction given by the courts, if a majority of 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.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3591

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
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Carole E. Stone
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February 19, 2003

Ms. Carol D. Stevens
Greene County Attorney
901 Green County Office Building
Cairo, NY 12413-9509

The staff of the Committee 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. Stevens:

I have received your thoughtful letter in which you referred to a conversation that we had on January 23 concerning the status of Greene County's Task Force on Reapportionment. You have offered background pertaining to the Task Force and requested a written advisory opinion on the matter.

According to your letter:

> "Greene County at its organizational meeting in January, 2002, by executive order appointed a task force to study various proposals for reapportionment of the Greene County Legislature. The task force was and is comprised of 5 sitting members of the Legislature, 4 Republicans and 1 Democrat and myself as counsel. The task force's sole purpose was to make recommendations without the necessity of a quorum. The task force has no power on its own to implement any of its recommendations. It's function was merely to give advice about different scenarios for reapportionment without any other performance of a public duty."

You added that it is your view that the Task Force "does not require a quorum to conduct its business" and that:

> "The recommendations of the task force are not to be executed unilaterally or finally by the Legislature. Nor would they receive a merely perfunctory review or approval. The proposed plan or plans of reapportionment will still have to go through committee and on the Legislative floor for the passing of a public law which is subject to permissive referendum."

From my perspective, the Task Force is essentially equivalent of a committee of the County Legislature. Like the Task Force, committees lack the power or authority to take final and binding action. By their nature, they merely have the authority to offer recommendations to a governing body, which may accept, reject or modify its recommendations. A committee of a county legislature is, in my opinion, clearly subject to the Open Meetings Law. Because the Task Force is a similar

body, I believe that the same conclusion may be reached concerning its responsibility to give effect to the Open Meetings Law. In this regard, I offer the following comments.

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

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

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

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

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

In view of the amendments to the definition of "public body", I believe that any entity consisting of two or more members of a public body, such as a committee, subcommittee or "similar body" consisting of members of a county legislature, would fall within the requirements of the Open Meetings Law, assuming that such entity 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, 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); County of Lewis v. O'Connor, Supreme Court, Lewis County, January 21, 1997].

Based on your description of the matter, the Task Force was created by the County Legislature to conduct public business, to offer recommendations, as an entity, to the Legislature.

Lastly, despite your statement concerning the absence of any "necessity of a quorum", I believe that §41 of the General Construction Law provides that the Task Force must carry out its duties in conjunction with a quorum requirement. That statute as recently amended 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."

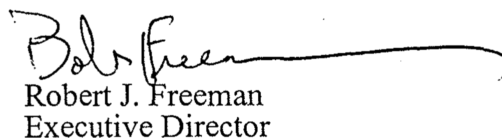
Based on your letter, the members of the Task Force have been designated to conduct public business and carry out a "public duty", collectively, as a body. Consequently, in my view, it may perform that duty only by means of a quorum.

As suggested at the outset, I believe that the Task Force is analogous to a committee of the County Legislature, that it is, as stated in the definition of "public body", a "similar body" of the Legislature, and that, therefore, is itself a public body subject to the Open Meetings Law.

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

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

OML-AO-3592

From: Robert Freeman
To: [redacted]
Date: 2/19/03 4:32PM
Subject: Dear Ms. Gilbert:

Dear Ms. Gilbert:

I have received your inquiry concerning your ability to tape record a meeting of a planning board during which the board's attorney will explain to the members the meaning of your Steep Slopes law.

In my view, your inquiry raises two issues.

First, just as the communications between you and your attorney are subject to the attorney-client privilege, there are cases going back a century indicating that a municipal board and its attorney may create an attorney-client relationship. In short, insofar as the board is seeking legal advice and the attorney is offering legal advice or a legal opinion, their communications would fall within the scope of the attorney-client privilege and would be exempt from the requirements of the Open Meetings Law. Stated differently, I believe that the the board could seek and acquire legal advice or a legal opinion from its attorney in private.

Notwithstanding the foregoing, if the board waives the privilege and opts to obtain its attorney's legal advice in public, I believe that you or anyone else could record the meeting, so long as the use of the recording device is neither obtrusive nor disruptive.

For a more detailed explanation of the issues, you may connect with our website and click on to the Open Meetings Law index to opinions. From there, you can click on to "A" and scroll down to "attorney-client privilege" and then "T", where you can scroll to "tape recorders, use of". The opinions prepared within the past 10 years are available in full text.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
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Albany, NY 12231
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3593

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February 21, 2003

E-MAIL

TO: Jill S. Knapp <jsk53@cornell.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. Knapp:

As you are aware, I have received your letter of February 5. When an entity subject to the Open Meetings Law conducts a meeting "at the office of a former board member who works for a brokerage firm," you asked whether it is "sufficient to just give the address in the press release as 40 ZZ St. ANYTOWN, when the brokerage office is located in a large office building with many other businesses, none of which have a connection to the [entity] and neither does the office building have any central reception or information office at which an individual might inquire about the meeting location within the building."

In this regard, §104 of the Open Meetings Law requires that every meeting of a public body be preceded by notice of the time and place given to the news media and posted in one or more designated, conspicuous public locations. Although the phrase "time and place" is not specifically defined, I believe that every provision of law, including the Open Meetings Law, must be implemented in a manner that gives reasonable effect to its intent. In the context of your inquiry, a basic requirement of the Open Meetings Law involves the public's right to know when and where public bodies hold their meetings. That being so, to carry out the notice requirements reasonably, a notice concerning the meeting to which you referred must in my view include sufficient detail to enable those interested in attending to locate the area within the building where the meeting will be held. That might involve an indication of a floor, a room number, or perhaps a company name, for example. In addition or perhaps in the alternative, a notice might be conspicuously posted in the lobby of the building providing the detailed information needed by the public to locate the site of the meeting.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3594

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February 26, 2003

E-MAIL

TO: Doreen Tignanelli [redacted]

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Ms. Tignanelli:

I have received your inquiry in which you questioned the status of a task force designated by the Supervisor of the Town of Poughkeepsie regarding the preparation of a local wetlands ordinance. You indicated that the task force consists of two members of the Town Board and three residents of the Town.

Based on judicial decisions, I do not believe that the task force is required to comply with the Open Meetings Law. In this regard, I offer the following comments.

As you may be 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, 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, assuming that the task force 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 task force 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.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3595

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Dominick Tocci

Executive Director

Robert J. Freeman

February 27, 2003

Mr. Edward B. Godwin

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

Dear Mr. Godwin:

I have received your thoughtful letter and commentary concerning "Evolving Policy on the Public's Right to Know." As you requested, I offer the following comments.

First, based on your review of the language of the Open Meetings Law and advisory opinions rendered by this office, you are undoubtedly aware that the term "personnel" appears nowhere in the Open Meetings Law. From my perspective, it has become a catchall that often results in inaccurate implementation of the law and executive sessions held to discuss matters that should be considered in public.

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 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 under that provision 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.

Although the language of §105(1)(f) is not restricted to issues involving prospective, current or former employees, it does not permit a public body to discuss every subject that might arise in relation to a "particular person". The language of that provision is precise and pertains only to certain enumerated subjects that relate to an individual. I agree with your contention that when a matter essentially involves an issue of policy, i.e., whether a staff member should be permitted to accept a gift, the issue should be discussed in public in great measure, if not in its entirety.

Moreover, even though an action taken might relate currently only to one employee, that action might affect or serve as precedent in cases arising in the future pertaining to others. In a decision involving that principle, it was held that the "personnel" exception for entry into executive session was not validly asserted. The court stated that:

> "In relying on the exception contained in paragraph f, the town asserts that its decision 'applied to a particular person, the Appellant herein'. While the town board's decision certainly did affect petitioner, and indeed at the time the decision was made affected only him, the town board's decision was a policy decision to not extend insurance benefits to police officers on disability retirement. Presumably this policy decision will apply equally to all persons who enter into that class of retirees. Thus, it cannot be said that the purpose of the meeting was to discuss 'the medical, financial, credit or employment history of a particular person'" [Weatherwax v. Town of Stony Point, 97 AD 2d 840, 841 (1983)].

In sum and in conjunction with the information that you provided, although a discussion concerning the discipline of a particular staff member regarding the acceptance of a gift could properly be considered in executive session, I believe that a line of demarcation should be drawn, to the extent possible, between that issue and a policy question involving the acceptance of gifts. The latter, in my view, must be discussed in public.

Second, as you are likely aware, it has been advised that a motion describing the subject to be discussed as "personnel" is inadequate, and that the motion should be based upon the specific language of §105(1)(f). For instance, a proper motion might be: "I move to enter into an executive session to discuss the employment history of a particular person (or persons)". Such a motion would not in my opinion have to identify the person or persons who may be the subject of a discussion. By means of the kind of motion suggested above, members of a public body and others in attendance would have the ability to know that there is a proper basis for entry into an executive session.

Absent such detail, neither the members nor others may be able to determine whether the subject may properly be considered behind closed doors.

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

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

Lastly, in your commentary, you suggested that a public body is "prevented" or "prohibited" from "discussing particular individual personnel problems in public." 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 described; whether it would be wise or ethical to do so involves a different question. Further, even when information might have been obtained during an executive session properly held or from records marked "confidential", I note that the term "confidential" in my view has a narrow and precise technical meaning. For records or information to be validly characterized as confidential, I believe that such a claim must be based upon a statute that specifically confers or requires confidentiality.

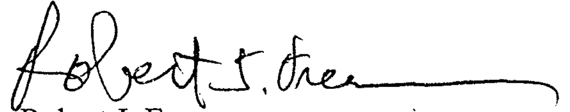
For example, if a discussion by a board of education concerns a record pertaining to a particular student (i.e., in the case of consideration of disciplinary action, an educational program, an award, etc.), the discussion would have to occur in private and the record would have to be withheld insofar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

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

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.

I hope that the foregoing will be useful to you and that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3596

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March 3, 2003

E-MAIL

TO: Cindy Barrett <cid@westelcom.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. Barrett:

I have received your letter in which you asked whether a vote taken during an executive session concerning what appears to have been a proper subject for consideration in executive session remains valid if a public body also considered a topic that should have been discussed in public.

From my perspective, even though the second topic, which you described as "redistricting", would not, in my view, have served as a proper subject for consideration in executive session, that discussion would have no impact on the validity of the action taken regarding a proper subject for consideration in executive session. Even when action is taken behind closed doors that should have been taken in public, I believe that it remains valid unless and until a court determines to the contrary.

The provision dealing with the enforcement of the Open Meetings Law and the possible invalidation of action taken in violation of the law, §107(1), states in relevant part that:

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

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

In view of the foregoing, there is no automatic invalidation of action taken. Further, a court's ability to invalidate action exists only when the action is taken in private in violation of the Open Meetings Law, and the authority to do so, even in that circumstance, is discretionary.

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

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3597

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March 4, 2003

Hon. Roger Higgins
Minority Leader
Dutchess County Legislature
22 Market Street
Poughkeepsie, NY 12601

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

Dear Mr. Higgins:

I have received your letter of February 7 in which you requested an advisory opinion relating to the Open Meetings Law. You wrote that:

> "In Dutchess County, the Legislature is solidly controlled by Republicans, 28 - 6 (one vacancy). A recent vacancy was filled by a registered Democrat, Christopher Baiano. Mr. Baiano has stated publicly that he has re-registered at the Dutchess County Board of Elections as a Republican. However, the new registration does not become effective until after the general election in November 2003. In fact, Mr. Baiano's registration form will remain sealed at the Board of Elections.
>
> "Republicans at the Legislature continually hold caucuses with Mr. Baiano present, in spite of my objections. It is my belief that their closed caucuses with one registered Democrat present constitutes a legal meeting of the Dutchess County Legislature and those meetings should be open to the public. These meetings or 'party caucus' as the Republicans call them, are closed to the public, the press, and to other Democrats."

In this regard, by way of background, the definition of "meeting" [see Open Meetings Law, §102(1)] has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals found that any gathering of a 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.

With respect to the ability to exclude the public, 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 regard 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.

As you suggested in your letter, the member who intends to change his party registration is not yet a member of the majority. 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."

When a similar issue arose, 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 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 seeks to change his enrollment will not be deemed to be a registered republican until after the next general election in November; for purposes of political party registration, he will remain a democrat until that date.

In a variety of decisions, the courts have determined that provisions authorizing the exclusion of the public from meetings of public bodies should be construed narrowly. Notable in the context of the situation described is 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 consideration of the intent of the Open Meetings Law, the exemption concerning political caucuses should be narrowly construed. 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:

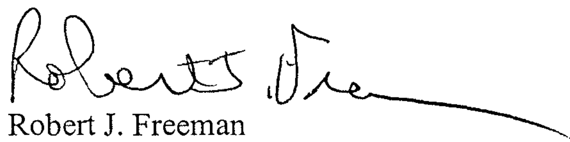
> "The Court of Appeals in *Orange County* (supra) also declared: 'The purpose and intention of the State Legislature in the present context are interpreted as expressed in the language of the statute and its preamble.' The legislative intent, therefore, expressed in Section 108, must be read in conjunction 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).

Lastly, one of the articles attached to your letter suggests that "if it were up to Bob Freeman, if you were on the phone in the bathroom, he would want the door open." In this regard, it is emphasized that every opinion offered by this office is based on the law and its judicial interpretation and that our only goal is to provide accurate legal advice, irrespective of the source of the question. Thousands of opinions rendered by this office are accessible online, and I believe that a review of the opinions will confirm that they are impartial and consistent with law and the direction provided by the courts.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

OML-AO - 3598

From: Robert Freeman
To: Donald Symer
Date: 3/4/03 8:18AM
Subject: Re: Lancaster Rural Cemetery Assoc

Dear Mr. Symer:

I have received your comments concerning the lack of "meaningful access" to an annual meeting of the Lancaster Rural Cemetery Association.

In this regard, I do not believe that meetings of the Association or its board of directors fall within the coverage of the Open Meetings Law. That statute pertains to meetings of public bodies, and section 102(2) defines the phrase "public body" to include entities that perform a "governmental function" and conduct public business for the state or for a unit of local government. The association, based on your comments, is not a governmental entity, but rather is a private, not-for-profit corporation. If that is so, it would not constitute a public body and, therefore, would not be required to comply with the Open Meetings Law.

Since you characterized the Association as "a type of public benefit organization", I nnote that the term "public benefit corporation" is defined in section 66(4) of the General Construction Law to mean "a corporation organized to construct or operate a public improvement wholly or partly within the state, the profits from which inure to the benefit of this or other states or to the people thereof." As I understand the matter, the Association is not a public benefit corporation; again, it appears to be a private non-profit organization.

It is suggested that you review the Association's by-laws, for they will likely include information concerning the conduct of its meetings and access by members and lot owners.

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

Robert J. Freeman
Executive Director
NYS Committee on Open Government
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OML-AO-3599

From: Robert Freeman
To: [redacted]
Date: 3/6/03 8:44AM
Subject: Dear Mr. Henderson:

Dear Mr. Henderson:

I have received your inquiry concerning a special meeting held by the Fulton Common Council.

In this regard, there is nothing in the Open Meetings Law that deals specifically with "special meetings", and nothing in that law precludes a public body from convening quickly when there is a need to do so.

The only issue, as you described the matter, would likely have involved the adequacy of notice given prior to the meeting. Under section 104 of the Open Meetings Law, if a meeting is scheduled at least a week in advance, notice of the time and place must be given not less than 72 hours prior to the meeting to the news media and by means of posting in one or more designated, public locations. If a meeting is scheduled less than a week in advance, notice of the time and place must be given to the news media and posted "to the extent practicable" at a reasonable time prior to the meeting.

It is also noted that the most significant penalty that may imposed for failure to comply with the Open Meetings involves the situation in which action was taken in private that should have been taken in public. In that instance, should the action be challenged in court, the court may, in its discretion and upon good shown, invalidate the action taken in violation of the Open Meetings Law pursuant to section 107 of that statute. However, the same provision also says that an unintentional failure to fully comply with the notice requirements shall not alone be grounds for invalidating action.

I hope that the foregoing serves to clarify your understanding of the law and that I have been of assistance. If you have questions relating to the matter, please feel free to contact me.

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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-13930
OML-AO-3600

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March 10, 2003

Mr. William Hanson

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. Hanson:

I have received several letters from you directly, and the Office of the State Comptroller also recently forwarded correspondence from you to this office. You complained that Mr. Leon Campo, Assistant Superintendent and Records Access Officer for the East Meadow Union Free School District, has failed to comply with the Freedom of Information Law. In brief, you sought the "attendance records" of members of the Board of Education concerning meetings and work sessions held by the Board from September, 2001 to January of this year.

In this regard, first, it is emphasized that the Freedom of Information Law pertains to existing records and that §89(3) states in relevant part that an agency, such as a school district, is not required to create or prepare a record in response to a request.

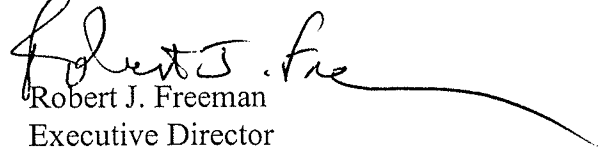
In my experience, it would be unusual for a school district to maintain what might be characterized as attendance records pertaining to school board members' presence at meetings. However, a source of equivalent information typically would be minutes of meetings. Minutes generally identify board members in attendance and must include the manner in which members voted in each instance in which action is taken [see Freedom of Information Law, §87(3)(a); Open Meetings Law, §106]. As such, a review of minutes would indicate which members of the board attended meetings. I note, too, that it was established nearly twenty-five years ago that a "work session" constitutes a meeting that falls within the coverage of the Open Meetings Law [Orange County Publications v. Council of the City of Newburgh, 60 AD2d 409, aff'd 45 NY2d 947 (1978)].

To learn more of the matter, I contacted Mr. Campo. As I surmised, the District does not maintain separate attendance records relating to Board members' presence at meetings. Minutes of meetings, however, include the information of your interest. He also indicated that he attempted to contact you to inform you of the District's practice and the availability of the minutes, and that

copies of the minutes have been sent to you. Based on the information that he provided, I believe that the District has complied with law, that the matter has been resolved and that it has, therefore, become moot.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Leon Campo

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3601

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March 10, 2003

Mr. Peter B. Boody
Editor
The Shelter Island Reporter
P.O. Box 756
Shelter Island, NY 11964

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. Boody:

I have received your letter, as well as a news article and an editorial, concerning a certain issue considered by the Shelter Island Planning Board. You have questioned the propriety of executive sessions held during recent meetings at which that issue was discussed.

Specifically, in its review of a subdivision application, executive sessions have been held on the ground that the Town, in your words, is "negotiating for the acquisition of real estate - in this case an easement or 'development right' to a particular well-known parcel in town rather than the land itself." You added that "[a]ll parties that might be affected by this proposed purchase are well aware of the property involved and of these negotiations; the owners's representative, in fact, is in attendance at these closed sessions."

In this regard, as you are aware, the Open Meetings Law is based on a presumption of openness. Stated differently, meetings of public bodies must be conducted open to the public, except to the extent that an executive session may properly be conducted in accordance with paragraphs (a) through (h) of §105(1). Consequently, a public body, such as a planning board, 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 ground for entry into executive session that is relevant in relation to the matter that you described.

The only provision of apparent significance, §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.

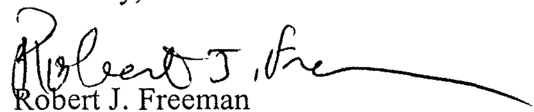
A key question, in my view, involves the extent to which information relating to possible real property transactions is or has become known to the public. The more that is known, the less likely it is that publicity would have an impact on the value of a parcel or would in some way damage the interests of Town 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. 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 may an executive session properly be held.

In this instance, there is nothing secret about the issue; the residents of the community are well aware of the matter, for it is the subject of review by the Planning Board. Moreover, all of the parties affected have been involved in the negotiations. In consideration of the facts as you presented them, I do not believe that a claim could justifiably be made or proven that publicity could have an effect, let alone a "substantial" effect, on the value of the property that is the subject of the discussion. If that is so, I do not believe that §105(1)(h), or any other ground for entry for executive session, could be asserted as a means of closing a meeting of the Board.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt
cc: Planning Board
Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 3602

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March 11, 2003

Mr. Joseph W. Sallustio, Jr.

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

Dear Mr. Sallustio:

I have received your letter in which you raised a question concerning compliance with the Open Meetings Law by the City of Rome Common Council.

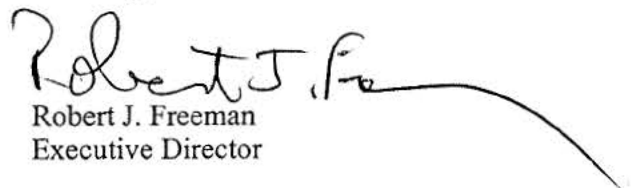
According to your letter, the Common Council entered into executive session "to hear the progress and agreements made between the Rome City administration and the Town of Verona in regards to the selling of water to the Town of Verona by the City of Rome." You added that "[t]he selling of water to Verona includes making the water available to the Oneida Indian Nation, a sovereign nation."

In this regard, as you may be 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 a closed or executive session may properly be held. Paragraphs (a) through (h) of §105(1) specify and limit the subjects that may be considered during an executive session. That being so, a public body cannot enter into executive session to discuss the subject of its choice; again, its authority to do so is restricted to the eight grounds appearing in §105(1).

From my perspective, based on a review of the grounds for entry into executive session and your description of the facts, it is unlikely that any of those grounds could validly have been asserted by the Common Council to consider the issue that is the subject of your inquiry.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Common Council

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 13936
OML-AO-3603

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March 12, 2003

Ms. Vonnie Kessler

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. Kessler:

I have received your letter in which you raised a variety of questions relating to the implementation of the Open Meetings and Freedom of Information Laws by the Elmira City School District and its Board of Education.

The first area of inquiry concerns a gathering of a public body that has been characterized as a "presentation practice", rather than a meeting, and that, therefore, it falls outside the coverage of the Open Meetings Law. Without more specific information pertaining to the event, I cannot provide a precise response. However, in an effort to offer guidance, it is noted 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)].

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 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.

Second, you asked whether the Superintendent may "call for an unscheduled executive session during a school board meeting to 'get legal advice' concerning the issue of discussion and then come out session 20 minutes later and announce board action that was decided on the issue behind closed doors." In this regard, there are two vehicles that may authorize a public body to discuss public business in private. One involves entry into an executive session. Section 102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded, and §105(1) 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. That being so, an executive session, in my view, cannot be scheduled, for it cannot be known in advance that motion to enter into executive will be approved.

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

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

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

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

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

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

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

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

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

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.

Since you referred to action taken in private, I point out that a board of education may do so only in rare instances. As a general rule, a public body may take action during a properly convened executive session [see Open Meetings Law, §105(1)]. In the case of most public bodies, if action is taken during an executive session, minutes reflective of the action, the date and the vote must be recorded in minutes pursuant to §106(2) of the Law. If no action is taken, there is no requirement that minutes of the executive session be prepared. Various interpretations of the Education Law, §1708(3), however, indicate that, except in situations in which action during a closed session is permitted or required by statute, a school board cannot take action during an executive session [see United Teachers of Northport v. Northport Union Free School District, 50 AD 2d 897 (1975); Kursch et al. v. Board of Education, Union Free School District #1, Town of North Hempstead, Nassau County, 7 AD 2d 922 (1959); Sanna v. Lindenhurst, 107 Misc. 2d 267, modified 85 AD 2d

157, aff'd 58 NY 2d 626 (1982)]. Stated differently, based upon judicial interpretations of the Education Law, a school board generally cannot vote during an executive session, except in those unusual circumstances in which a statute permits or requires such a vote.

Those circumstances would arise, for example, when a board initiates charges against a tenured person pursuant to §3020-a of the Education Law, which requires that a vote to do so be taken during an executive session. The other instance would involve a situation in which action taken in public could identify a student. When information derived from a record 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.

The remaining question relating to the Open Meetings Law involves "the legal definition" of "consensus." I know of no "legal definition." However, the notion of a consensus reached at a meeting of a public body was considered in Previdi v. Hirsch [524 NYS 2d 643 (1988)], which 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 session was properly held, it was found that "this was not a 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).

If a public body, such as a board of education, 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 [see Freedom of Information Law, §87(3)(a); Smithson v. Ilion Housing Authority, 130 AD 2d 965, 967 (1987)]. I recognize that the public bodies often attempt to present themselves as being unanimous and that a ratification of a vote is often carried out in public. Nevertheless, if a unanimous ratification does not indicate how the members actually voted behind closed doors, the public may not 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 so-called "straw vote", which 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.

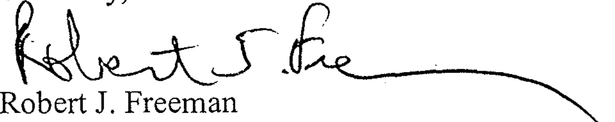
Next, if a request is denied under the Freedom of Information Law, and the denial is sustained following an appeal, the person denied access has the right to seek judicial review of the determination by initiating a proceeding under Article 78 of the Civil Practice Law and Rules. In the alternative, any person may seek an opinion concerning the propriety of the denial of access from this office. While the opinions rendered by this office are not binding, it is our hope that they are educational and persuasive. Further, the courts in many instances have cited and relied upon the Committee's opinions as the basis for their decisions.

Lastly, when seeking records under the Freedom of Information Law, §89(3) requires that an applicant must "reasonably describe" the records sought. Therefore, a person requesting records should provide sufficient detail to enable the staff of an agency to locate and identify the records. Often names, dates, time periods, locations, file designations and similar identifiers can be useful in reasonably describing the records.

As you requested, and in an effort to enhance compliance with and understanding of the Freedom of Information and Open Meetings 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:tt

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO - 3604

Committee Members

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March 24, 2003

Ms. Debra Balestra
Ad Hoc Committee for Leadership
SUNY Rockland Community College
145 College Road
Suffern, NY 10901-3699

The staff of the Committee on 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. Balestra:

I have received your letter in which you sought my views concerning a matter involving the Rockland Community College Board of Trustees and its implementation of the Open Meetings Law.

You referred to a recent meeting held by the Board in the usual location, "a room that holds 49 people." You indicated that, prior to the meeting, you "personally called the president's office to inform them that there were going to be well over 49 people in attendance and they might want to change the location of the room to accommodate the students, faculty, and staff that were planning on attending." Notwithstanding your request, the Board chose not to change the location of the meeting, and you wrote that "[t]here were well over 75 people standing outside the room, unable to listen and observe what took place at this meeting."

You asked whether the Board was "required by the Open Meetings Law to accommodate the public by changing the room, if they know in advance that there is going to be a larger turnout than usual." Based on a judicial decision concerning a similar situation, the Board should have held its meeting in a larger facility.

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

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

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

In view of the foregoing, 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.

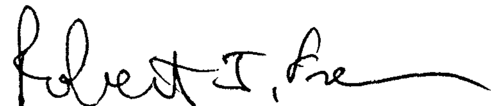
From my perspective, every provision of law, including the Open Meetings Law, should be implemented in a manner that gives reasonable effect to its intent. In my opinion, if it is known in advance of a meeting that a larger crowd is likely to attend than the usual meeting location will accommodate, and 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.

In sum, in consideration of the facts as you presented them, the intent of the Open Meetings Law and the judicial decision referenced above, I believe that the Board of Trustees was required to have chosen a location for its meeting of a size sufficient to have accommodated those likely interested in attending.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-13963
OML-AO-3605

Committee Members

Randy A. Daniels
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Stewart F. Hancock III
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March 25, 2003

E-Mail

TO: Allegra Dengler [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 Trustee Dengler:

I have received your letter of March 3 in which you raised a variety of questions, several of which concern the Open Meetings and Freedom of Information Laws as they relate to certain activities of the Village of Dobbs Ferry.

In this regard, it is emphasized at the outset that the advisory jurisdiction of this office is limited to matters involving the two statutes referenced above. I have neither the authority nor the expertise to respond to your questions concerning the expenditure of public money without public notice. As your questions pertain to those statutes, I offer the following comments.

First, as a general matter, when a public body has properly entered into executive session, it may vote during the executive session, unless the vote is to appropriate public moneys. Section 106(2) of the Open Meetings Law pertains specifically to minutes of executive sessions and states 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."

Subdivision (3) of §106 requires that minutes of executive session must be prepared and made available, to the extent required by the Freedom of Information Law, within one week of the executive session during which the action was taken.

Second, with respect to the map to which you referred, the Freedom of Information Law is expansive in its coverage, for it pertains to all agency records and defines the term "record" broadly to include:

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

Based on the foregoing, Village records include not only those kept in Village Hall, but also those prepared or kept *for* the Village as well. Therefore, if, for example, the Village retains a consultant and the consultant prepares or maintains records for the Village, those records, in my view, fall within the coverage of the Freedom of Information Law. If a request has been made for records in that circumstance, it has been advised that the designated records access officer direct the consultant to disclose the records in a manner consistent with law, or acquire the records to determine the extent to which they must be disclosed.

Lastly, if an agency "does not release records", the person denied access has the right to appeal pursuant to §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 of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

I hope that I have been of assistance.

RJF:jm

cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3606

Committee Members

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March 27, 2003

Hon. Florence T. Santini
Town Clerk
Town of Deerpark
P.O. Box A
Huguenot, NY 12746

The staff of the Committee on 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. Santini:

I have received your note and the materials attached to it. As I understand the matter, the Town Board has conducted executive sessions, describing the issue to be discussed as a "personnel matter". Further, situations have arisen in which the Board has entered into executive sessions to discuss certain matters, but immediately thereafter took action on completely different matters.

In this regard, I offer the following comments.

First, 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 public body, such as a town board, indicates that a certain subject or subjects will be discussed during an executive session, it is restricted to consideration of the topics expressed in its motion for entry into executive session. If the board begins to discuss a new or different subject, it should return to the open meeting.

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

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

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

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

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

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

Insofar as a discussion involves a particular person in relation to one or more of the subjects described in §105(1)(f), an executive session may justifiably held. On the other hand, when it involves consideration or review of procedures, policies or practices, or positions, irrespective of who might hold those positions, I do not believe that there would be a basis for discussion in executive session. Even though those kinds of subjects might be reflective of "personnel" issues,

they would not focus on any particular person and, therefore, in my opinion, must be discussed in public.

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 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:

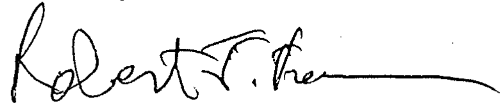
> "...the public body must identify the subject matter to be discussed (See, Public Officers Law § 105 [1]), and it is apparent that this must be accomplished with some degree of particularity, i.e., merely reciting the statutory language is insufficient (see, Daily Gazette Co. v Town Bd., Town of Cobleskill, 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, a motion to enter into executive session should be sufficiently detailed to enable members of the Board and the public in attendance to know that there is clearly a proper basis for conducting an executive session.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML AO - 3607

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March 28, 2003

Mr. William Margrabe

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

Dear Mr. Margrabe:

I have received your letter in which you questioned the propriety of a delay in the disclosure of minutes of meetings of the Board of Education of the Pelham Union Free School District.

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

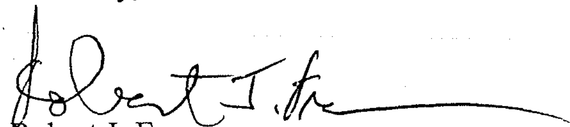
> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.
>
> 2. Minutes shall be taken at executive sessions of any action that is taken by formal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

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

There is nothing in the Open Meetings Law or any other statute of which I am aware that requires that minutes be approved. Nevertheless, as a matter of practice or policy, many public bodies approve minutes of their meetings. In the event that minutes have 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.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3608

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March 28, 2003

Mr. Jim Parker
Clapsaddle Farm

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

Dear Mr. Parker:

I have received your letter in which you wrote that you and others sought to attend a scheduled meeting of Ilion Village Board of Trustees and the boards of directors of the Village's municipal light and water departments. Upon arrival, you were informed that the entities participating in the meeting were entering into executive session to discuss "finances." You have questioned the propriety of the foregoing.

In this regard, first, it was held more than twenty years ago that joint meetings held by two or more public bodies are subject to the Open Meetings Law [Oneonta Star v. Board of Trustees of Oneonta School District, 66 AD 2d 51 (1979)], and later that a gathering of a quorum of a city council for the purpose of holding a "planned informal conference" involving a matter of public business constituted a meeting that fell within the scope of the Open Meetings Law, even though the council was asked to attend by a city official who was not a member of the city council [Goodson-Todman v. Kingston Common Council, 153 AD 2d 103 (1990)]. Therefore, so long as a quorum of at least one public body, such as the Village Board of Trustees, gathered to conduct public business, the event as you described it would have constituted a "meeting" subject to the Open Meetings Law.

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

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

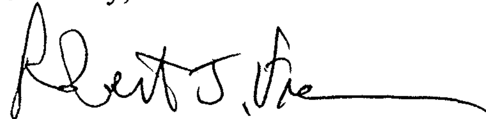
As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed and it must be carried by majority vote of a public body's membership before such a session may validly be held. The ensuing provisions of §105(1) specify and limit the subjects that may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

In my view, describing the matter to be considered in executive session as "finances", without more, would not be sufficient to enable the public to know whether there may indeed have been a proper basis for entry into executive session. Moreover, a discussion concerning municipal finances ordinarily would not fall within any of the grounds for entry into executive session.

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

OML AO - 3609

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March 28, 2003

Ms. Joan M. Charles
President, Mendon Public Library
Board of Trustees
Mendon Public Library
15 Monroe Street
Honeoye Falls, NY 14472

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. Charles:

I have received your letter of March 8 in which you sought clarification concerning the application of the Open Meetings Law to the Mendon Public Library Board of Trustees, as well as committees and subcommittees consisting of members of the Board.

In this regard, I offer the following comments.

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

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

Based on the foregoing, as a general matter, the Open Meetings Law pertains to governmental bodies, such as a board of education, a city council, a county legislature, and the like. It also clearly applies to the board of trustees of a school district or municipal public library. Therefore, if a majority or quorum board of trustees of a governmental library, such as a school district or town library, gathers to conduct public business, the gathering would constitute a "meeting" that falls within the coverage of the Open Meetings. In a board consisting of seven, four would constitute a quorum. Similarly, if the board of a governmental library designates a committee consisting of two or more of its members, that, too, would constitute a public body subject to the Open Meetings Law.

If a committee consists of three, for example, its quorum would be two, and if two of the three gather as committee members to discuss the business of the committee, such a gathering would also be within the scope of the Open Meetings Law.

Many entities characterized as public libraries are not-for-profit corporations that are not governmental in nature. While the Open Meetings Law ordinarily does not apply to meetings of the governing bodies of those entities, the boards of trustees of all public libraries are required to comply with the Open Meetings Law in order to comply with §260-a of the Education Law. That provision states that:

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

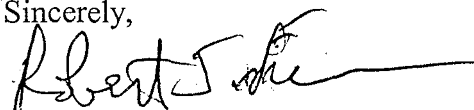
Since Article 7 of the Public Officers Law is the Open Meetings Law, meetings of boards of trustees of various libraries, including public libraries that are not-for-profit corporations, must be conducted in accordance with that statute.

For reasons discussed earlier, a committee of the board of a governmental library would be required to comply with the Open Meetings Law even if §260-a of the Education Law had never been enacted. However, in situations in which the Open Meetings Law would not apply had that law not been enacted, i.e., in the case of the board of a not-for-profit corporation or its committees, the committees and subcommittees of those boards outside of New York City are not subject to Open Meetings Law.

In sum, the boards of trustees of all public libraries are required to comply with the Open Meetings Law; the committees and subcommittees of governmental library boards of trustees are also required to comply with that statute; committees and subcommittees of non-governmental library boards outside of New York City are not subject to the Open Meetings Law. This not to suggest that committees and subcommittees outside the requirements of the Open Meetings Law may not conduct open meetings. On the contrary, they may do so even though the law does not require that they do so.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

OML-AO - 3610

From: Robert Freeman
To: [redacted]
Date: 3/31/03 10:17AM
Subject: Dear Ms. Reeverts:

Dear Ms. Reeverts:

I have received your inquiry concerning the preparation of minutes of certain union meetings.

In this regard, the statutes within the advisory jurisdiction of this office deal with public access to government information. The Open Meetings Law contains provisions concerning committees, subcommittees and the preparation of minutes. However, that statute pertains only governmental entities; it does not apply to private organizations, such as unions.

In short, I cannot offer specific guidance, for the matter is beyond the jurisdiction or expertise of this office. It is suggested, however, that the union's by-laws may address the issue and that it may be worthwhile to review them.

I regret that I cannot be of greater assistance.

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

OML-AO-3611

From: Robert Freeman
To: [redacted]
Date: 3/31/03 10:28AM
Subject: Dear Ms. Simonson:

Dear Ms. Simonson:

I have received your inquiry and, if I understand it correctly, the Town Supervisor intends to take action based on discussion with at least two members of the Town Board that occurred outside of a meeting of the Board. If that is so, I do not believe that he or the Board can validly do so.

The only instances in which the Board may take action in my view would be at a meeting during which a quorum is physically present and a motion is carried by a majority vote of the Board's total membership, or, based on relatively recent legislation, when the members of the Board conduct a meeting by videoconference during which the members of the Board and others present at one or more locations can all observe one another. I note that there is a judicial decision indicating that action purportedly taken by members of a town board by means of a series of telephone calls was invalid and a nullity.

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

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3612

Committee Members

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April 1, 2003

Ms. Margaret Murphy

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. Murphy:

I have received your letter of March 17 and the materials attached to it. According to the correspondence, you arrived at a meeting of the Board of Education of the Sewanhaka Central High School District on March 11 at 7:30 p.m. and found that the meeting was already in progress. During a break, you asked whether you could address the Board concerning a matter of policy, but you were informed by the President that "the Board had already voted prior to 7:00 p.m. and that the Board approved the policy." You wrote that you thought that you "must have gotten the time of the meeting wrong", but you checked further and attached a newspaper article and an agenda, both of which confirmed your belief that the meeting was scheduled to begin at 7:30.

You expressed the understanding "that the Board's vote on this policy issue prior to the published time of 7:30 p.m. is inconsistent with the Open Meetings Law", and you have sought my opinion on the matter.

From my perspective, the Board failed to comply with the Open Meetings Law.

In this regard, if notice was given indicating that the meeting would begin at 7:30 p.m., the Board should have waited until that time to begin conducting its business. Alternatively, if there was a need to convene earlier than the time specified in the original notice, I believe that the Board should have given additional notices to the news media and at the location where notice is posted to reflect the actual time when the meeting would begin. If no notice was given of the actual time that the meeting convened, it would appear that the meeting was held, in effect, in private. When action is taken in private in violation of the Open Meetings Law, a court is authorized to invalidate such action pursuant to §107 of that statute.

Section 104 of the Open Meetings Law pertains to notice of meetings and requires that every meeting be preceded by notice given to the news media and posted. That provision states that:

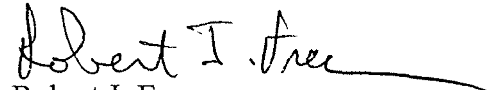
> "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before each meeting.
>
> 2. Public notice of the time and place of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

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

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

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Education
Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-13989
OML-AO-3613

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April 3, 2003

James T. Crean

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. Crean:

I have received your letter in which you requested an advisory opinion.

According to the materials that you enclosed, you serve as a member of the Orchard Park Central School District Board of Education, and you indicated that "[t]here is e-mail traffic that indicates that some board members receive e-mails concerning official school business when other board members do not." By means of example, you referred to a situation in which a Board member transmitted a draft of a letter he planned to send to an Assemblyman relating to state funding for the School District to all but two members of the Board.

From my perspective, the issues arising from the facts as you described them potentially involve both the Open Meetings and Freedom of Information Laws. In this regard, I offer the following comments.

First, there is nothing in the Open Meetings Law that would preclude members of a public body from conferring individually, 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. With specific respect to email, I believe that it must be considered in terms of two kinds of communications.

By way of background, the Open Meetings Law pertains to public bodies, and §102(2) defines the phrase "public body" to mean:

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

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

Further, §102(1) of the Open Meetings Law defines the term "meeting" to mean "the official convening of a public body for the purpose of conducting public business, including the use of videoconferencing for attendance and participation by the members of the public body." Based upon an ordinary dictionary definition of "convene", that term means:

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

In view of that definition and others, I believe that a meeting, i.e., the "convening" of a public body, involves the physical coming together of at least a majority of the total membership of such a body, i.e., the Board of Education, or a convening that occurs through videoconferencing. I point out, too, that §103(c) of the Open Meetings Law states that "A public body that uses videoconferencing to conduct its meetings shall provide an opportunity to attend, listen and observe at any site at which a member participates."

The provisions in the Open Meetings Law concerning videoconferencing are newly enacted (Chapter 289 of the Laws of 2000), and in my view, those amendments clearly indicate that there are only two ways in which a public body may validly conduct a meeting. Any other means of conducting a meeting, i.e., by telephone conference, by mail, or by e-mail, would be inconsistent with law.

As indicated earlier, the definition of the phrase "public body" refers to entities that are required to conduct public business by means of a quorum. The term "quorum" is defined in §41 of the General Construction Law, which has been in effect since 1909. The cited provision, which was also amended to include language concerning videoconferencing, states that:

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

> officers would have were there no vacancies and were none of the persons or officers disqualified from acting."

Based on the foregoing, again, a valid meeting may occur only when a majority of the total membership of a public body, a quorum, has "gathered together in the presence of each other or through the use of videoconferencing." Moreover, only when a quorum has convened in the manner described in §41 of the General Construction Law would a public body have the authority to carry out its powers and duties. Consequently, it is my opinion that a public body may not take action or vote by means of e-mail.

Conducting a vote or taking action via e-mail would, in my view, be equivalent to voting by means of a series of telephone calls, and in the only decision dealing with a vote taken by phone, the court found the vote to be a nullity. In Cheevers v. Town of Union (Supreme Court, Broome County, September 3, 1998), which cited and relied upon an opinion rendered by this office, the court found that action taken by means of a series of telephone calls was invalid, for there was "no physical gathering", but rather a circumvention of the Open Meetings Law.

As the foregoing relates to email among the members, one kind of email involves the transmission of information from one member to another. In my view, the Open Meetings Law is not implicated by that kind of communication. Similar is the transmission of information to several people, as in the use of a listserve, where each recipient opens the email transmission at a different time. One person might be in front of the monitor constantly and may receive the transmission instantly; another might review his or her email at the end of the day or in the evening at home; a third might not check his or her email for days at a time. In those instances, the transmissions are, in my view, equivalent to the distribution of traditional mail. Each recipient opens and reads the contents at a different time. There is no instantaneous communication, and I do not believe that the Open Meetings Law in that situation is implicated in any way.

The other kind of email involves the use of a chat room or instant messaging. If a majority of the Board communicates instantaneously via a chat room or instant messaging, I believe that it would be conducting, in essence, a virtual meeting that would be inconsistent with the Open Meetings Law. The legislative declaration appearing in §100 of that statute provides 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. If a majority gathers and communicates instaneously by holding a meeting through the use of email, the public would have no notice of the gathering, nor would the public have the right to observe the performance of public officials or the deliberative process.

As the Freedom of Information Law relates to your concerns, I note that that statute pertains to all agency records, and that §86(4) of that statute defines the term "record" expansively to include:

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

Based on the foregoing, I believe that e-mail communications between Board members or to any person when a member is acting in his or her capacity as a Board member would constitute "records" that fall within the coverage of the Freedom of Information Law. Whether those communications come into the physical possession of the District at its offices is, according to case law, irrelevant. So long as the communications exist in some physical form (i.e., if they are stored in a computer and may be transmitted or printed), I believe that they are subject to rights conferred by the Freedom of Information Law. 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; also Encore College Bookstores, Inc. v. Auxiliary Service Corp., 87 NY 2d 410 (1995)]..

This is not to suggest that email is necessarily accessible in its entirety to the public. As in the case of paper records, the nature and content of an email communication are the factors that determine public 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.

Perhaps most pertinent in the context of your comments 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. If, for instance, Board members exchange their opinions regarding an issue via email, those kinds of communications could be withheld. On the other hand, insofar as their exchanges include statistical or factual information, those portions of the communications would ordinarily be accessible to the public under §87(2)(g)(i).

Also potentially relevant is §87(2)(b), which authorizes an agency to deny access to records insofar as disclosure would result in "an unwarranted invasion of personal privacy." That provision might be asserted to withhold identifying details in correspondence between Board members and residents of the District. Similarly, the Family Educational Rights and Privacy Act (20 USC §1232g) may prohibit the disclosure of information identifiable to a student that would make the student's identity easily traceable.

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

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

I hope that the foregoing serves to clarify your understanding of the scope of open government laws and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Education
Mary Pasciak

STATE OF NEW YORK
DEPARTMENT OF STATE
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OML-AO-3614

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April 3, 2003

Mr. H. William VanAllen

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. Van Allen:

As you are aware, I have received your correspondence concerning access to the meetings, records and related activities of the State Board of Elections.

In one of your letters, you referred to the "miss-use [sic] of executive sessions" by the Board. Without additional information concerning the nature of or basis for entry into the executive sessions, I cannot offer specific guidance. However, as a general matter, it is emphasized that every meeting of a public body, such as the Board, must be convened as an open meeting, and that §102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. 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..."

Based on the foregoing, 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. Consequently, a public body may not conduct an executive session to discuss the subject of its choice.

In another letter, you referred specifically to a federal statute, the "Help America Vote Act" (HAVA). As I understand the legislation, it requires each state to designate a HAVA task force charged with duty to offer advice and recommendations designed to enhance participation in the electoral process. If my understanding of the legislation is accurate, while the HAVA task force may hold its meetings open to the public, it would not be required to do so by the Open Meetings Law. Based on a decision rendered by the State's highest court, the Court of Appeals, an entity created pursuant to federal law would not be subject to the New York Open Meetings Law. The decision dealt with a "laboratory animal use committee" (LAUC) required to be established pursuant to federal law and instituted at the State University at Stony Brook, and it was determined that the entity in question fell beyond the scope of the Open Meetings Law.

That statute pertains to meetings of public bodies, and the Court cited §102(2), which defines the phrase "public body" to mean:

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

Following its reference to the definition, the Court found that:

> "It is thus evident that the Open Meetings Law excludes Federal bodies from its ambit.
>
> "The LAUC's constituency, powers and functions derive solely from Federal law and regulations. Thus, even if it could be characterized as a governmental entity, it is at most a *Federal* body that is not covered under the Open Meetings Law" [ASPCA v. Board of Trustees of the State University of New York, 79 NY 2d 927, 929 (1992)].

Assuming that the HAVA task force is a creation of federal law, again, it would not constitute a "public body" required to comply with the Open Meetings Law. This not to suggest that it cannot hold open meetings, but rather that it is not required by the Open Meetings Law to do so.

Since you referred to the Freedom of Information Law as well, I note that it has been held that its scope is more expansive than the Open Meetings Law. The former is applicable to all agency records, for §86(4) defines the term "record" to include:

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

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

In another decision rendered by the Court of Appeals, Citizens for Alternatives to Animal Labs, Inc. v. Board of Trustees of the State University of New York [92 NY2d 357, October 22, (1998)], even though records were kept pursuant to federal law by a state agency, the Court determined that the records fell within the coverage of the New York Freedom of Information Law and were subject to rights conferred by that statute. In short, the fact that records are kept or held by an agency brings them within the coverage of the Freedom of Information Law, irrespective of "the function or purpose for which an agency's documents are generated or held." The Court held further that "FOIL's scope...'is not to be limited based on the [Federal] purpose' for which the certifications were kept 'or the function to which [they] relate [],' i.e., serving to comply with a Federal mandate..." (id., 361).

As in the case of your contentions concerning executive sessions in which no specific allegation was offered, you have not referred to any particular instance in which you believe that the Board has failed to comply with the Freedom of Information Law. That being so, I can only advise that the law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. I note that the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the exceptions that follow. In my view, the phrase quoted in the preceding sentence evidences a recognition on the part of the Legislature that a single record or report, for example, might include portions that are available under the statute, as well as portions that might justifiably be withheld. That being so, I believe that it also imposes an obligation on an agency to review records sought, in their entirety, to determine which portions, if any, might properly be withheld or deleted prior to disclosing the remainder.

The Court of Appeals reiterated its general view of the intent of the Freedom of Information Law in Gould v. New York City Police Department, stating that:

> "To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption' (*Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 *see,* Public Officers Law § 89[4][b]). As this Court has stated, '[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld' (*Matter of Fink v. Lefkowitz*, 47 N.Y.2d, 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)" [89 NY 2d 267, 275 (1996)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Tom Wilkey
Lee Daghlian

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3615

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April 4, 2003

Mr. John Hammond
Executive Director
Northern New York
Library Network
6721 US HWY 11
Potsdam, NY 13676

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. Hammond:

I have received your letter in which you requested an opinion concerning "the applicability of the Open Meetings Law and §260-a of the Education Law to the Northern New York Library Network ("the Network"), a not-for-profit educational corporation chartered by the University of the State of New York and established under §255(3) of the Education Law.

The Provisional Charter of the Network, which had been known as the North Country Reference and Research Resources Council, indicates that its purpose is "to improve reference and research library resources and services, and to provide a means for the development of inter-library cooperative plans and services within the area of the Council", which includes seven counties in northern New York. You wrote that the Network is not a library but rather "a reference and research library resources library system" and that its "voluntary membership includes hospital libraries, museum libraries, public libraries, law libraries, public library systems, school library systems, college and university libraries, corporate libraries, and correctional facility libraries."

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

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

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

In addition, that statute, which is codified as Article 7 of the Public Officers Law, is applicable to boards of trustees of public libraries pursuant to §260-a of the Education Law, which states that:

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

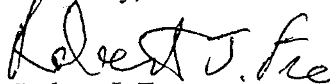
Again, since Article 7 of the Public Officers Law is the Open Meetings Law, meetings of boards of trustees of various libraries, including public libraries that are not-for-profit corporations, must be conducted in accordance with that statute.

As you suggested, the Network does not appear to be a public library system or cooperative library system as those entities are described in §255 of the Education Law, nor is it a public library or a free association library. If that is so, because the network is not a governmental entity, it appears that the meetings of its governing body are not subject to either the Open Meetings Law or §260-a of the Education Law.

Having sought to research the issue, the Network appears to be most analogous to a "reference and research library resources system", which is defined in §272(2)(a) of the Education Law to mean "a duly chartered educational institution resulting from the association of a group of institutions of higher education, libraries, non-profit educational institutions, hospitals and other institutions organized to improve reference and research library resources service." I note, however, that paragraph (b) of §272(2) indicates that the area served by a reference and research library resources system "shall include not less than seven hundred fifty thousand persons", which is more than the Network serves. Nevertheless, again, as I understand its nature, the Network's governing body is not required to give effect to §260-a of the Education Law or, therefore, the Open Meetings Law.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3616

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April 4, 2003

E-Mail

TO: Hon. Margaret A. Kastler <sandycreekny@tcenet.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 Supervisor Kastler:

As you are aware, I have received your letter of March 24 in which you raised a series of questions concerning the Open Meetings Law.

By way of background, you wrote that a motion was made to enter into executive session "to discuss health insurance." When you asked that the Clerk review the eight areas appropriate for consideration in executive session that appear in §105(1) of the Open Meetings Law, you contended that there was no basis for discussing the matter in private. Some time later, the Board member who made the motion referred to Article XIV of the Civil Service Law, the Public Employees Fair Employment Act, which is also known as the "Taylor Law", and expressed the belief that it authorized the Board to conduct an executive session to discuss the matter that was the subject of his motion. He referred specifically to §§204-a and 209. You wrote that since there is "no organized labor" in the Town of Sandy Creek, those provisions appear to be inapplicable.

Sections 204-a and 209 pertain respectively to "[a]greements between public employers and employee organizations" and "[r]esolution of disputes in the course of collective negotiations." An employee organization for the purposes of those provisions is a public employee union, and collective bargaining involves the process of negotiation between a public employer, such as a municipality, and a public employee union. If the employees of the Town of Sandy Creek are not members of an employee organization, a union, I believe that your contention was accurate, for the provisions cited by the Board member would not apply.

Lastly, since "it is at the discretion of the Town Clerk if personal opinions are included in the minutes", you asked whether incorrect and misleading information [may] be deleted from the minutes before they are approved at the next board meeting." In this regard, §106 of the Open Meetings Law pertains to minutes of meetings and states that:

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

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. Reference to personal opinions expressed during meetings need not be included in the minutes at all. Therefore, whether a personal opinion is considered to accurate or misleading, there is no requirement that it be included in the minutes. If information contained in draft or unapproved minutes is inaccurate, I believe that the Board has the authority to take action to attempt to correct the inaccuracy.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML AO - 3617

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April 7, 2003

Mr. Barton D. Graham

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. Barton:

I have received your letter of March 18, which reached this office on March 25. As indicated by phone and now being confirmed, the word "not" was inadvertently omitted from the ninth line from the bottom of page four of the letter addressed to Ms. Vonnie Kessler on March 12.

Additionally, you referred to the shared decision making committee, known in the Elmira City School District as the "District Planning Team", and the quorum requirements established pursuant to the District's plan. The plan indicates that the District Planning Team "will designate its own quorum at the October meeting." In my view, that entity does not have the authority to "designate its own quorum." A statute deals specifically with quorum requirements, and I do not believe that an entity may establish provisions dealing with a quorum that are inconsistent with that statute.

The term "quorum" has been the subject of §41 of the General Construction Law since 1909. That statute provides that:

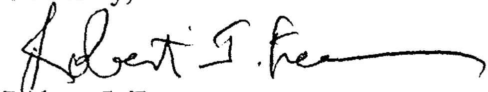
> "Whenever three of more public officers are given any power or authority, or three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of the whole number of such persons or officers, gathered together in the presence 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."

The District Planning Team is, in my view, clearly subject to §41, for it consists of "three or more persons...charged with [a] public duty to be performed or exercised by them jointly...as a board or similar body." That being so, a quorum, by statute, is a majority of the total membership of the Team, notwithstanding absences or vacancies. Unless a statute, an act of the State Legislature, contains direction to the contrary, I do not believe that the District may, on its own initiative, establish a provision concerning a quorum that differs from §41 of the General Construction Law or that eliminates the presence a quorum or the ability to conduct a valid meeting due to the absence of a particular member.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Education
Superintendent Sherwood

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3618

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April 8, 2003

Ms. Debra Balestra
Ad Hoc Committee for Leadership
SUNY Rockland Community College
145 College Road
Suffern, NY 10901-3699

The staff of the Committee on 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. Balestra:

I have received your letter of March 25, which deals in part with a meeting held by the SUNY Rockland Community College Board of Trustees in a room too small for those who sought to attend, even though you informed various officials in advance of the meeting that many more would attend than the meeting room would accommodate.

In this regard, as you are aware, I sent an advisory opinion to you dated March 24 dealing with the issue and transmitted a copy to the Board of Trustees. It is suggested that you might attempt to ensure that copies are reviewed by the Chairman of the Board and as many trustees as possible, as well as the attorney for the College.

You also asked whether the Board of Trustees is required to provide an agenda in advance of its meetings and indicated that: "The BOT begins their meeting by going directly into executive session. This is not done before the public. They then come out, and then open meeting." You expressed the view that the procedure described is inconsistent with law.

With respect to your question concerning an agenda, there no reference in the Open Meetings Law to agendas. Consequently, a public body, such as the Board of Trustees, may choose to prepare or follow an agenda, but there is no obligation to do so. I note that, once an agenda is prepared, it constitutes a "record" subject to rights of access conferred by the Freedom of Information Law.

With regard to the procedure that you described, it is emphasized that a public body cannot conduct an executive session prior to a meeting. Every meeting must be convened as an open meeting, for §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. That being so, 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:

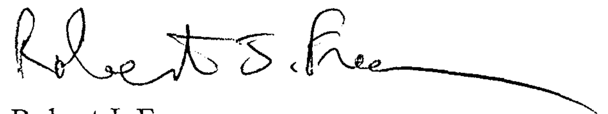
> "Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

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

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

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13998
OML-AO-3619

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April 8, 2003

Mr. George Yourke

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. Yourke:

I have received your letter in which you raised a variety of questions concerning public access to information relating primarily to municipal boards and similar entities.

In this regard, it is emphasized at the outset that the Committee on Open Government is authorized to offer advice and opinions concerning the Freedom of Information and Open Meetings Laws. The former, as you are likely aware, pertains to access to government records; latter pertains to meetings of public bodies, such as town boards, planning boards, city councils and the like.

In consideration of your question, I point out that there is a difference between a "meeting" and a "hearing." A meeting typically involves a situation in which a majority of a public body gathers for the purpose of discussing public business and perhaps taking action. A hearing is typically held to enable the public to speak and to express views in relation to a particular matter, such as an application for a variance, a proposed local law, or a municipality's budget. The Open Meetings Law is a general law, in that it pertains to all public bodies in the state; the notice requirements imposed by that statute generally relate to all meetings of all public bodies. In contrast, numerous statutes involve public hearings and notice requirements associated with those hearings. Unlike the Open Meetings Law and its applicability to meetings of public bodies, there is no general statute dealing with hearings or notice of hearings. For example, provisions relating to a hearing concerning a town's budget are found in the town law, but different provisions appear in the Village Law and the Education Law concerning hearings and notices relating to village and school district budgets. In short, while I can offer advice and guidance relating to the Open Meetings Law, your questions concerning hearings are, in many instances, beyond the scope of the jurisdiction or expertise of this office. That being so, the following remarks will focus on matters involving the Freedom of Information and Open Meetings Laws.

Your first area of inquiry is "whether there are any specific regulations concerning the public being able to obtain information from various local Town Boards, Planning Boards, Wetlands

Commissions, etc." The statute that generally deals with public access to government records is the Freedom of Information Law. That law applies to agency records, and §86(3) defines the term "agency" to mean:

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

Based on the foregoing, the Freedom of Information Law pertains to records of entities of state and local government in New York.

In addition, §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..."

In short, the records access officer must "coordinate" an agency's response to requests, and again, the functions of the records access officer are separate and distinct from those of the records management officer.

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

Similarly, I know of no law that requires that a public body or a member answer questions raised during a meeting or hearing. Certainly they may choose to do so, but there is no obligation to do so, again, unless a policy or rule imposes such a requirement.

Third, with respect to "obtaining an answer requested through FOIL", I note that the title of that law may be somewhat misleading. It does not deal with information *per se*; rather it is a vehicle under which any person may seek records. It is emphasized that the Freedom of Information Law pertains to existing records, and that §89(3) of the law states in part that an agency is not required to create or prepare a record in response to a request. In the same vein, the Freedom of Information Law does not require that agency staff or officials provide information by responding to questions. Their duty under the law is to respond to requests for and provide access to records in accordance with its provisions.

When a request is made for existing records, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied [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)].

Next, you raised several issues relating to recordings of meetings. Provisions concerning the retention and disposal of records are found in Article 57-A of the Arts and Cultural Affairs Law. In brief, under those provisions, the Commissioner of Education, through the State Archives, establishes schedules indicating minimum retention periods for various kinds of records, and I believe that the retention period applicable to tape recordings of meetings is four months.

You wrote that if a member of the public tape records a meeting, he or she is required to provide the board being recorded with a copy of the tape. I do not believe that there is any such requirement; on the contrary, the tape recording in that circumstance is private property and need not be shared or duplicated. You also asked whether "advance notice" must be given prior to recording a meeting. I point out in this regard neither the Open Meetings Law nor any other statute of which I am aware deals with the use of audio or video recording devices at open meetings of public bodies. There are, however, several judicial decisions concerning the use of those devices at open meetings. In my view, the decisions consistently apply certain principles. One is that a public body has the ability to adopt reasonable rules concerning its proceedings. The other involves whether the use of the equipment would be disruptive.

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

Notwithstanding Davidson, the Committee on Open Government advised that the use of tape recorders should not be prohibited in situations in which the devices are unobtrusive, for the presence of such devices would not detract from the deliberative process. In the Committee's view, a rule prohibiting the use of unobtrusive tape recording devices would not be reasonable if the presence of such devices would not detract from the deliberative process.

This contention was initially confirmed in a decision rendered in 1979. That decision arose when two individuals sought to bring their tape recorders at a meeting of a school board in Suffolk County. The school board refused permission and in fact complained to local law enforcement authorities who arrested the two individuals. In determining the issues, the court in People v. Ystueta, 418 NYS 2d 508, cited the Davidson decision, but found that the Davidson case:

> "was decided in 1963, some fifteen (15) years before the legislative passage of the 'Open Meetings Law', and before the widespread use of hand held cassette recorders which can be operated by individuals without interference with public proceedings or the legislative process. While this court has had the advantage of hindsight, it would have required great foresight on the part of the court in Davidson to foresee the opening of many legislative halls and courtrooms to television cameras and the news media, in general. Much has happened over the past two decades to alter the manner in which governments and their agencies conduct their public business. The need today appears to be truth in government and the restoration of public confidence and not 'to prevent star chamber proceedings'...In the wake of Watergate and its aftermath, the prevention of star chamber proceedings does not appear to be lofty enough an ideal for a legislative body; and the legislature seems to have recognized as much when it passed the Open Meetings Law, embodying principles which in 1963 was the dream of a few, and unthinkable by the majority."

More recently, the Appellate Division, Second Department, unanimously affirmed a decision of Supreme Court, Nassau County, which annulled a resolution adopted by a board of education prohibiting the use of tape recorders at its meetings and directed the board to permit the public to tape record public meetings of the board [Mitchell v. Board of Education of Garden City School District, 113 AD 2d 924 (1985)]. In so holding, the Court stated that:

> "While Education Law sec. 1709(1) authorizes a board of education to adopt by-laws and rules for its government and operations, this authority is not unbridled. Irrational and unreasonable rules will not be sanctioned. Moreover, Public Officers Law sec. 107(1) specifically provides that 'the court shall have the power, in its discretion, upon good cause shown, to declare any action *** taken in violation of [the Open Meetings Law], void in whole or in part.' Because we find that a prohibition against the use of unobtrusive recording goal of a fully informed citizenry, we accordingly affirm the judgement annulling the resolution of the respondent board of education" (id. at 925).

Further, I believe that the comments of members of the public, as well as public officials, may be recorded. As stated by the court in Mitchell.

> "[t]hose who attend such meetings, who decide to freely speak out and voice their opinions, fully realize that their comments and remarks are being made in a public forum. The argument that members of the public should be protected from the use of their

> words, and that they have some sort of privacy interest in their own comments, is therefore wholly specious" (id.).

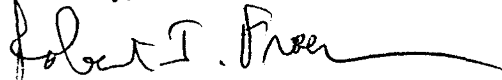
In view of the judicial determination rendered by the Appellate Division, I believe that any person may tape record open meetings of public bodies, so long as tape recording is carried out unobtrusively and in a manner that does not detract from the deliberative process.

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

Lastly, as you suggested, the Open Meetings Law applies when a quorum, a majority of the total membership of a public body, gathers for the purpose of conducting public business. If a gathering includes less than a quorum, that law does not apply. Further, there is no provision in the Open Meetings Law that requires that a gathering of less than a quorum of a public body prepare a record of or otherwise describe its discussions.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3620

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April 8, 2003

Ms. Dione Goldin

The staff of the Committee on 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 letter in which you asked whether, in my view, a board of education may "meet with [the consultant] in executive session to receive his presentation regarding superintendent semi-finalists."

Assuming that the gathering that you described involves consideration of specific candidates for the position, I believe that an executive session could properly be held. Section 105(1)(f) of the Open Meetings Law authorizes a public body to enter into executive session to discuss:

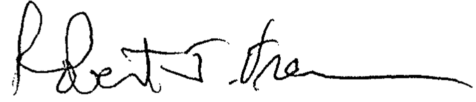
> "the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation..."

If the focus of the discussion involves consideration of the "employment history" of a "particular person" or persons, or matters leading to the "appointment [or] employment" of a particular person or persons, the provision quoted above would serve as a basis for entry into executive session.

On the other hand, when the discussion involves ancillary matters in the search process that do not focus on a "particular person", i.e., when and where to advertise the position, whether to seek candidates from New York only or out of state as well, I do not believe that there would be any ground for conducting an executive session.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3621

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April 15, 2003

Mr. Doug Buchanan
Staff Writer
The Malone Telegram
469 East Main Street
Malone, NY 12953

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. Buchanan:

I have received your letter of March 26, which reached this office on March 31. You have asked whether a political caucus held by the five democrat members of the seven member Franklin County Legislature is "considered an 'official' meeting, and therefore subject to the Open Meetings Law, or...a 'chance' meeting, which is exempt."

In this regard, I offer the following comments.

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

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

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

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

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

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

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

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

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

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

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

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

Based on the foregoing, in general, either the majority or minority party members of a legislative body may conduct closed political caucuses, either during or separate from meetings of the public body. Those caucuses are exempt from the provisions of the Open Meetings Law, which, again, would mean that the Open Meetings Law does not apply.

It is emphasized that the foregoing is not intended to suggest that closed caucuses held to discuss public business represent optimal public policy or further the general goals and intent of the Open Meetings Law. I note, too, that several legislative bodies have relinquished their ability to conduct closed political caucuses when they discuss public business and have instead chosen to conduct public business in public as the law had required prior to the enactment of the amendment in 1985.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Franklin County Legislature

From: Robert Freeman
To: [redacted]
Date: 4/22/2003 4:48:24 PM
Subject: Dear Ms. Schwartzberg:

Dear Ms. Schwartzberg:

I have received your inquiry concerning the status of drafts, particularly draft resolutions.

Since you are somewhat familiar with the Freedom of Information Law, my comments will be brief. If you need additional detail, please let me know.

First, a draft prepared by or for a town officer or employee constitutes a "record" that falls within the coverage of the Freedom of Information Law as soon as it exists. Second, the characterization of a record as a "draft" is not determinative of rights of access; on the contrary, the contents of the record determine the extent to which it may be withheld, or conversely, must be disclosed.

Third, in the context of your inquiry, drafts would likely constitute "intra-agency materials" that fall within §87(2)(g). Under that provision, opinions, advice, recommendations and the like may be withheld. Therefore, in a technical sense, a draft resolution, in my view, may be withheld, for it is a proposal that has not yet been adopted or approved.

It is emphasized that there is no obligation to withhold a draft resolution, and documents of that nature are routinely disclosed, as a matter of practice or rule.
Often it may make little sense to withhold a draft resolution because the resolution will be discussed and essentially disclosed by means of discussion and deliberation at open meetings.

I note that there is what may be viewed as an inconsistency between the Freedom of Information Law and the Open Meetings Law. Again, the former permits (but does not require) a denial of access to a draft resolution; under the latter, however, there would be no basis for entry into executive session to discuss the draft resolution. That being so, while a draft resolution may be withheld, there may be little reason to do so because of its inevitable disclosure at an upcoming meeting.

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

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3623

Committee Members

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April 25, 2003

E-MAIL

TO: Robert Multer <RETLU1@aol.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 facts presented in your correspondence.

Dear Chairman Multer:

As you are aware, I have received your communication in which you asked whether executive sessions may properly be held by a committee of the Yates County Legislature to consider certain matters.

According to your letter, the committee was created to review vacancies as they occur, consider whether the vacancies should be filled, and to offer recommendations to the full Legislature.. You referred specifically to issues involving the District Attorney and the Sheriff and wrote that:

> "The discussion with the District Attorney involved an assistant DA and the fact that the DA stated that they would plea bargain more cases including the kinds of cases as well as the possibility of dismissal because of the delays in cases. The Sheriff discussion involved discussions about not having personnel on duty at specific times of day."

From my perspective, the only ground for entry into executive session that would be relevant in the situations that you described is §105(1)(a). That provision states that a public body may conduct an executive session to consider "matters which will imperil the public safety if disclosed." As I understand this issues, an executive session be proper with respect to one, but difficult to justify regarding the other.

The first situation concerning the position of assistant district attorney appears to pertain to the ability of staff to carry out functions in relation to matters in which persons are or have been arrested and/or in custody of law enforcement officials. While the inability to fill a vacancy might

result in a greater number of cases being plea bargained or perhaps dismissed, it seems unlikely that problems of that nature if discussed in public would "imperil the public safety." With respect to the second situation, since it involves coverage by law enforcement officials, it appears that an executive session could properly be held. If potential lawbreakers can gain the ability to know when or whether personnel are unavailable or off duty, they could tailor their activities in a manner that would circumvent effective law enforcement. If that may be the result of public consideration of the issue, I believe that §105(1)(a) could justifiably be asserted.

I hope that I have been of assistance. If you would like to discuss the matter, please do not hesitate to contact me.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO- 14015
OML-AO - 3624

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April 29, 2003

Mr. Timothy M. Dodd

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. Dodd:

I have received your inquiry and appreciate your kind words. You have raised a series of questions relating to meetings of the Plattsburgh Town Board.

First, you wrote that the Town Board consists entirely of members of a single political party, and you asked whether the Board can "circumvent, the Open Meetings Law by calling a party Caucus." In this regard, judicial precedent indicates that when all of the members of a legislative body are the same political party, the public business of the Board must be conducted in public, and that a closed political caucus may be held only to discuss political party business.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I point out that the language of the decision in many ways is analogous to that of the Appellate Division in Orange County Publications, supra. Specifically, it was stated in Buffalo News that:

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

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

Based on the foregoing, I believe that consideration of the matter must focus on the overall thrust of the decision. To reiterate a statement in the Buffalo News decision: "any exemption must be narrowly construed so that it will not render Section 100 meaningless" (id., 278). Since all the members of the Board are from a single political party, based on the decision cited above, I do not believe that the Board may validly conduct a closed political caucus to discuss matters of public business. However, when the members are discussing political party business (i.e., fund raising, party leadership, etc.), a closed political caucus may in my view be appropriately held.

Second, you referred to the Board's practice of holding "pre-meetings" without notice and in a "much smaller room adjacent to the main meeting room" that "discourages public participation."

For reasons offered earlier concerning the definition of "meeting", a "pre-meeting" gathering of the Board held to discuss public business would fall within the coverage of the Open Meetings Law. Further, every meeting must be preceded by notice given to the news media and by means of posting pursuant to §104 of the law.

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

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

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

From my perspective, every provision of law, including the Open Meetings Law, should be implemented in a manner that gives reasonable effect to its intent. In my opinion, if it is known in advance of a meeting that a larger crowd is likely to attend than the usual meeting location will accommodate, and if a larger facility is available, it would be reasonable and consistent with the intent of the Law to hold the meeting in the larger facility. Conversely, assuming the same facts, I believe that it would be unreasonable to hold a meeting in a facility that would not accommodate those interested in attending.

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.

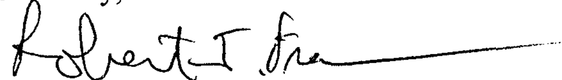
Lastly, you asked when a resolution to be considered at a meeting must be made available and whether you may submit a "standing request" for the Board's "agenda packets."

In most instances, draft or proposed resolutions are disclosed prior to or at meetings, for they are generally disclosed by means of discussion during an open meeting. However, there is nothing in either the Freedom of Information Law or the Open Meetings Law that specifies when proposed resolutions must be disclosed.

With respect to the "standing request", it has been advised that an agency is not required to honor an ongoing or prospective request for records. As you may be aware, the Freedom of Information Law pertains to existing records [see §89(3)]. Consequently, I do not believe that an agency has the ability or is required to grant or deny access to records that do not yet exist. In short the Town may choose to make its agenda packets available in the manner that you suggested, but I do not believe that it is required to do so.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3625

Committee Members

Randy A. Daniels
Mary O. Donohue
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May 5, 2003

Mr. Robert A. Axelrod

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. Axelrod:

I have received your letter in which you expressed "dismay" concerning your treatment during a meeting of the Board of Trustees of Rockland Community College and questioned "the Board's use of Executive Session..."

You wrote that you were elected in 2000 as President of the SUNY Faculty Council of Community Colleges (FCCC), which is a full-time two year position that requires approval from the colleges that employs the president of FCCC. You received the requisite approval and will complete your term at the end of this month. In February, you were invited to discuss your activities and accomplishments with the Board of Trustees on March 20. I do not believe that the details of your treatment by certain Board members and staff is significant in relation to the Open Meetings Law. What is significant, in my view, is that you were invited in to speak before the Board when the Board was conducting an executive session, and that your meeting with the Board occurred during that executive session.

In this regard, as you may be aware, the Open Meetings Law is based on a presumption of openness. Stated differently, a public body, such as the Board of Trustees, must conduct public business in public, unless there is a basis for entry into an executive session.

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

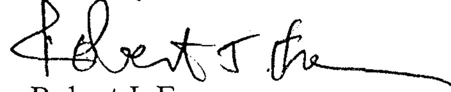
> "Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

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

In consideration of the nature of your presentation and the discussion that you described, I do not believe that there would have been any justifiable basis for the Board conducting that aspect of the meeting during an executive session.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3626

Committee Members

Randy A. Daniels
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May 12, 2003

Mr. Allan M. Dorman

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

Dear Mr. Dorman:

Your letter addressed to Secretary of State Daniels has been forwarded to me. As indicated above, the staff of the Committee on Open Government is authorized to respond on behalf of its members. In addition, although the Department of State serves as the secretariat for the Committee and Mr. Daniels is an *ex officio* member, he does not serve as chairman.

The issue that you raised pertains to the implementation of the Open Meetings Law by the Mayor and Board of Trustees of the Village of Islandia. In brief, you wrote with respect to a recent meeting that:

> "Mayor Frank Falco made the statement that the Board will now go into Executive Session. The Mayor did not take a vote to go into Executive Session. He only made a statement. When asked for what reason the executive session was called, the Mayor of our Village said that we could find out the reason later if we wanted to. When the Village Prosecuting Attorney, Frank N. Ambrosino, was asked for help in this matter, he refused to answer. The Attorney said in Public that he would not get involved with this."

In this regard, it is emphasized that every meeting must be convened as an open meeting, and that §102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. As such, it is clear that an executive session is not separate and distinct from an open meeting, but rather that it is a part of an open meeting.

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

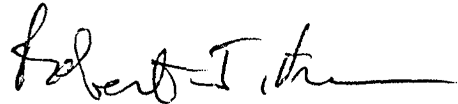
> "Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

Based on the foregoing, 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, such as the Village Board of Trustees, may not conduct an executive session to discuss the subject of its choice.

In an effort to enhance compliance with and understanding of the Open Meetings Law, copies of this response and that statute will be forwarded to the Mayor and the Board of Trustees.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Frank Falco
Board of Trustees

OML-AO-3627

From: Robert Freeman
To: [redacted]
Date: 5/19/2003 12:30:59 PM
Subject: Dear Mr. Solak:

Dear Mr. Solak:

I have received your inquiry concerning the coverage of the Open Meetings Law concerning two kinds of entities.

That statute clearly applies to meetings of a community college board of trustees. With respect to the other entity, which you characterized as "advisory" and consisting of community leaders and a student, the courts have found on several occasions that advisory bodies, other than committees consisting solely of members of a governing body, are not generally required to comply with the Open Meetings Law. That is not to suggest that they cannot hold open meetings, but rather that the law does not require that they do so.

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 - 14040
OML-AO-3628

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May 19, 2003

Mr. Vincent Oliveri

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. Oliveri:

I have received your letter in which you sought assistance and an advisory opinion concerning your efforts in gaining access to information from or pertaining to the Long Island Power Authority (LIPA).

By way of background, you requested the service repair log of a named repairman "who made repairs to the electrical wire connectors servicing [your] home." When you were contacted by LIPA customer service representatives, on two occasions, they read the repair log entry to you. However, despite having requested it under the Freedom of Information Law, LIPA has not made the record containing the entry available to you. You added that you would also like to obtain "characteristic information on the electrical distribution system which services [your] home and asked for the name of the agency to which LIPA reports, as well as information concerning its public meetings.

In this regard, I offer the following comments.

First, the Freedom of Information Law is applicable to all agency records, including those of a public authority, 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, the repair log or similar document would, in my view, clearly constitute a record that falls within the coverage of the Freedom of Information Law.

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

In this instance, since the entry was read to you, I believe that LIPA would have waived its ability to deny access to that portion of a record. Even if that were not so, I believe that the entry would be accessible. Pertinent is §87(2)(g). While that provision potentially serves as a basis for a denial of access, due to its structure, it often requires 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. If I understand the situation accurately, the entry in the repair would consist of factual information accessible under subparagraph (i) of §87(2)(g).

With respect to the "characteristic information on the electrical distribution system which services your home", if that information exists in the form of a record or records and was prepared by LIPA, again, it would constitute intra-agency material that would appear to be factual in nature, and, therefore, would be accessible, unless a different ground for denial could justifiably be asserted. If any such record or records were not prepared by LIPA, §87(2)(g) would not apply.

Since I am unfamiliar with the nature or content of "characteristic information", I note that in some instances, depending on the degree of detail and the effects of disclosure, §87(2)(f) may be relevant in consideration of rights of access to what has become known as "critical infrastructure information." That provision permits an agency to withhold records to the extent that disclosure would "endanger the life or safety of any person."

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..."

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."

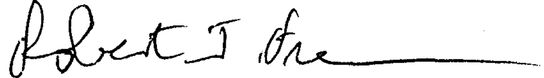
In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge 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)].

Next, the governing body of LIPA in my view clearly constitutes a "public body" required to comply with the Open Meetings Law (Public Officers Law, §§100-111). In brief, meetings of public bodies must be preceded by notice of the time and place given to the news media and by means of posting, and they must be held open to the public, unless there is a basis for entry into a closed or "executive" session.

Lastly, I know of no agency that has general oversight concerning the operations or day to day functioning of LIPA. However, pursuant to §1020 of the Public Authorities Law, it is my understanding that the Public Authorities Control Board reviews and determines certain matters concerning the fund sufficiency of LIPA bonds and provides approval regarding other than routine projects involving a cost above one million dollars.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Stanley Klimberg

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3629

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
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May 20, 2003

Ms. Tamara O'Bradovich

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

Dear Ms. O'Bradovich:

I have received your letters of April 23 and other materials relating to the Village of Tuckahoe.

You referred specifically to situations in which meetings of neighborhood associations may be attended by the Mayor and members of the Board of Trustees. At one such gathering, you indicated that the Mayor and two trustees "were introduced as mayor and trustees, located themselves together, facing the audience, heard comments and took questions from the audience." You expressed the view that the gathering should have been held in accordance with the Open Meetings Law.

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. If, for example, the members of a public body attend an event as concerned citizens, and not in their capacities or functioning as members of municipal boards, I do not believe that the gathering would constitute a "meeting" subject to the Open Meetings Law.

On the other hand, in the decision cited above, 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.).

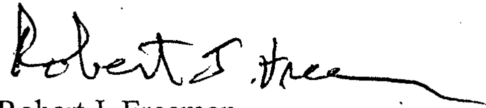
Based upon the direction given by the courts, if a majority of public body gathers for the purpose of conducting public business, collectively, as a body, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law.

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

You also raised issues relating to the swearing in of Village officials that are beyond the scope of the authority or expertise of this office. With respect to the policy regarding disclosure of records, the enclosed advisory opinion was prepared concerning that subject.

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

OML-AO-3630

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May 20, 2003

E-Mail

TO: Michael McGuire <

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. McGuire:

As you are aware, I have received your letter of April 24. You have questioned the authority of the Tuckahoe Village Board of Trustees to enter into executive session "under the guise of 'potential litigation.'"

In this regard, by way of background, 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.

In the context of your inquiry, 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 the potential for or fear of litigation. As the court in Weatherwax suggested, if the potential or fear of litigation served as a valid basis for entry into executive session, there could be little that remains to be discussed in public, and the intent of the Open Meetings Law would be thwarted.

I 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].

In another decision that was 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)].

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

I hope that I have been of assistance.

RJF:jm

cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO - 3631

Committee Members

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Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
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May 22, 2003

Ms. Dora Eccleston

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. Eccleston:

I have received your letter of April 16, which reached this office on April 25. You raised a variety of issues relating to the Town of Tuscarora Town Board, the Supervisor and the Town Attorney. In this regard, it is emphasized that the advisory authority of this office involves issues concerning the Freedom of Information and the Open Meetings Laws. In the context of your remarks, the matter that can be addressed involves the obligation of a certain committee to conduct its meetings in accordance with the Open Meetings Law.

As I understand the matter, a committee was created to review minutes of meetings and, in your words, "compose a policy book so newer board members and public would know past policies set by board." You added that the Supervisor indicated, again, in your words, that "the reason for the Committee was to make recommendations of certain policies they think are necessary for smooth government."

If indeed the committee has been created to make recommendations, I do not believe that it is subject to the Open Meetings Law. That statute pertains to meetings of public bodies, and §102(2) defines the phrase "public body" to mean:

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

Based on the foregoing, a public body is, in my view, an entity required to conduct public business by means of a quorum that performs a governmental function and carries out its duties collectively, as a body. In order to constitute a meeting subject to the Open Meetings Law, a majority of the total

membership of a public body, a quorum, must be present for the purpose of conducting public business. I note, too, that the definition refers to committees, subcommittees and similar bodies of a public body. Based on judicial interpretations, if a committee, for example, consists solely of members of a particular public body, it, too, would constitute a public body. For instance, in the case of a board of education consisting of seven members, four would constitute a quorum, and a gathering of that number or more for the purpose of conducting public business would be a meeting that falls within the scope of the Law. If that board designates a committee consisting of three members, the committee would itself be a public body; its quorum would be two, and a gathering of two or more, in their capacities as members of that committee, would be a meeting subject to the Open Meetings Law.

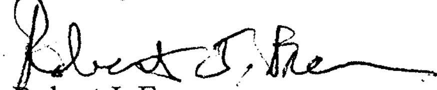
Several judicial decisions, however, indicate generally that advisory bodies, other than those consisting of members of a particular governing body, that have no power to take final action fall outside the scope of the Open Meetings Law. As stated in those decisions: "it has long been held that the mere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

In the context of your inquiry, the committee apparently does not include a majority of any particular public body, and it has no authority to take any final and binding action for or on behalf of the Town. If those assumptions are accurate, the committee, in my view, would not constitute a public body and, therefore, would not be obliged to comply with the Open Meetings Law.

The foregoing is not intended to suggest that the committee cannot hold open meetings. On the contrary, it may choose to conduct meetings in public, and similar entities have done so, even though the Open Meetings Law does not require that they do so.

I hope that the preceding commentary serves to enhance your understanding of the Open Meetings Law and that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board
Town Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3632

Committee Members

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Mary O. Donohue
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Stephen W. Hendershott
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May 22, 2003

Mr. Peter D. Costa, Jr.
County of Westchester
Department of Public Works
148 Martine Ave., Room B-7
White Plains, NY 10601-3361

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

Dear Mr. Costa:

I have received your letter of April 23 in which you inquired with respect to the "legal requirements under the open meetings law for proper postings (72 hours?)" when a meeting is postponed and rescheduled.

It appears that you raised the issue before Ms. Susan Ciamarra, Clerk of the Village of Tuckahoe, who wrote that:

> "...we know that a meeting scheduled at least a week before needs to be sent to the media 72 hours prior to the meeting and be posted as well; however, once a meeting is cancelled that rule does not apply since the second meeting scheduled is considered a new meeting and only needs to be given to the news media to the extent practicable and needs to be posted at a reasonable time prior to the meeting."

I am in general agreement with Ms. Ciamarra's statement.

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

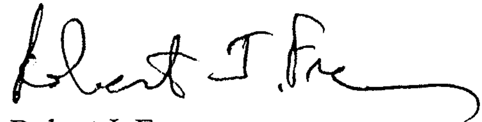
> "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before each meeting.

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

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

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Susan Ciamarra

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3633

Committee Members

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May 22, 2003

Ms. Deda Cedar
Chair
Town of Erin Planning Board
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. Cedar:

As you are aware, I have received your inquiry of April 23.

You indicated that you serve as Chair of the Town of Erin Planning Board and that the Board "set up a Comprehensive Planning Committee with the approval of the Town Board for the purpose of revising [y]our comprehensive zoning plan." The Committee consists of six members of the Planning Board and four residents, and you asked whether the Committee is subject to the Open Meetings Law.

In this regard, the Open Meetings is applicable 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."

Although it has been held that advisory bodies are not required to comply with the Open Meetings Law [see e.g., NYPRIG v. Governor's Advisory Commission, 507 NYS2d 798, aff'd with no opinion, 135 AD2d 1149, motion for leave to appeal denied, 71 NY2d 964 (1988); Poughkeepsie Newspaper v. Mayor's Intergovernmental Task Force on New York City Water Supply Needs. 145 AD2d 65 (1989)], in this instance, the Committee includes a majority of the membership of the Planning Board, which, pursuant to Town Law, must consist of five or seven members. Since six of the seven members of the Planning Board serve on the Committee, I believe that a gathering of

a majority of the Committee for the purpose of conduct public business would constitute a meeting of a public body, the Planning Board, that is subject to the Open Meetings Law.

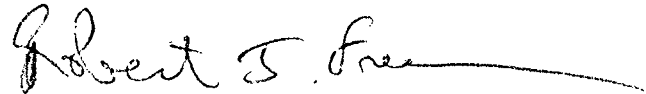
Additionally, it appears that the Committee may be a creation of law. Section 272-a of the Town Law entitled "Town comprehensive plan" includes reference to a "special board." That phrase is defined in subdivision (2)(c) of §272-a to mean:

> "...a board consisting of one or more members of the planning board and such other members as are appointed by the town board to prepare a proposed comprehensive plan and/or amendment thereto."

If the Committee is a "special board", because it would have been created pursuant to a statute, again, I believe that it would constitute a "public body" subject to the Open Meetings Law.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO - 14049

OML-AO - 3634

Committee Members

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May 23, 2003

Ms. Jolie Dunham

The staff of the Committee on 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 letter in which you raised a series of questions relating to open government laws and their implementation by the Kingston City School District.

First, you wrote that you appealed a denial of access to records on February 10, but that you received no response as of the date of your letter to this office. Pertinent is §89(4)(a) of the Freedom of Information Law, which states in relevant part that:

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

I note that it has been held that an agency's failure to determine an appeal within the statutory time may be deemed a denial of the appeal, that the person denied access is deemed to have exhausted his or her administrative remedies, and that he or she may seek judicial review of the denial by initiating a proceeding under Article 78 of the Civil Practice Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed, 57 NY2d 774 (1982)].

Second, you referred to a "'student survey' given by the district to its middle and high school students." Although the survey was apparently made available to parents and for your brief inspection, you were denied access and wrote that you were informed, in your words, that "releasing this survey would 'jeopardize its validity and reliability.'"

In this regard, the Freedom of Information Law is applicable to all records maintained by or for an agency, such as a school district, and that §86(4) defines the term "record to mean:

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

In consideration of the language quoted above, the survey would constitute a "record", irrespective of its validity or reliability, that is subject to rights of access.

So long as the survey does not identify any student, I believe that it would be accessible. From my perspective, assuming that the survey does not include information that is personally identifiable to a student, if it was made available to parents, it should be available to anyone. As early as 1976, it was held that records accessible under the Freedom of Information Law should be made equally available to any person, without regard to one's status or interest [Burke v. Yudelson, 51 AD2d 673; see also Farbman v. New York City, 62 NY2d 75 (1984)]. Further, when records are available for inspection, they are also available for copying. In brief, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available for inspection and copying, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Insofar the survey may identify a student, relevant is the initial ground for denial, §87(2)(a), which pertains to records that are "specifically exempted from disclosure by state or federal statute." In the context of your inquiry, insofar as disclosure of the records in question would identify a student, I believe that they must be withheld. A statute that exempts records from disclosure is the Family Education Rights and Privacy Act (20 U.S.C. section 1232g), which is commonly known as "FERPA." In brief, FERPA applies to all educational agencies or institutions that participate in grant programs administered by the United States Department of Education. As such, FERPA includes within its scope virtually all public educational institutions and many private educational institutions. The focal point of the Act is the protection of privacy of students. It provides, in general, that any "education record," a term that is broadly defined, that is personally identifiable to a particular student or students is confidential, unless the parents of students under the age of eighteen waive their right to confidentiality, or unless a student eighteen years or over similarly waives his or her right to confidentiality. Further, the federal regulations promulgated under FERPA define the phrase "personally identifiable information" to include:

> "(a) The student's name;
> (b) The name of the student's parents or other family member;
> (c) The address of the student or student's family;
> (d) A personal identifier, such as the student's social security number or student number;

(e) A list of personal characteristics that would make the student's identity easily traceable; or

(f) Other information that would make the student's identity easily traceable" (34 CFR Section 99.3).

Based upon direction provided by FERPA and the regulations that define "personally identifiable information", references to students' names or other aspects of records that would make a student's identity easily traceable must in my view be withheld in order to comply with federal law.

On the other hand, if the survey does not identify students, it would appear to be accessible, for none of the grounds for denial access would appear to be accessible. I note that "statistical or factual tabulations or data" contained within internal governmental communications are accessible under paragraph (i) of §87(2)(g).

Third, with respect to the disclosure of information that is characterized as confidential, 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)].

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 indicated earlier, FERPA generally prohibits an educational agency from disclosing education records or information derived from those records that are identifiable to a student, unless the parents of the student consent to disclosure. In the context of the Open Meetings Law, a discussion concerning a student would constitute a matter made confidential by federal law and would be exempted from the coverage of that statute [see Open Meetings Law, §108(3)]. In the context of the Freedom of Information Law, an education record would be specifically exempted from disclosure by statute in accordance with §87(2)(a). In both contexts, I believe that a board of education, its members and school district

employees would be prohibited from disclosing, because a statute requires confidentiality. In other situations, even though a record *may* be withheld or information is derived from an executive session, I do not believe that there would be a prohibition regarding disclosure.

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

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.

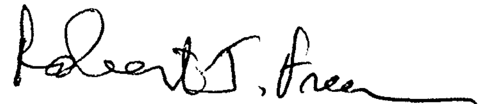
Lastly, you raised questions relating to the District's proposed budget. The key provision in my view is §1716 of the Education Law, entitled "Estimated expenses for ensuing year." Subdivision (1) of that provision requires that the Board present "a detailed statement in writing", specifying the amounts needed for school purposes in the ensuing year. That statement must be made available at least fourteen days prior to the vote on the budget. However, in consideration of the definition of "record" cited earlier, I believe that the proposed budget and related records are accessible under the Freedom of Information Law as soon as they exist.

I note that subdivision (4) requires that the proposed budget "shall be presented in three components: a program component, a capital component and an administrative component which shall be separately delineated...." and states in part that:

> "The program component shall include, but need not be limited to, all program expenditures of the school district, including the salaries and benefits of teachers and any school administrators or supervisors who spend a majority of their time performing teaching duties, and all transportation operating expenses. The capital component shall include, but need not be limited to, all transportation capital, debt service, and lease expenditures; costs resulting from judgements in tax certiorari proceedings or the payment of awards from court judgments, administrative orders or settled or compromised claims; and all facilities costs of the school district, including facilities lease expenditures, the annual debt service and total debt for all facilities financed by bonds and notes of the school district, and the costs of construction, acquisition, reconstruction, rehabilitation or improvement of school buildings, provided that such budget shall include a rental, operations and maintenance section that includes base rent costs, total rent costs, operation and maintenance charges, cost per square foot for each facility leased by the school district, and any and all expenditures associated with custodial salaries and benefits, service contracts, supplies, utilities, and maintenance and repairs of school facilities."

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Bernard A. Feeney
Carol A. Bell

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OML-AO-3635

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June 3, 2003

E-MAIL

TO: Bonnie Barkley [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. Barkley:

As you are aware, I have reviewed your letter of May 12. You asked whether a member of the public may tape record meetings of a board of education.

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

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

Notwithstanding Davidson, the Committee on Open Government advised that the use of tape recorders should not be prohibited in situations in which the devices are unobtrusive, for the presence of such devices would not detract from the deliberative process. In the Committee's view, a rule prohibiting the use of unobtrusive tape recording devices would not be reasonable if the presence of such devices would not detract from the deliberative process.

This contention was initially confirmed in a decision rendered in 1979. That decision arose when two individuals sought to bring their tape recorders at a meeting of a school board in Suffolk

County. The school board refused permission and in fact complained to local law enforcement authorities who arrested the two individuals. In determining the issues, the court in People v. Ystueta, 418 NYS 2d 508, cited the Davidson decision, but found that the Davidson case:

> "was decided in 1963, some fifteen (15) years before the legislative passage of the 'Open Meetings Law', and before the widespread use of hand held cassette recorders which can be operated by individuals without interference with public proceedings or the legislative process. While this court has had the advantage of hindsight, it would have required great foresight on the part of the court in Davidson to foresee the opening of many legislative halls and courtrooms to television cameras and the news media, in general. Much has happened over the past two decades to alter the manner in which governments and their agencies conduct their public business. The need today appears to be truth in government and the restoration of public confidence and not 'to prevent star chamber proceedings'...In the wake of Watergate and its aftermath, the prevention of star chamber proceedings does not appear to be lofty enough an ideal for a legislative body; and the legislature seems to have recognized as much when it passed the Open Meetings Law, embodying principles which in 1963 was the dream of a few, and unthinkable by the majority."

More recently, the Appellate Division, Second Department, unanimously affirmed a decision of Supreme Court, Nassau County, which annulled a resolution adopted by a board of education prohibiting the use of tape recorders at its meetings and directed the board to permit the public to tape record public meetings of the board [Mitchell v. Board of Education of Garden City School District, 113 AD 2d 924 (1985)]. In so holding, the Court stated that:

> "While Education Law sec. 1709(1) authorizes a board of education to adopt by-laws and rules for its government and operations, this authority is not unbridled. Irrational and unreasonable rules will not be sanctioned. Moreover, Public Officers Law sec. 107(1) specifically provides that 'the court shall have the power, in its discretion, upon good cause shown, to declare any action *** taken in violation of [the Open Meetings Law], void in whole or in part.' Because we find that a prohibition against the use of unobtrusive recording goal of a fully informed citizenry, we accordingly affirm the judgement annulling the resolution of the respondent board of education" (id. at 925).

Further, I believe that the comments of members of the public, as well as public officials, may be recorded. As stated by the court in Mitchell:

> "[t]hose who attend such meetings, who decide to freely speak out and voice their opinions, fully realize that their comments and remarks are being made in a public forum. The argument that members of the public should be protected from the use of their words, and that they have some sort of privacy interest in their own comments, is therefore wholly specious" (id.).

In view of the judicial determination rendered by the Appellate Division, I believe that any person may tape record open meetings of public bodies, so long as tape recording is carried out unobtrusively and in a manner that does not detract from the deliberative process.

I point out that the same conclusion was reached last month by the Appellate Division in a decision involving the use of a video recorder at a meeting of a board of education (Csorny v. Shorham-Wading River Central School District, NYLJ, May 20, 2003).

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3636

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Executive Director

Robert J. Freeman

June 3, 2003

Ms. Maria Peterson

The staff of the Committee 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. Peterson:

As you are aware, I have received your letter of May 1. Based on its content and our discussion, your inquiry involves the sufficiency of a motion for entry into executive session expressed at meetings of the Highland Central School District Board of Education. Specifically, you referred to a motion to "discuss teacher contracts."

In this 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 ensuing provisions of §105(1) specify and limit the subjects that may appropriately be considered during an executive session.

In my view and in consideration of the intent of the Open Meetings Law, a motion to enter into executive session must include information sufficient to enable members of a public body and others in attendance to 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.

A motion to discuss "teacher contracts" in my opinion is inadequate. The provision that relates to the subject matter under consideration, §105(1)(e), 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 or involving a public employee union.

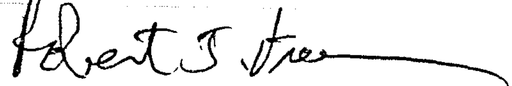
In terms of a motion to enter into an executive session held pursuant to §105(1)(e), it has been held that:

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

A proper motion might be: "I move to enter into executive session to discuss the collective bargaining negotiations involving the teachers union." I believe that a motion of that nature would indicate that the Board seeks to discuss a subject that may properly be considered during an executive session.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

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FOIL-AO-14057
OML-AO-3637

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June 3, 2003

Ms. Kathy Snyder

The staff of the Committee on 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. Snyder:

As you are aware, I have received your letter of May 7. You wrote that the Village of Brockport "hired a consultant for environmental matters approx one and a half years ago", but that "[t]his employment was never approved at an open meeting." Additionally, although efforts have been made to obtain the consultant's "resume and/or qualifications", the denials of those requests indicate that the Village does "not maintain such a record or that such a record does not exist."

In this regard, I offer the following comments.

First, assuming that only the Village Board of Trustees was empowered to hire, retain or enter into a contract with the consultant, I believe that it could validly have done so only at a meeting of the Board. The meeting would have been required to have involved the convening of the Board, and an affirmative vote of a majority of its total membership. When action is taken in public, the Open Meetings Law, §106, requires that minutes reflective of the nature of the action taken, the date and the vote of each member be prepared and made available to the public within two weeks. If action was taken during an executive session, minutes consisting of the same information in this instance would have been required to have been prepared and made available within one week.

If action was taken by the Board is private, in violation of the Open Meetings Law, and if no minutes reflective of this action taken were prepared, any aggrieved person would have the ability to challenge the action pursuant to §107 of the Open Meetings Law by initiating a proceeding under Article 78 of the Civil Practice Law and Rules. In such a proceeding, a court would have discretionary authority, upon good cause shown, to nullify the action taken in contravention of the Open Meetings Law.

Second, with respect to a resume or similar or related records, I note that the Freedom of Information Law is expansive in its coverage. That statute is applicable to all agency records, such as those of a Village, regardless of the physical location of the records. Section 86(4) of defines the term "record" to include:

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

Therefore, if a record is transmitted to a Village official in conjunction with that person's duties, I believe that it would fall within the coverage of the Freedom of Information Law, whether it is maintained in a Village office, at the home of a Village official or, for example, at the Village Attorney's private office.

It is emphasized, however, that if no resume or similar record is maintained by or for the Village, i.e., if no such record exists, the Freedom of Information Law would not apply. 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.

If a resume or similar documentation indicating the consultant's qualifications exists, it would likely be available in part.

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 resumes and similar records is §87(2)(b). That provision permits an agency to withhold records or portions of records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." Additionally, §89(2)(b) includes a series of examples of unwarranted invasions of personal privacy.

In a decision rendered by the Court of Appeals, the state's highest court, reference was made to the authority to withhold "certain personal information about private citizens" [see Federation of New York State Rifle and Pistol Clubs, Inc. v. New York City Police Department, 73 NY2d 92 (1989)]. In another decision rendered by the Court of Appeals and a discussion of "the essence of the exemption" concerning privacy, the Court referred to information "that would ordinarily and reasonably regarded as intimate, private information" [Hanig v. State Dept. of Motor Vehicles, 79 NY 2d 106, 112 (1992)]. In view of the direction given by the state's highest court, again, I believe that the authority to withhold the information based upon considerations of privacy is restricted to those situations in which records contain *personal* information about natural persons.

Several judicial decisions, both New York State and federal, pertain to records about individuals in their business or professional capacities and indicate that the records are not of a "personal nature." For instance, one involved a request for the names and addresses of mink and ranch fox farmers from a state agency (ASPCA v. NYS Department of Agriculture and Markets, Supreme Court, Albany County, May 10, 1989). In granting access, the court relied in part and quoted from an opinion rendered by this office in which it was advised that "the provisions concerning privacy in the Freedom of Information Law are intended to be asserted only with respect to 'personal' information relating to natural persons". The court held that:

> "...the names and business addresses of individuals or entities engaged in animal farming for profit do not constitute information of a private nature, and this conclusion is not changed by the fact that a person's business address may also be the address of his or her residence. In interpreting the Federal Freedom of Information Law Act (5 USC 552), the Federal Courts have already drawn a distinction between information of a 'private' nature which may not be disclosed, and information of a 'business' nature which may be disclosed (see e.g., Cohen v. Environmental Protection Agency, 575 F Supp. 425 (D.C.D.C. 1983)."

In another decision, Newsday, Inc. v. New York State Department of Health (Supreme Court, Albany County, October 15, 1991)], data acquired by the State Department of Health concerning the performance of open heart surgery by hospitals and individual surgeons was requested. Although the Department provided statistics relating to surgeons, it withheld their identities. In response to a request for an advisory opinion, it was advised by this office, based upon the New York Freedom of Information Law and judicial interpretations of the federal Freedom of Information Act, that the names should be disclosed. The court agreed and cited the opinion rendered by this office.

Like the Freedom of Information Law, the federal Act includes an exception to rights of access designed to protect personal privacy. Specifically, 5 U.S.C. 552(b)(6) states that rights conferred by the Act do not apply to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." In construing that provision, federal courts have held that the exception:

> "was intended by Congress to protect individuals from public disclosure of 'intimate details of their lives, whether the disclosure be of personnel files, medical files or other similar files'. Board of Trade of City of Chicago v. Commodity Futures Trading Com'n supra, 627 F.2d at 399, quoting Rural Housing Alliance v. U.S. Dep't of Agriculture, 498 F.2d 73, 77 (D.C. Cir. 1974); see Robles v. EOA, 484 F.2d 843, 845 (4th Cir. 1973). Although the opinion in Rural Housing stated that the exemption 'is phrased broadly to protect individuals from a wide range of embarrassing disclosures', 498 F.2d at 77, the context makes clear the court's recognition that the disclosures with which the statute is concerned are those involving matters of an intimate personal nature. Because of its intimate

> personal nature, information regarding 'marital status, legitimacy of children, identity of fathers of children, medical condition, welfare payment, alcoholic consumption, family fights, reputation, and so on' falls within the ambit of Exemption 4. Id. By contrast, as Judge Robinson stated in the Chicago Board of Trade case, 627 F.2d at 399, the decisions of this court have established that information connected with professional relationships does not qualify for the exemption" [Sims v. Central Intelligence Agency, 642 F.2d 562, 573-573 (1980)].

In Cohen, the decision cited in ASPCA v. Department of Agriculture and Markets, supra, it was stated pointedly that: "The privacy exemption does not apply to information regarding professional or business activities...This information must be disclosed even if a professional reputation may be tarnished" (supra, 429). Similarly in a case involving disclosure of the identities of those whose grant proposals were rejected, it was held that:

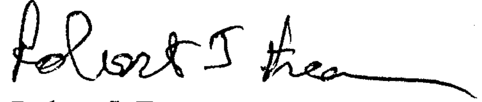
> "The adverse effect of a rejection of a grant proposal, if it exists at all, is limited to the professional rather than personal qualities of the applicant. The district court spoke of the possibility of injury explicitly in terms of the applicants' 'professional reputation' and 'professional qualifications'. 'Professional' in such a context refers to the possible negative reflection of an applicant's performance in 'grantsmanship' - the professional competition among research scientists for grants; it obviously is not a reference to more serious 'professional' deficiencies such as unethical behavior. While protection of professional reputation, even in this strict sense, is not beyond the purview of exemption 6, it is not at its core" [Kurzon v. Department of Health and Human Services, 649 F.2d 65, 69 (1981)].

It is clear in my opinion that items of a personal nature, such as a social security number, home address, marital status and the like may be withheld. Those kinds of details are irrelevant to the performance of one's duties as an employee or contractor retained by an agency. Further, §89(2)(b)(i) refers to the ability to withhold one's employment history. In my view, and based on Kwasnik v. City of New York and City University of New York [691 NYS2d 525, 262 AD2d 171 (1999)[, employment history refers to a person's private employment, and indications of the names of a person's private employers may be withheld. However, the indication of a person's prior public employment has been found to be available (see Kwasnik, supra), as has one's general educational background [see Ruberti, Girvin & Ferlazzo v. NYS Division of State Police, 641 NYS2d 411, 218 AD2d 494 (1996)].

A license, a permit or a certification is typically conferred by a government agency, and insofar as a Village record includes reference to a license, permit or certification, I believe that the Village would be required to disclose to comply with the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees

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OML-AO-3638

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June 9, 2003

Mr. George R. Frantz

The staff of the Committee 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. Frantz:

I have received your letter concerning a public hearing held by the City of Ithaca Landmarks Preservation Commission on May 6 that began at 7 p.m. In brief, you indicated that you attended the hearing but left at approximately 7:40 to make a phone call. When you attempted to return to hearing, the doors were locked, and you could not get back into the building until "about 8:10." In relation to the foregoing, you raised the following question:

> "Did the Commission violate the law by voting on matters before it, in that same meeting, knowing full well that the doors to the building were locked and that any member of the public who arrived after 7:40 - - possibly even earlier than that time - - was barred from attending the proceedings?"

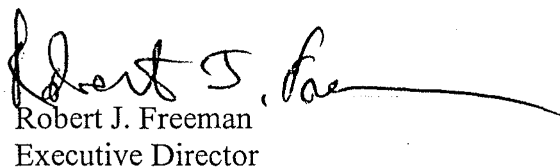
In an effort to learn more of the matter, I contacted the City Attorney, Ms. Norma Schwab, who is familiar with the matter. Based on my conversation with her, it clear that there was neither an intent to exclude any member of the public from the hearing, nor was there knowledge that the building was locked.

She indicated that the doors were open and blocked from being closed, and that at least 25 people attended. However, at some point, the doors were inadvertently closed and automatically locked. No City official "knew full well" that the public could not enter the building; on the contrary, Ms. Schwab stressed that the doors would have been reopened had it been known that they had closed. Since you missed a portion of the hearing, she indicated that you were offered a tape recording of the hearing and added that a second hearing was held during which you and others were given the opportunity to speak.

In consideration of the action taken by the City to ensure that you and others could have heard statements or testimony that might have been missed and to enable you to express your opinions, and in view of the fact that your exclusion was unintentional, I believe that the City and the Commission effectively corrected the problem. That being so, from my perspective, the Commission did not engage in what could be characterized as a violation of law.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Norma Schwab, City Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML AO - 3639

Committee Members

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June 12, 2003

Ms. Bertha Jenson

The staff of the Committee on 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. Jenson:

I have received your letter of May 21 in which you expressed concern with respect to the location of meetings of the Board of Trustees of the Village of Deposit.

According to your letter, the Board had held its meetings at the fire hall. However, a new facility is being constructed, and apparently the Board can no longer meet at that location. You wrote that the Board seeks to conduct its meetings "upstairs at the Village Hall." That building, however, is not "handicapped accessible."

In this regard, subdivision (a) of §103 of the Open Meetings Law states in relevant part that "Every meeting of a public body shall be open to the general public..." Subdivision (b) provides that:

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

The same direction appears in §74-a of the Public Officers Law regarding public hearings. Based upon those provisions, there is no obligation upon a public body to construct a new facility or to renovate an existing facility to permit barrier-free access to physically handicapped persons. However, I believe that the law does impose a responsibility upon a public body to make "all reasonable efforts" to ensure that meetings and hearings are held in facilities that permit barrier-free access to physically handicapped persons. Therefore, if, for example, the Board has the capacity to hold its meetings in a facility that is accessible to handicapped persons, I believe that the meetings should be held in the location that is most likely to accommodate the needs of those persons.

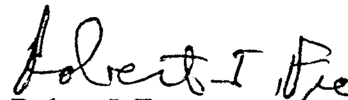
I note that in 1977, the initial year of the implementation of the Open Meetings Law, judicial direction was consistent with the advise offered here. Specifically, it was held that if a public body has the ability to conduct meetings in a location that is barrier free accessible, it is required to do so to comply with the Open Meetings Law [Fenton v. Randolph, 400 NYS 2d 987 (1977)].

It has been suggested in the past that a person who cannot attend a meeting held on a second floor should inform a public body in advance of his or her intention to attend so that appropriate arrangements can be made to transport that person to the meeting. Nevertheless, requiring handicapped persons who could not attend a meeting on the second floor to call in advance of a meeting is in my view unreasonable and inconsistent with law and would provide an impediment with respect to handicapped persons that does not exist with regard to others. There may be any number of reasons why a person may be precluded from notifying the Village of his or her intent to attend a meeting in advance of a meeting. For instance, an individual may not be aware of a meeting until just prior to the meeting; a person may not know so far in advance that he or she would want to attend; a handicapped person may not know if transportation can be arranged, etc. In short, to fully comply with the Open Meetings Law, I believe that every meeting subject to that statute should be convened and held in a barrier-free accessible facility.

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

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-14072
OML-AO-3640

Committee Members

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June 12, 2003

Ms. Regina Riely
United Pro-Life Committee on Gannett

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. Riely:

I have received your letter of May 16. You wrote that the Chairman of the Westchester Medical Center Hospital Board has failed to respond to your requests made under the Freedom of Information Law. In addition, although you offered no specifics, you contend that the Board conducts executive sessions inappropriately.

In this regard, I offer the following comments.

First, pursuant to regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), each agency is required 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, and requests should ordinarily be made to that person. While I believe that the Chairman should have responded to your requests or forwarded your requests to the records access officer, it is suggested that you might resubmit your requests to the records access officer.

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.

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)].

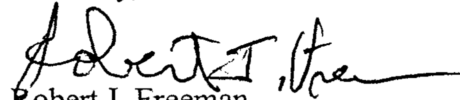
Lastly, with respect to meetings of the Board, I point out that every meeting must be convened as an open meeting, and that §102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. As such, it is clear that an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

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

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

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Gene Capello, Chairman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML AO - 3641

Committee Members

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June 12, 2003

Ms. Mary Thill
Co-Editor
Adirondack Life Magazine
P.O. Box 410
Jay, NY 12491

The staff of the Committee on 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. Thill:

I have received your letter in which you questioned the status of certain gatherings in relation to the Open Meetings Law. You wrote that:

> "The New York State Department of Environmental Conservation (DEC) Region 5 is facilitating meetings of citizens it has selected to participate in what it calls a 'discussion group' to provide input as it develops management policies for the Saranac Lake Wild Forest.
>
> "The DEC has previously convened a 'citizen advisory committee' to serve a similar function for another parcel of Forest Preserve. However, meetings of the citizen advisory committee were open to the public; meetings of the discussion group are not."

It is your view that "the meetings of these groups, no matter how they are characterized, should be open to the public since public business is being conducted." Nevertheless, based on judicial decisions, I do not believe that the discussion group is required to comply with the Open Meetings Law. In this regard, I offer the following comments.

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

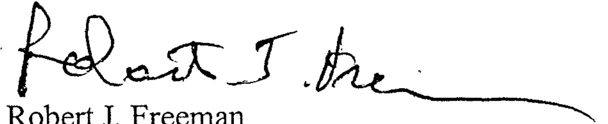
Several judicial decisions, however, indicate generally that advisory bodies, other than those consisting of members of a particular governing body, that have no power to take final action fall outside the scope of the Open Meetings Law. As stated in those decisions: "it has long been held that the mere 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 discussion group does not consist of members of a public body, and since it 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 group cannot hold open meetings. On the contrary, it may choose to conduct meetings in public, and similar entities have done so, even though the Open Meetings Law does not require that they do so.

I hope that the preceding commentary serves to enhance your understanding of the Open Meetings Law and that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: David Winchell

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-14077
OML-AO-3642

Committee Members

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Stephen W. Hendershott
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J. Michael O'Connell
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June 12, 2003

Mr. Jerome A. Mirabito, Esq.
Fulton Savings Bank
75 South First Street
Fulton, NY 13069

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. Mirabito:

I have received your letter of May 23 and the materials attached to it. Your inquiry involves the status of the board of directors of the Fulton Community Revitalization Corporation ("the FCRC") under the Open Meetings Law.

You wrote that the FCRC has been asked by the City of Fulton to:

> "1. Employ a person(s) who will be in charge of implementation of the comprehensive plan and report to the legislative body on a periodic basis as to the progress; and
>
> 2. Seek private funding and public funding/grants to retain personnel to implement the comprehensive plan."

You added that it is expected that the board will consist of eleven to thirteen members and include the Mayor and President of the Common Council of the City of Fulton, and perhaps the Executive Director of the City's Community Development Agency. No other members of the Board "will be voting members of the executive branch of the legislative branch of the City of Fulton."

A review of FCRC's certificate of incorporation and its by-laws indicate that it is a not-for-profit corporation and that eligibility for membership on the board is conditioned on residence in the City or "some interest in the City which relate to the purposes of the Corporation..." One-third of the directors are elected at an annual meeting by a majority of the directors then in office. There is nothing in the provisions specifying that the board must include City officials, their representatives or their designees.

In this regard, in general, the Open Meetings Law and its companion, the Freedom of Information Law, are applicable to governmental entities, including not-for-profit corporations that are, in essence, creations or extensions of government.

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

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

In 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, 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 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).

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."

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).

As I understand it by-laws, FCRC has a relationship with government, but its purposes are not exclusively governmental in nature. Further, although two and perhaps three members of the FCRC board are expected to be City officials, the by-laws do not require that any board member be a City official. Further, City government has no official role in the designation or selection of members of the board. If my understanding is accurate, the FCRC board would not constitute a "public body", and its meetings, therefore, would not be subject to the Open Meetings Law.

Similarly, I do not believe that the FCRC would constitute an "agency" that falls within the coverage of that statute. However, some of its records likely would be subject to rights of access conferred by that statute.

The Freedom of Information Law is applicable to agency records, and based on the definition of "agency" cited earlier, the City of Fulton clearly falls within the scope of that law. Significant in this instance is the definition of "record." Section 86(4) defines that term 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."

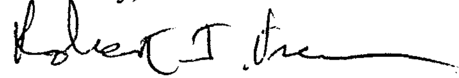
Based on the foregoing, the Court of Appeals has found that documents maintained by a not-for-profit corporation providing services for a branch of the State University were kept on behalf of the University and constituted agency "records" falling within the coverage of the Freedom of Information Law. 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.

Further, due to the breadth of the definition, when records involving FCRC come into possession of City officials, I believe that they would constitute agency records that fall within the coverage of the Freedom of Information Law.

In sum, it does not appear that the FCRC is an agency for purposes of the Freedom of Information Law or a public body subject to the Open Meetings Law. Nevertheless, records maintained by the City of Fulton or for the City pursuant to its relationship with the FCRC would, in my opinion, be subject to rights of access conferred by the Freedom of Information Law.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Mayor, City of Fulton
President of the Common Council
Carol Rutledge

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14079
OML-AO-3643

Committee Members

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June 16, 2003

E-MAIL

TO: Toni Delmonte <tdf@daddandnelson.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. Delmonte:

I have received your letter in which you questioned the status of a "private, nonprofit hospital" under the Open Meetings Law.

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. That being so, based on your description of the hospital as private, it does not appear that its governing body would constitute a public body required to comply with the Open Meetings Law.

I note that the companion of the Open Meetings Law, the Freedom of Information Law, is applicable to all government agency records. While the hospital, a private entity, is not subject to that statute, records submitted by or pertaining the hospital that are maintained by a municipal or state agency fall within the coverage of the Freedom of Information Law and would be subject to rights of access.

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

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 14084
OML-AO - 3644

Committee Members

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Carole E. Stone
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Executive Director

Robert J. Freeman

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

June 18, 2003

Ms. Stephanie Kushner

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. Kushner:

I have received our letter in which you questioned the propriety of a response to your request for records of the East Williston School District.

According to your letter, your challenge to the nomination of a candidate for the Board of Education was denied by the "nominating petition Review Board and the School Board." Although you obtained the Review Board's written decision and were permitted to inspect minutes of the Board of Education meeting during which Board rendered its decision, your were not permitted to obtain a copy of the minutes, for they had not been "accepted" by the Board. Further, you wrote that "the portion of the written decision of the Review Board given to [you] did not contain the basis on which they made their decision, which, subsequently, the School Board cited as what they used to make their decision." That portion of the record was withheld on that ground that it is "intra-agency information not foilable."

In this regard, I offer the following comments.

First, it is emphasized that the Freedom of Information Law is expansive in its scope, for it pertains to all agency records, such as those of a school district, and defines the term record expansively in §86(4) 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, once information exists in some physical form, i.e., a draft, or "unaccepted" minutes, it constitutes a "record" subject to rights conferred by the Freedom of Information Law.

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

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

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

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

Third, returning to the Freedom of Information Law, when records are available under that law, they are available for inspection and copying. Further, §89(3) states that an agency must make a copy of an accessible record upon payment of or offer to pay the requisite fee, which cannot exceed twenty-five cents per photocopy. In short, the minutes, irrespective of whether they were "accepted" or approved should, in my opinion, have been copied upon request.

With respect to the portion of the record that indicated the basis of the decision, I agree that it may be characterized as "intra-agency material." However, due to the structure of the provision pertaining to intra-agency materials, it often requires disclosure. Specifically, §87(2)(g) authorizes an agency to withhold records that:

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

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

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

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

With respect to the substance of §87(2)(g) and the capacity to withhold records similar to that at issue, it has been held that:

> "There is no exemption for final opinions which embody an agency's effective law and policy, but protection by exemption is afforded for all papers which reflect the agency's group thinking in the process of working out that policy and determining what its law ought to be. Thus, an agency may refuse to produce material integral to the agency's deliberative process and which contains opinions, advice, evaluations, deliberations, policy formulations, proposals, conclusions, recommendations or other subjective matter (National Labor Relations Bd. v. Sears, Roebuck & Co., supra, pp 150-153; Wu v. National Endowment for Humanities, 460 F2d 1030, 1032-1033, cert den 410 US 926). The exemption is intended to protect the deliberative process of government, but not purely factual deliberative material (Mead Data Cent. v United States Dept. of Air Force, 566 F2d 242, 256, supra). While the purpose of the exemption is to encourage the free exchange of ideas among government policy-makers, it does not authorize an agency to throw a protective blanket over all information by casting it in the form of an internal memo (Wu v. National Endowment for Humanities, supra, p1033). The question in each case is whether production of the contested document would be injurious to the consultative functions of government that the privilege of nondisclosure protects..." [Miracle Mile Associates v. Yudelson, 68 AD 2d 176, 182-183; motion for leave to appeal denied, 48 NY 2d 706 (1979)].

Insofar as intra-agency materials in which members of the Board of Education, the Review Board or staff expressed their opinions in relation to Board's final decision, I believe that those records ordinarily may be withheld. However, insofar as the document in question includes opinions or

recommendations adopted by the Board and reflective of the Board's collective determination, it would, in my view, be available.

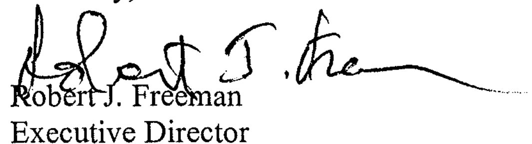
A decision rendered in Nassau County indicates that a record adopted by a decision-maker as the agency's determination is accessible under §87(2)(g)(iii). In Miller v. Hewlett-Woodmere Union Free School District #14 [Supreme Court, Nassau County, NYLJ, May 16, 1990], the court wrote that:

> "On the totality of circumstances surrounding the Superintendent's decision, as present in the record before the Court, the Court finds that petitioner is entitled to disclosure. It is apparent that the Superintendent unreservedly endorsed the recommendation of the Term [sic; published as is], adopting the reasoning as his own, and made his decision based on it. Assuredly, the Court must be alert to protecting 'the deliberative process of the 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 Construction Corp. v. Stubing, 82 A.D. 2d 546, 549 [2d Dept. 1981], but the Court bears equal responsibility to ensure that final decision makers are accountable to the public. When, as here, a concord exists as to intraagency views, when deliberation has ceased and the consensus arrived it represents the final decision, disclosure is not only desirable but imperative for preserving the integrity of governmental decision making. The Team's decision no longer need be protected from the chilling effect that public exposure may have on principled decisions, but must be disclosed as the agency must be prepared, if called upon, to defend it."

In sum, I do not believe that §87(2)(g) may serve as a basis for withholding to the extent that the documentation in question represents a final agency determination. If that is the case, I believe that it would be accessible under §87(2)(g)(iii).

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14086
OML-AO-3615

Committee Members

Randy A. Daniels
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June 18, 2003

Mr. Michael A. Kless

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

Dear Mr. Kless:

I have received your letter of May 30 in which you asked whether a newly created control board in the City of Buffalo will be subject to "any special rules" or whether "the normal rules relating to freedom of information and open meetings apply."

In this regard, the Freedom of Information Law is applicable to agency records, and §86(3) of that statute defines the term "agency" to include:

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

If the control board in Buffalo is typical of others, it would constitute an agency and would, therefore, but subject to the Freedom of Information Law.

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

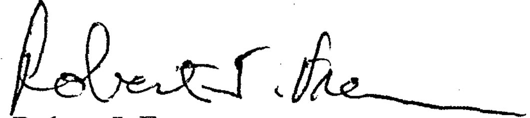
> "...any entity for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction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

In my view, the control board would constitute a public body required to comply with the Open Meetings Law.

In short, in both instances, the control board would be subject to the same rules as other agencies and public bodies, unless there is statutory direction to the contrary.

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-3646

Committee Members

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June 23, 2003

Mr. John Kwasnicki

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

Dear Mr. Kwasnicki:

As you are aware, I have received your letter of June 9. You indicated that you requested minutes of meetings of the Board of Trustees of the Village of Sloatsburg and were informed that the minutes are maintained on tape. You questioned whether there must be written minutes of meetings.

In this regard, first, while a tape recording would likely contain the elements of minutes, I believe that minutes should be nonetheless reduced to writing in order that they constitute a permanent, written record that can be viewed by the public. Perhaps just as important, a municipality often might need a permanent written record readily accessible to its officials who must refer to or rely upon the minutes in the performance of their duties. I point out, too, that in an opinion rendered by the State Comptroller, it was found that, although tape recordings may be used as an aid in compiling minutes, they do not constitute the "official record" (1978 Op. St. Compt. File #280).

I note that the State Archives and Records Administration, pursuant to provisions of the Arts and Cultural Affairs Law, develops schedules indicating minimum retention periods for various kinds of records. A town or village clerk, in that person's capacity as "records management officer", would have a copy of the retention schedule, which indicates that tape recordings of meetings must be retained for a minimum of four months. In contrast, minutes of meetings, presumably written minutes, must be kept permanently according to the schedule.

Second, the Open Meetings Law provides direction concerning the content of minutes and the time within which they must be prepared. Section 106 provides that:

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

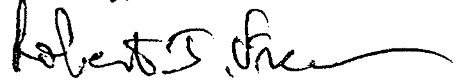
> 2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.
>
> 3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such 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, a public body, such as a village board of trustees, has two weeks from a meeting to prepare minutes and make them available.

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

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Thomas Bollato, Village Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3647

Committee Members

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June 25, 2003

Ms. Elaine Herrick

<u>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.</u>

Dear Ms. Herrick:

Your letter addressed to David Treacy of this office has been forwarded to me for response.

According to your letter, the Elma Town Board recently held a meeting and hearing concerning a large development. Because a petition containing the signatures of six hundred residents opposed to the plan was submitted to the Board in advance of the event, it is your belief that the Board was aware in advance that the Town Hall would be too small to accommodate those interested in attending or expressing their opinions. You added that the Supervisor "closed the hearing at 8:29 p.m. with only 16 people giving their input while the rest of us, out in the hall, on the stairway and out the door couldn't hear the vote being called for before we had our chance to speak."

You have asked that I prepare an opinion advising the Supervisor that "he should hold another hearing in a place large enough to accommodate all those wanting to participate."

In this regard, it is emphasized that the authority of this office is purely advisory and that the Committee on Open Government is not empowered to direct a government agency or official to follow a certain course of action. However, in an effort to assist you, I offer the following comments.

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.

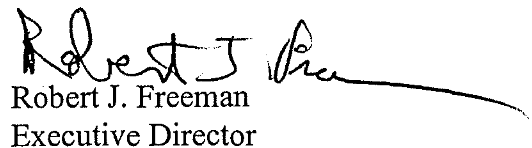
From my perspective, every provision of law, including the Open Meetings Law, should be implemented in a manner that gives reasonable effect to its intent. In my opinion, if it is known in advance of a meeting that a larger crowd is likely to attend than the usual meeting location will accommodate, and 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.

With respect to the closing of the hearing, I believe that the purpose of holding a public hearing is to provide those interested in speaking or expressing a point of view to have a reasonable opportunity to do so. I am unaware of when the hearing began, the number of those who spoke, or whether those who did speak represented the views of all the residents who attended or who wanted to speak. If, however, a reasonable opportunity to be heard or to express opinions or points of view was not offered, I would agree with your inference that a second hearing should be held, presumably in a location that can better accommodate those desiring to attend or speak.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt
cc: Town Board
Supervisor Dudek

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14100
OML-AO-3648

Committee Members

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June 25, 2003

Mr. Steven G. Poyzer

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. Poyzer:

I have received your letter of June 13 and the materials attached to it. You have sought advice concerning requests made under the Freedom of Information Law to the City of Canandaigua and the Canandaigua Recreation Development Corporation ("CRDC").

In this regard, first, having reviewed the correspondence, it is noted at the outset that the CRDC has been found by both the Supreme Court and the Appellate Division to be subject to the requirements of the Freedom of Information and Open Meetings Laws [Canandaigua Messenger, Inc. v. Wharmby, Supreme Court, Ontario County, May 11, 2001; affirmed, 739 NYS2d 508, 292 AD2d 835 (2002)].

Second, I am in general agreement with Ms. Wharmby's comments. In some respects, your request to the City involved the making of judgments or subjective conclusions. For example, seeking records indicating the City's knowledge of the operations of the CRDC, in my view, would involve questioning City officials as to what they may have known and locating records reflective of their knowledge. Further, knowledge can be derived from any number of sources, including newspapers, journals, financial documentation, etc. It is suggested that in the future, you attempt to "reasonably describe" the records sought as required by §89(3) of the Freedom of Information Law. If, for instance, minutes of meetings are not indexed by subject matter but rather are kept chronologically, a proper request would involve minutes prepared within a certain time period. If you know or can reasonably estimate that officials were considering issues concerning the CRDC from June, 2000 through March, 2001, you might request minutes of City Council meetings covering that period. Similarly, when seeking minutes of CRDC meetings, it is recommended that you request them by indicating a time period rather than subject matter.

Third, since both the City and the CRDC are agencies required to comply with the Freedom of Information Law, I note that that statute provides direction concerning the time and manner in

which agencies must respond to requests for records. 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)].

Lastly, since much of your requests focuses on minutes of meetings, I point out that §106 of the Open Meetings Law contains what might be characterized as minimum requirements concerning the contents of minutes. 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."

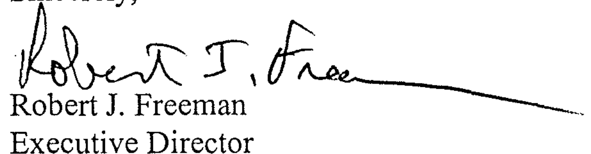
Based upon the foregoing, it is clear that minutes need not consist of a verbatim account of all commentary expressed at a meeting. It is also clear that minutes must be prepared and made available within two weeks of meetings.

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.

I point out, too, that since its enactment in 1974, the Freedom of Information Law has included an "open vote" requirement. Section 87(3)(a) states that "[e]ach agency shall maintain a record of the final vote of each member in every agency proceeding in which the member votes." Therefore, in each instance in which a public body, such as the City Council or the Board of Directors of the CRDC, takes action, a record must be prepared specifying the manner in which each member cast his or her vote. Typically, the record of votes appears in minutes of meetings.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Laura Kay Wharmby
Dennis Morga

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO - 3649

Committee Members

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Mary O. Donohue
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Stephen W. Hendershott
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July 2, 2003

E-Mail

TO: June Smith

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. Smith:

I have received your inquiry in which you asked whether the Open Meetings Law "covers Home Owners Association meetings in New York State."

From my perspective, the Open Meetings Law does not include those gatherings within its coverage. That statute applies 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, the Open Meetings Law generally pertains to meetings of governmental bodies; it does not apply to private entities that are not governmental in nature.

I note that confusion has arisen on occasion with reference to the phrase "public corporation." As that phrase is used in this context, it is defined in §66 of the General Construction Law to mean a county, city, town, school district, fire district or similar political subdivision.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14114
OML-AO-3650

Committee Members

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July 3, 2003

Ms. Carol D. Stevens
County of Greene
Office of the County Attorney
901 Green County Office Building
Cairo, NY 12413-9509

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. Stevens:

I have received your letter of June 13 concerning the "Applicability of Open Meetings Law and FOIL to Settlement Agreements with Greene County." Specifically, you raised the following question:

> "May a County keep the details of the settlement of a lawsuit by the County against another when the litigation has been authorized by Legislative resolution but not actually commenced?"

You added that "[a]n exchange of mutual releases is expected but no other documents would be generated."

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to existing records, and §89(3) states in part that "[n]othing in this article shall be construed to require any entity to prepare any record not possessed or maintained by such entity..." Also significant is §86(4), which defines the term "record" to mean:

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

Based on the foregoing, information existing in a physical form maintained by or for the County would constitute a record that falls within the coverage of the Freedom of Information Law. If, however, information does not exist in the form of a record or records, that statute would not be applicable.

Second, situations have arisen in which the parties to an agreement or stipulation of settlement have agreed to refrain from speaking about or disclosing the terms of the agreement or stipulation on their own initiative. In my view, the parties may validly agree not to speak about a settlement or agreement. However, the Freedom of Information Law pertains to records, not to speech. In a decision that may be pertinent to the matter that you described, Paul Smith's College of Arts and Sciences v. Cuomo, it was stated that:

> "Plaintiff was the subject of a complaint made by a former employee who alleged that he was a victim of age discrimination. Prior to a scheduled hearing and with the assistance of an employee of defendant State Division of Human Rights (hereinafter SDHR), plaintiff entered into a stipulation of settlement with the complaining employee. Plaintiff's stated purpose for settling was to eliminate any negative publicity resulting from a public hearing on the allegations. The order after stipulation signed by defendant Commissioner of Human Rights on August 23, 1989 provided for absolute confidentiality except for enforcement purposes. The order also provided for the withdrawal of the charges and discontinuance of the administrative proceeding. Plaintiff did not admit to a Human Rights violation. On October 27, 1989, SDHR issued a press release detailing the allegations, disclosing that the matter hade been settled and set forth certain parts of the settlement terms" [589 NYS2d 106,107, 186 AD2d 888 (1992)].

Although the Appellate Division determined that the issuance of the press release "was both arbitrary and capricious and an abuse of discretion" (id.), it also found that the stipulation of settlement was subject to rights of access conferred by the Freedom of Information Law.

I note that it has been held in variety of circumstances that a promise or assertion of confidentiality cannot be upheld, unless a statute specifically confers confidentiality. In Gannett News Service v. Office of Alcoholism and Substance Abuse Services [415 NYS 2d 780 (1979)], a state agency guaranteed confidentiality to school districts participating in a statistical survey concerning drug abuse. The court determined that the promise of confidentiality could not be sustained, and that the records were available, for none of the grounds for denial appearing in the Freedom of Information Law could justifiably be asserted. In a decision rendered by the Court of Appeals, it was held that a state agency's:

> "long-standing promise of confidentiality to the intervenors is irrelevant to whether the requested documents fit within the Legislature's definition of 'record' under FOIL. The definition does

> not exclude or make any reference to information labeled as 'confidential' by the agency; confidentiality is relevant only when determining whether the record or a portion of it is exempt..." [Washington Post v. Insurance Department, 61 NY 2d 557, 565 (1984)].

Third, I believe that, insofar as it exists in the form of a record or records, a settlement or similar agreement must be disclosed. 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. Unless records may justifiably be withheld in accordance with one or more of the grounds for denial, a claim, a promise or an agreement to maintain confidentiality would, based on judicial decisions, be meaningless.

In Geneva Printing Co. v. Village of Lyons (Supreme Court, Wayne County, March 25, 1981), a public employee charged with misconduct and in the process of an arbitration hearing engaged in a settlement agreement with a municipality. One aspect of the settlement was an agreement to the effect that its terms would remain confidential. Notwithstanding the agreement of confidentiality, the court found that no ground for denial could justifiably be cited to withhold the agreement.

It was also found that the record indicating the terms of the settlement constituted a final agency determination available under the Freedom of Information Law [see FOIL, §87(2)(g)(iii)].

In another decision, the matter involved the subject of a settlement agreement with a town that included a confidentiality clause who 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, absent the assertion of a ground for denial appearing in §87(2) of the Freedom of Information Law, and none in my view would apply, I believe that a record reflective of a settlement must be disclosed in response to a request made under the Freedom of Information Law, notwithstanding any condition regarding confidentiality in the agreement.

With respect to the "Applicability of the Open Meetings Law", it appears that only issue of significance involves minutes and the extent to which information regarding settlement agreements must be included. Section 106 of that statute pertains to minutes and provides that:

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

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

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

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.

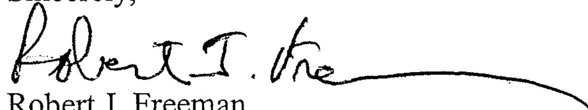
It is noted that minutes of executive sessions need not include information that may be withheld under the Freedom of Information Law. From my perspective, when a public body makes a final determination during an executive session, that determination will, in most instances, be

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, I believe that the minutes of the County Legislature must indicate in general terms that settlements were reached or approved; I do not believe they are required to include a detailed description of a settlement.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3651

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July 8, 2003

Mr. Robert L. Leonard
CSEA
332 Jefferson Road
Rochester, NY 14623

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

Dear Mr. Leonard:

I have received your letter and the materials attached to it. You have asked that I "look at the way the Geneva City School District Board of Education conducts meetings", particularly with respect to "possible violations of the open meeting law."

You referred to the absence of any reference on an agenda of a recent meeting to the "abolishment" of a certain position, specifically, the position held by the CSEA unit president. According to the minutes of the meeting, the Board entered into executive session:

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

Immediately after the executive session, a motion to eliminate the position was approved. In minutes of another meeting, reference was made to an executive session held "to discuss personnel issues."

In this regard, I offer the following comments.

First, there is nothing in the Open Meetings Law or any other statute of which I am aware that requires that an agenda be prepared or followed. If an agenda has been prepared, unless it has adopted a rule or policy to the contrary, the Board in my view could choose to discuss topics not referenced on the agenda or pass over items that appear on an agenda.

Second, I do not believe that the "abolishment" or elimination of a position could validly have been considered during an executive session. Further, the motion for entry into executive session reflected in the minutes is inconsistent with the direction provided by the courts.

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. 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.

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, §105(1)(f) cannot 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, the educational needs of students, etc. 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).

I note that it was held long ago that personnel layoffs are primarily budgetary matters that would not qualify for consideration in executive session (Orange County Publications v. City of Middletown, Supreme Court, Orange County, December 6, 1978). The same conclusion was reached in a case specifically dealing with the creation and termination of positions [Gordon v. Village of Monticello, Supreme Court, Ulster County, August 5, 1993; modified, 207 AD2d 55 (1994); reversed on other grounds, 87 NY2d 124 (1995). The Supreme Court in that decision awarded attorney's fees to the petitioners; the Appellate Division agreed that there had been a violation of the Open Meetings Law, but reversed the award of attorney's fees on the ground that there was no indication that the Village Board of Trustees had repeatedly violated the law or had acted in bad faith; the Court of Appeals reversed that determination, reinstating the award of attorney's fees and tacitly confirming that the Board had no basis for discussing the creation or elimination of positions in executive session.

Lastly, the motion for entry into executive session as indicated in the minutes is a word for word recitation of the language of §105(1)(f). In a similar situation, it was held that a motion to enter into executive session cannot "merely regurgitate the statutory language" and that such a "boilerplate recitation does not comply with the intent of the statute" [Daily Gazette v. Town Board, Town of Cobleskill, 444 NYS2d 44, 46 (1981)]. Further, with respect to the "personnel" exception, 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.

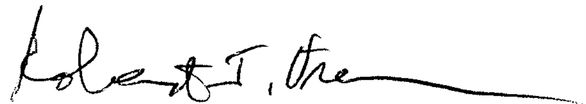
The Appellate Division in Gordon, supra, confirmed the advice rendered by this office. In discussing §105(1)(f) in relation to a matter involving the establishment and functions of a position, the Court stated that:

> "...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, supra, 207 AD 2d 55, 58).

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

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14127
OML-AO-3652

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July 9, 2003

Ms. Stephanie Kushner

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. Kushner:

I have received your letter of June 26 and the materials attached to it. You referred to an advisory opinion prepared at your request on June 18 and interpreted that opinion to mean that you are "entitled to receive a copy of the minutes from the Board meeting, even if not approved, and the backup information when decisions are made." You wrote, however that the East Williston Union Free School District views the opinion "differently" and attached a copy of a response to your request granting access to "approved minutes" of a meeting of the Board of Education and a denial of access to "notes that formed the basis" for a certain decision on the ground that are "an intra-agency communication and not subject to disclosure under the Freedom of Information Law."

In this regard, it is not clear that either you or District officials have construed my opinion or the law accurately. To attempt to clarify both the opinion and the law, I offer the following remarks.

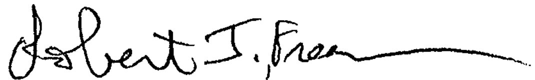
First, based on the language of the Open Meetings Law, §106(3), minutes of meetings must be prepared and made available to the public within two weeks of the date of the meetings to which they relate. As indicated in the earlier opinion, there is nothing in the law that requires that minutes be approved.

Second, if I accurately understand the situation, the decision of the "nominating petition review board" was made available to you, but documentation indicating the basis of its decision was withheld. That documentation was described as "notes that formed the basis for Mrs. Gaglio's original decision." The notes are clearly "intra-agency material", and in the context of your request, I believe that portions consisting of statistical or factual information or which represent a final agency determination must be disclosed, respectively, pursuant to subparagraphs (i) and (iii) of §87(2)(g). Not all "backup information" leading to or used in the decision making process is necessarily available. If five recommendations were made to a decision maker and he or she in some

way considered all of them in reaching a decision, but that person did not specifically adopt a recommendation or recommendations, I believe that those records may be withheld. Similarly, if the notes to which you referred were merely used to aid in reaching a decision, I believe that those portions consisting of opinions, advice, recommendations, conjecture and the like may be withheld. An example of a situation in which "backup" material would be available would involve a proceeding in which a hearing officer prepares a recommendation and the commissioner or other decision maker adopts the recommendation as his or her decision. In that kind of situation, the recommendation becomes the decision. It would be unlikely in my view that notes would become a decision.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Education
Edward J. Cigna

OML-AO- 3653

From: Robert Freeman
To: [redacted]
Date: 7/9/2003 9:07:51 AM
Subject: Re: (no subject)

Hi - -

I hope that you are well and happy and enjoying the summer.

In brief, the Open Meetings Law exempts political caucuses from its coverage, irrespective of the nature of a discussion. If, for example, a town board consists of four members from one party and one from the other, the four can legally conduct a closed political caucus to discuss any topic, including matters of public business.

I should point out that the answer is different, based on case law, if all of the board members are from the same political party. In that situation, if a majority gathers to discuss public business, the gathering would be a "meeting" covered by the Open Meetings Law. The exemption regarding political caucuses would apply only when the discussion involves political party business.

For more detailed analyses of the issue, you can go to the index to advisory opinions on our website dealing with the Open Meetings Law, click on to "P" and scroll down to "political caucus". Several opinions will be accessible in full text.

I hope that this helps.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
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Albany, NY 12231
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STATE OF NEW YORK
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OML-AO-3651

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July 10, 2003

Ms. Marion Brown

The staff of the Committee on 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. Brown:

I have received your letter and appreciate your kind words. You have sought guidance concerning a proper motion for entry into executive session under §105(1)(d). That provision authorizes a public body to conduct an executive session to discuss "proposed, pending or current litigation."

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

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

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

In construing the exception concerning litigation, 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.

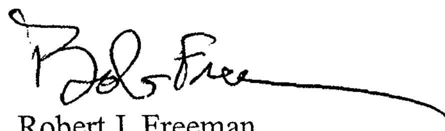
With regard to the sufficiency of a motion to discuss litigation, it has been held that:

> "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].

The emphasis in the passage quoted above on the word "*the*" indicates that when the discussion relates to litigation that has been initiated, the motion must name the litigation. For example, a proper motion might be: "I move to enter into executive session to discuss our litigation strategy in the case of the XYZ Company v. the Town of Brighton." If the Town Board seeks to discuss its litigation strategy in relation to a person or entity that it intends to sue, and if premature identification of that person or entity could adversely affect the interests of the Town and its residents, it has been suggested that the motion need not identify that person or entity, but that it should clearly indicate that the discussion will involve the litigation strategy. Only by means of that kind of description can the public know that the subject matter may justifiably be considered during an executive session.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

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FOIL-AO-14131
OML-AO-3655

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July 10, 2003

Ms. Judy Kessler-Rix
Editor
Arcade Herald
223 Main Street
Arcade, NY 14009

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. Kessler-Rix:

I have received your letter in which you raised issues concerning the implementation of the Open Meetings and Freedom of Information Laws by the Pioneer Central School District and its Board of Education.

You referred initially to an executive session held recently to discuss, in your words, "five specific personnel appointments." Two representatives of the Management Group of New York were asked to join the Board in executive session, and you learned that "this consulting group did a comprehensive management study and evaluation of the Pioneer district, the results of which were not favorable." A request for the study was rejected on the ground that it "is still in draft form and has not been finalized." When questioned about the function of the consultants who attended the executive session, the interim superintendent replied, "I can't say." After the executive session, the Board approved four personnel appointments but gave no indication that any different kind of discussion occurred. You also referred to a contract with District administrators that expired on June 30 and wrote that, while you "realize contract negotiations are discussed during closed sessions, the public was not advised that they were even taking place."

In this regard, I offer the following comments.

First, the Open Meetings Law is based on a presumption of openness. Meetings of a public body, such as a board of education, must be conducted in public, except to the extent an executive session may validly be held. Paragraphs (a) through (h) of §105(1) specify and limit the subject matter that may properly be considered during an executive session. Additionally, as you are aware, a procedure must be accomplished in public before an executive session may be held. Specifically, the introductory language of §105(1) states that:

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

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 language of the provision to which Board alluded in relation to the executive session, 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 appointment 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)].

A "specific personnel appointment" could involve consideration of the merits of a particular candidate for a position, and in that circumstance, I believe that an executive session could properly be held. However, that phrase might also relate to the process of seeking a candidate for the position, i.e., whether the District will advertise in a newspaper or trade publication, the criteria needed to apply, and other subjects that do not focus on a particular person. A discussion of that nature, even though it relates to a specific personnel appointment, would not, in my view, qualify for consideration in executive session.

Moreover, as indicated in the language of the law and confirmed in Gordon, "the topics discussed during the executive session must remain within the exceptions enumerated in the statute..." From my perspective, a management study typically focuses on practices, policies, procedures and the like, rather than the performance of specific employees. To the extent that the Board, with or without the presence of the consultants, discussed those kinds of issues, I do not believe that there would have been a basis for conducting the executive session. Again, only to the extent that the discussion focused on a particular person or persons in conjunction with a topic appearing in §105(1)(f) could an executive session appropriately have been held.

With respect to the issue relating to the expiration of the administrators' contract, if the Board has not been involved in discussions of that subject, there is no issue involving the Open Meetings Law. If, however, the Board has discussed the matter, it appears that §105(1)(e) would be pertinent. That provision authorizes a public body to enter into executive session to consider "collective negotiations pursuant to article fourteen of the civil service law." Article 14 is commonly known as the "Taylor Law" and deals with the relationship between public employers and public employee unions, which are characterized in §201(5) of the Civil Service Law as "employee organizations." That being so, not all contract negotiations fall within the coverage of §105(1)(e).

According to the Public Employment Relations Board (PERB), to be considered an employee organization for purposes of the Taylor Law, certain criteria must be met. The organization must be certified by PERB or recognized by an employer in order to engage in collective bargaining negotiations. I was also informed that to be an employee organization, an entity must function as a collective bargaining unit in an ongoing manner with respect to all issues involving the terms and conditions of employment.

If District administrators have formed an employee organization, I believe that the Board could conduct executive sessions to discuss or engage in collective negotiations relating to the organization pursuant to §105(1)(e). 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 District Administrator's organization."

If there is no employee organization, I do not believe that §105(1)(e) would serve as a basis for conducting an executive session.

Next, with regard to the management study, that the study is in draft or may not be final would not necessarily provide a basis for denying access to its contents or portions thereof. The Freedom of Information Law is applicable to all 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, the document in question, irrespective of its characterization as a draft or not "finalized", or that it has not been accepted or approved, in my view clearly constitutes an agency record that is subject to rights of access. Further, even if it never came into the physical custody of the District, it would fall within the coverage of the Freedom of Information Law, because it was prepared "for" the District.

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

The Court of Appeals, the state's highest court, confirmed its general view of the intent of the Freedom of Information Law in Gould v. New York City Police Department, stating that:

> "To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption' (*Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 *see,* Public Officers Law § 89[4][b]). As this Court has stated, '[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld' (*Matter of Fink v. Lefkowitz*, 47 N.Y.2d, 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)" [87 NY2d 267, 275 (1996)].

Just as significant, the Court in Gould repeatedly specified that a categorical denial of access to records is inconsistent with the requirements of the Freedom of Information Law. In that case,

the Police Department contended that complaint follow up reports could be withheld in their entirety on the ground that they fall within the exception regarding intra-agency materials, §87(2)(g). The Court, however, wrote that: "Petitioners contend that because the complaint follow-up reports contain factual data, the exemption does not justify complete nondisclosure of the reports. We agree" (id., 276), and stated as a general principle that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government" (id., 275). The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, stating that:

> "...to invoke one of the exemptions of section 87(2), the agency must articulate 'particularized and specific justification' for not disclosing requested documents (*Matter of Fink v. Lefkowitz, supra*, 47 N.Y.2d, at 571, 419 N.Y.S.2d 467, 393 N.E.2d 463). If the court is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an in camera inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material (*see, Matter of Xerox Corp. v. Town of Webster*, 65 N.Y.2d 131, 133, 490 N.Y.S. 2d, 488, 480 N.E.2d 74; *Matter of Farbman & Sons v. New York City Health & Hosps. Corp., supra*, 62 N.Y.2d, at 83, 476 N.Y.S.2d 69, 464 N.E.2d 437)" (id.).

The provision to which the Court referred in Gould, §87(2)(g), is likely the only ground for denial of significance with respect to the document at issue. While that provision potentially serves as a basis for denying access, due to its structure, it often requires substantial disclosure. Specifically, that provision states that an agency may withhold records that:

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

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

In a discussion of the issue of records prepared by consultants for agencies, the Court of Appeals stated that:

> "Opinions and recommendations prepared by agency personnel may be exempt from disclosure under FOIL as 'predecisional materials, prepared to assist an agency decision maker***in arriving at his decision' (McAulay v. Board of Educ., 61 AD 2d 1048, aff'd 48 NY 2d 659). Such material is exempt 'to protect the deliberative process of government by ensuring that persons in an advisory role would be able to express their opinions freely to agency decision makers (Matter of Sea Crest Const. Corp. v. Stubing, 82 AD 2d 546, 549).
>
> "In connection with their deliberative process, agencies may at times require opinions and recommendations from outside consultants. It would make little sense to protect the deliberative process when such reports are prepared by agency employees yet deny this protection when reports are prepared for the same purpose by outside consultants retained by agencies. Accordingly, we hold that records may be considered 'intra-agency material' even though prepared by an outside consultant at the behest of an agency as part of the agency's deliberative process (see, Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD 2d 546, 549, supra; Matter of 124 Ferry St. Realty Corp. v. Hennessy, 82 AD 2d 981, 983)" [Xerox Corporation v. Town of Webster, 65 NY 2d 131, 132-133 (1985)].

Based upon the foregoing, records prepared by a consultant for an agency may be withheld or must be disclosed based upon the same standards as in cases in which records are prepared by the staff of an agency. It is emphasized that the Court in Xerox specified that the contents of intra-agency materials determine the extent to which they may be available or withheld, for it was held that:

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

Therefore, a record prepared by a consultant for an agency would be accessible or deniable, in whole or in part, depending on its contents.

I note that in Gould, one of the contentions was that certain reports could be withheld because they were not final and because they related to incidents for which no final determination had been made. The Court rejected that finding and stated that:

> "...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers Law §87[2][g][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, I believe that the report may be characterized as intra-agency material. However, that it is internal, not final, not officially accepted or approved would not remove it from rights of access. Again, I believe that those portions consisting of statistical or factual information must be disclosed.

The Court in Gould considered the intent of §87(2)(g) and what constitutes "factual" information, stating 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).]

I would conjecture that the study consists of opinions and recommendations, which may be withheld, as well as statistical or factual information, which should be accessible. It is also important to reiterate that if a discussion by the Board relating to the study does not focus on a particular person, it is likely that the discussion must occur in public to comply with the Open Meetings Law. If that is so, public discussion and, therefore, disclosure of certain aspects of the report would in my opinion result in a waiver of the ability to withhold records reflective of those aspects of the report under the Freedom of Information Law.

Lastly, you wrote that the interim superintendent replied, "I can't say", when asked about the nature of the discussion during the executive session. In my view, neither he nor others present during the executive session would have been required to inform those who questioned them about the executive session. However, they would not have been prohibiting from responding or generally indicating what transpired during the executive session. Stated differently, it would have been more accurate to reply, "I choose not to say", rather than "I can't say."

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

I am unaware of any statute that would prohibit a Board member or other person who attended the executive session 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 characterized as 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

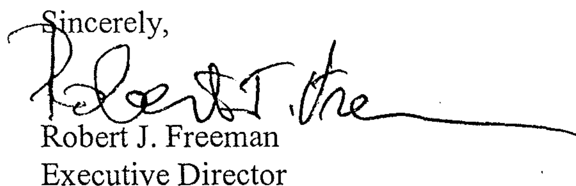
by federal law and would be exempted from the coverage of that statute [see Open Meetings Law, §108(3)]. In the context of the Freedom of Information Law, an education record would be specifically exempted from disclosure by statute in accordance with §87(2)(a). In both contexts, I believe that a board 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).

In an effort to enhance compliance with and understanding of the Freedom of Information and Open Meetings Laws, copies of this opinion will be sent to District officials.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Education
Michael Medden

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3656

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July 14, 2003

Ms. Joan M. Charles
President
Mendon Public Library Board of Trustees
15 Monroe Street
Honeoye Falls, NY 14472

The staff of the Committee 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. Charles:

I have received your letter and the materials attached to it. You have requested an advisory opinion in your capacity as President of the Mendon Public Library Board of Trustees concerning the propriety of an executive session held by the Mendon Town Board to discuss a site for your new public library.

As I understand the matter, the Board of Trustees met last September and informed the Town Supervisor of its recommendation to include the library as part of the Village Square development on Main Street. In March of this year, a presentation was made concerning that proposal at a joint meeting of the Town Board and the Board of Trustees. At a special meeting of the Town Board held on May 28, an executive session was held "for the purpose of discussing land acquisition", and immediately thereafter, a motion was made and approved stating that:

> "WHEREAS, the Mendon Library Board of Trustees conducted a search for potential sites for a new or expanded library building and performed an extensive evaluation of several potential sites, and
>
> "WHEREAS, this Town Board has studied the evaluation performed by the Library Board of Trustees and has supplemented the data presented by the Board of Trustees with additional information, engineering and architectural data and financial and tax-rate projections, and
>
> "WHEREAS, this Town Board has utilized all of the available information, as well as the Board members' overall knowledge of the

> Town and the collective sense of the future direction of the Town. NOW, THEREFORE, BE IT RESOLVED, that this Town Board determines that the most appropriate site for a new library building is the parcel of land directly north of the current library building because it is already owned by the Town, and in the same village-center location as the current building."

You indicated to me by phone that the executive session, upon information and belief, was held solely for the purpose of discussing the site of the new library. If that is so, I believe that the executive session was improperly held. In this regard, I offer the following comments.

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 town board, 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 only ground for entry into executive session that appears to be relevant in relation to the matter that you described.

Specifically, §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.

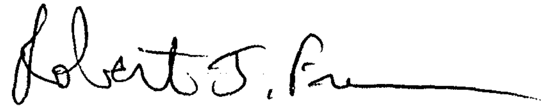
A key question, in my view, involves the extent to which information relating to possible real property transactions has become known to the public. The more that is known, the less likely it is that publicity would have an impact on the value of a parcel or in some way damage the interests of taxpayers. 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 this instance, the site suggested by the Board of Trustees became well known to the public some time ago, and the site chosen by the Town Board is owned by the Town. In consideration of those factors and the language of the Open Meetings Law, it does not appear that publicity would have had any impact, let alone a "substantial" impact, on the value of either Village Square or the parcel owned by the Town. If that is so, I do not believe that there would have been any basis for entry into executive session by the Town Board to discuss the issue of your interest.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board

From: Robert Freeman
To: augustine@hws.edu
Date: 7/21/2003 12:12:48 PM
Subject: Dear Ms. Augustine:

Dear Ms. Augustine:

As I understand the situation that you described, the Open Meetings Law would not apply for two reasons.

First, the application of that statute is not triggered unless and until a majority of a public body, such as a city council, gathers for the purpose of conducting public business collectively as a body. It appears that a majority of a public body would not be present at the gathering that you described.

And second, even if a majority attended, the gathering would in my view be exempt from the coverage of the Open Meetings Law based on §108(2) of that statute. That provision exempts political committees, conferences and caucuses from the Open Meetings Law.

I note that the Open Meetings Law is available in full text on our website. Additional information can be found in advisory opinions accessible on line. You might go the website, click on to advisory opinions under the Open Meetings, click on to "p" and scroll down to "political caucus."

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO - 3658

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July 28, 2003

Hon. April L. Scheffler
Town Clerk
Town of Groton
101 Conger Boulevard
Groton, NY 13073

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. Scheffler:

I have received your letter in which you sought assistance in relation to a new responsibility imposed upon you, the Groton Town Clerk, by the Town Board. Specifically, the Board recently approved a resolution requiring that you prepare "completely verbatim minutes" of meetings.

From my perspective, the Board cannot require that you prepare verbatim minutes of its meetings. To reiterate points offered in other opinions dealing with similar or related matters, I believe that four provisions law are pertinent to the matter.

First, §106 of the Open Meetings Law deals directly with minutes of meetings and states that:

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

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

Based on the foregoing, it is clear that minutes need not consist of a verbatim account of what is said. Rather, at a minimum, minutes must consist of a record or summary of motions, proposals, resolutions, action taken and the vote of each member. Second, subdivision (1) of §30 of the Town Law states in relevant part that the town clerk "shall attend all meetings of the town board, act as clerk thereof, and keep a complete and accurate record of the proceedings of each meeting". Third, subdivision (11) of §30 of the Town Law provides that the clerk "shall have such additional powers and perform such additional duties as are or hereafter may be conferred or imposed upon him by law, and such further duties as the town board may determine, not inconsistent with law". And fourth, §63 of the Town Law states in part that a town board "may determine the rules of its procedure".

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

While I know of no case law that focuses on this particular issue, the courts have offered guidance concerning the authority of governing bodies to adopt rules and the requirement that those rules must be reasonable. For example, as in the case of town boards having the authority to adopt rules and procedures pursuant to §63 of the Town Law, boards of education have essentially the same authority under §1709 of the Education Law. However, 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 town board 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, despite the authority conferred upon a town board by §63 of the Town Law.

In my opinion, a rule requiring that a town clerk prepare a verbatim account of everything said at every town board meeting would be found by a court to be unreasonable and beyond the authority granted to town boards by both §§30(11) and 63 of the Town Law. In consideration of the numerous statutory obligations imposed upon town clerks by a variety of statutes, a clerk would be effectively precluded from carrying out those duties if he or she is required to prepare verbatim minutes of every meeting. Meetings may be held frequently, often they are lengthy, and the time needed to type verbatim minutes would force the clerk to put aside other duties and likely engage in failures to comply with law. Moreover, if the Board or others have a need years from now to determine the nature of action taken by the Board, the task of wading through lengthy documentation in an effort to find the crucial portions will be unnecessarily frustrating and time consuming.

In short, I believe that a requirement that you, as clerk, prepare verbatim minutes is not only unreasonable; a requirement of that nature also results in inefficiency and a lesser capacity to conduct town business in a manner that enables you to meet your statutory responsibilities.

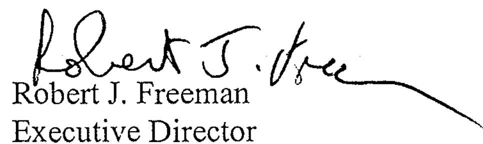
It is suggested that reasonable alternative exists and is practiced by many municipalities. In order to have a verbatim account of statements made at meetings, the meetings can be audio tape recorded or perhaps video recorded. If there is a question concerning the accuracy of minutes or a need for detail not ordinarily included in typical minutes of a meeting, the tape can be reviewed to ensure accuracy, to resolve a dispute or to refresh one's memory. I note, too, that minutes of meetings must be retained permanently pursuant to the records retention schedule issued by the State Archives at the State Education Department, but that tapes are required to be maintained for a period of months. At the expiration of the retention period, the tapes could be preserved, or if they are no longer of value, they could be erased and reused.

Lastly, although your letter indicates that Kevin Crawford, Counsel to the Association of Towns, is not familiar with opinions prepared by this office, I am sure that is inaccurate. Kevin and I have known one another for more than twenty years, I have spoken at the Association of Towns annual meeting in New York City for every year since 1977 (or perhaps earlier), and he is very familiar with the work of this office.

In an effort to resolve the matter, a copy of this opinion will be sent to the Town Board.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board
Kevin Crawford

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3659

Committee Members

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July 30, 2003

Dr. Janusz R. Richards, D.C.
150 Purchase Street
Rye, NY 10580

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

Dear Dr. Richards:

I have received your letter in which you indicated that you are a member of the Port Chester Housing Authority and raised questions concerning the Authority's obligation to comply with the Open Meetings Law.

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

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

Based on provisions within the Public Housing Law, a municipal housing authority clearly constitutes a public body. Section 414 established the Port Chester Housing Authority and specifies that the Authority "shall constitute a body corporate and politic, be perpetual in duration and consist of five members"; that provision also states that the Authority "shall have the powers and duties now or hereafter conferred...upon municipal housing authorities." Section 37 delineates the governmental powers of municipal housing authorities; §30(3) states that a "majority of the members of an authority shall constitute a quorum."

In short, each of the ingredients necessary to find that the Port Chester Housing Authority constitutes a public body subject to the Open Meetings Law is present: it is an entity consisting of five members, a quorum is required, and it clearly conducts public business and performs a governmental function for the Village of Port Chester, which is a public corporation (see General Construction Law, §66). I note, too, that it has been determined by the Appellate Division, Second

Department, which includes Port Chester, that a municipal housing authority is subject to and required to comply with the Freedom of Information Law [Westchester-Rockland Newspapers v. Fischer, 101 AD2d 840 (1985)].

Section 104 of the Open Meetings Law pertains to notice of meetings and requires that every meeting be preceded by notice given to the news media and posted. That provision states that:

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

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

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

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

However, the same provision states further that:

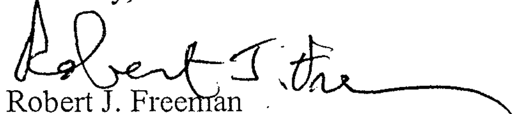
> "An unintentional failure to fully comply with the notice provisions required by this article shall not alone be grounds for invalidating any action taken at a meeting of a public body."

As such, when a legal challenge is initiated relating to a failure to provide notice, a key issue is whether a failure to comply with the notice requirements imposed by the Open Meetings Law was "unintentional".

Aside from the issue of notice, §107 also indicates that if action is taken in private that should have been taken in public, a court has discretionary authority to invalidate the action taken in violation of the law.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 14168
OML-AO - 3660

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August 5, 2003

Dr. Janusz R. Richards, D.C.
Chiropractic Office
150 Purchase Street
Rye, NY 10580

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

Dear Dr. Richards:

I have received your letter in which you asked whether the Graceland Terrace Housing Development Fund Corporation is subject to the Freedom of Information and Open Meetings Laws.

In this regard, the Freedom of Information Law is applicable to agencies, and §86(3) defines the term "agency" to mean:

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

The Open Meetings Law pertains to 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."

In consideration of the foregoing, as a general matter, the two statutes to which you referred pertain to records and meetings of governmental entities.

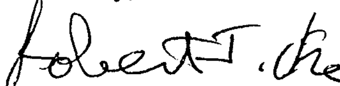
According to the Private Housing Finance Law, a housing development fund corporation is a private entity. Section 571, which is the "Statement of legislative findings and purposes", refers to "eleemosynary institutions, settlement houses, fraternal and labor organizations, foundations and other non-profit associations [that] are desirous of organizing companies to build or rehabilitate housing for low income families", and that the purpose of the law is to "provide temporary financial and technical assistance to enable such companies to participate in" government assistance programs. Further, §573 states that a housing development fund company shall be incorporated pursuant to the Business Corporation Law or as a not-for-profit corporation.

In short, while a housing development fund corporation may have a relationship with one or more units of government, it is not itself a governmental entity and, therefore, in my view, is not subject to either the Freedom of Information Law or the Open Meetings Law.

I note, however, that records maintained by an agency that is subject to the Freedom of Information Law which pertain to a housing development fund corporation fall within the scope of that statute and may be requested from the agency.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO - 3661

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August 6, 2003

E-Mail

TO: <lgordon2@optonline.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./Ms. Gordon:

As you are aware, I have received your letter in which you questioned the propriety of a provision in the by-laws of a free association library "which allow[s] for discussion of...'salaries, wages and personnel policies.'" You asked whether that provision can be "reconciled with the language of 105(1)(f)...or...fall under 105(1)(e)."

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

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

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

Second, insofar as a provision of a by-law restricts access to meetings in a manner inconsistent with the Open Meetings Law, I believe that it has no legal effect. Section 110 of the Open Meetings Law pertains to the relationship between that statute and other provisions of law, and subdivision (1) of §110 states that:

> "Any provision of a charter, administrative code, local law, ordinance, or rule or regulation affecting a public body which is more restrictive with respect to public access than this article shall be deemed superseded hereby to the extent that such provision is more restrictive than this article."

Based on the foregoing, to the extent that the by-laws are "more restrictive with respect to public access" that the Open Meetings Law, I believe that they would be "deemed superseded." In this instance, the provision of the by-laws to which you referred is likely "more restrictive with respect to public access" than the Open Meetings Law. To that extent, therefore, it would, in my view, be of no effect.

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

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

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

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

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

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

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

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

> "...the medical, financial, credit or employment history of a 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, Chemumg County, October 20, 1981).

In the context of your inquiry, again, consideration of "personnel policies" would not, in my opinion, qualify for consideration in executive session. Assuming that no public employee union

is involved, a discussion of salaries and wages concerning staff generally or employees as a group would not focus on a "particular person" and should occur in public. On the other hand, to the extent that the matter deals with a particular employee and, for example, whether he or she merits an increase in salary, the issue would involve the "employment history of a particular person" and could be discussed during an executive session.

Lastly, §105(1)(e) authorizes a public body to enter into an executive session regarding "collective negotiations pursuant to article fourteen of the civil service law." Article 14 of the Civil Service Law, commonly known as the "Taylor Law," pertains to the relationship between public employers and public employee unions. As such, §105(1)(e) deals with collective bargaining negotiations between a public employer and a public employee union. If employees of the library are represented by a public employee union, discussions regarding collective bargaining negotiations involving the union could be conducted in executive session. If, however, there is no public employee union, §105(1)(e) would not apply.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14169
OML-AO-3662

Committee Members

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August 6, 2003

Mr. Hugh M. Spoljaric
President
Kingston Teachers' Federation
P.O. Box 4481
Kingston, NY 12402

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. Spoljaric:

I have received your letter in which you sought an opinion concerning rights of access to certain records of the Kingston City School District.

According to your letter, the District:

> "....has refused to disclose to the leadership of the Kingston Teachers' Federation, as well as to members of the public, information relative to the elimination of and the restoration of positions that were and are a part of the budget process for funding the schools."

You added that:

> "Prior to the June 3, 2003 budget vote, the Superintendent stated that several positions would not be retained and produced a list of those positions. Additionally, the Superintendent indicated that several positions would be eliminated if the budget failed to pass. Among the stated positions were seven administrative jobs. The Superintendent stated that the exact list of positions had been discussed with the Board of Education, but he refused to disclose the exact list of positions.
>
> "After the budget passed, some of the 'not to be retained' positions were, in fact, retained... The Superintendent indicated that some other positions would be reinstated. He said that a list had been prepared

> and presented to the Board of Education, but that he was not disclosing the list...
>
> "In both instances, public information was discussed in private and the Superintendent refused to share that information with the Federation and with the members of the school district community.
>
> "We believe that the district and Superintendent refusal to disclose public information that was discussed in executive session is in violation of the Open Meetings Law..."

Based on the language of the Open Meetings Law and its judicial interpretation, it appears that the matters to which you referred could not properly have been discussed during executive session. Further, records reflective of determinations made either by the Board of Education or the Superintendent must, in my view, be disclosed. In this regard, I offer the following comments.

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

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

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

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

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

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

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

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

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

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

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

In <u>Doolittle</u>, it was stated that:

> "The court agrees with petitioner's contention that personnel lay-offs are primarily budgetary matters and as such are not among the specifically enumerated personnel subjects set forth in Subdiv. 1.f. of §100, for which the Legislature has authorized closed 'executive

> sessions'. Therefore, the court declares that budgetary lay-offs are not personnel matters within the intention of Subdiv. 1.f of §100 and that the November 16, 1978 closed-door session was in violation of the Open Meetings Law" (Orange County Publications v. the City of Middletown, Supreme Court, Orange County, December 26, 1978).

In consideration of the foregoing, and subject to the qualifications described in the preceding commentary, I do not believe that discussions relating to the budgetary matters, such as the retention or elimination of positions or programs, could appropriately be discussed during an executive session.

I note, too, that 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 confirmed that advice. 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)].

Insofar as records indicate positions that have been retained or eliminated, I believe that they would be available under the Freedom of Information Law. In brief, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

While one of the exceptions to rights of access is pertinent to the matter, due to its structure, it often requires disclosure, and I believe that to be so in this instance. Specifically, §87(2)(g) authorizes an agency to withhold records that:

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

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

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

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

From my perspective, records or portions of records indicating the positions that have been retained or eliminated would constitute factual information accessible under §87(2)(g)(i) or alternatively would reflect a final agency determination accessible under §87(2)(g)(iii).

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Education
Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14172
OML-AO-3663

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August 7, 2003

Ms. Dorothy Stundtner

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. Stundtner:

I have received your letter and enclosed copies of the Open Meetings Law and "Your Right to Know", which describes that law and the Freedom of Information Law.

You have raised a variety of questions relating to "grievance day", and in this regard, I must inform you that many provisions of law relating to the assessment of real property are found in statutes separate from the Open Meetings Law. To obtain information focusing on the assessment of real property and the right to challenge an assessment, it is suggested that you seek the assistance of the Office of Real Property Services, 16 Sheridan Avenue, Albany, NY 12210-2714. That agency's website address is <www.orps.state.ny.us> and its public information office can be reached by phone at (518)486-5446. Insofar as your questions relate to the Open Meetings Law, I offer the following comments.

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

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

prior to grievance day. Again, that is a matter that can be addressed with expertise by staff at the Office of Real Property Services.

Second, I believe that a board of assessment review is 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.

Third, you asked whether there is a requirement that "in an open meeting for Grievance day the Committee members the meeting give their names." I know of no such requirement. However, I know of no reason why those persons would not disclose their identities. Further, a record maintained by a municipality identifying those persons would be available under the Freedom of Information Law. That statute is also pertinent to your final question, whether you can ask for the credentials of those who serve on the Board.

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 to an analysis of rights of access is §87(2)(b), which states that an agency may withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy."

Based on the judicial interpretation of the Freedom of Information Law, it is clear that public officers and employees, as well as those performing duties for agencies, 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 those persons 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 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].

In a judicial decision that focused resumes of public employees, 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 portions of resumes must be disclosed in accordance with the previous commentary. The Committee's opinion stated that:

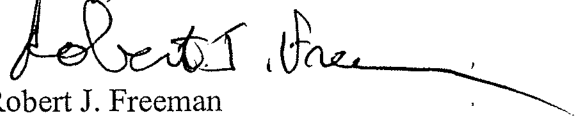
> "If, for example, an individual must have certain types of experience, educational accomplishments or certifications as a condition precedent to serving in [a] particular position, those aspects of a resume or application would in my view be relevant to the performance of the official duties of not 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."

I note that Kwasnik was affirmed by the Appellate Division [691 NYS2d 525, 262 AD2d 171 (1999)]. Based on that decision and others dealing involving analogous principles, those portions of a resume or similar records that are relevant to the performance of one's duties, including certification, must be disclosed. In addition, it has been held that those portions of records indicating one's general education background must be disclosed [Ruberti, Girvin and Ferlazzo v. NYS Division of State Police, 218 AD2d 494 (1996)].

Lastly, it is suggested that you ask staff at the Office of Real Property Services whether particular qualifications must be met to hold the positions of your interest.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 14176
OML-AO- 3664

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August 8, 2003

Mr. Michael A. Kless

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. Kless:

I have received your letter in which you asked whether the New York State Ethics Commission "is exempt from the Freedom of Information Law" and "any other NYS sunshine laws...."

In this regard, as you are aware, the Freedom of Information Law generally requires that government agency records be made available for inspection and copying, unless a ground for denial of access may properly be asserted. In the context of your question, the initial ground for denial, §87(2)(a), is relevant. That provision authorizes an agency to withhold records that "are specifically exempted from disclosure by state or federal statute." One such statute deals directly with records of the State Ethics Commission. Section 94 of the Executive Law deals with the powers and duties of the Commission, and subdivision (17), paragraph (a), states that:

> "Notwithstanding the provisions of article six of the public officers law, the only records of the commission which shall be available for public inspection are:
>
> (1) the information set forth in an annual statement of financial disclosure filed pursuant to section seventy-three-a of the public officers law except the categories of value or amount, which shall remain confidential, and any other item of information deleted pursuant to paragraph (h) of subdivision nine of this section:
>
> (2) notices of delinquency sent under subdivision eleven of this section;
>
> (3) notice of reasonable cause sent under paragraph (b) of subdivision twelve of this section; and

(4) notices of civil assessments imposed under this section."

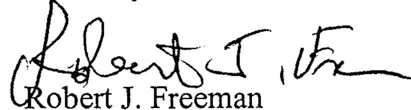
Article Six of the Public Officers Law is the Freedom of Information Law, and based on the foregoing, the only records required to be disclosed by the Commission are those identified in (1) through (4) of paragraph (a). I note, too, that the introductory portion of the provision quoted above refers to certain records that are "available for inspection." Based on that language, it has been held that the Ethics Commission is not required to prepare photocopies of those records [John v. NYS Ethics Commission, 178 AD2d 51 (1992)].

Similarly, subdivision (18) of §94 of the Executive Law specifies that the meetings of the Ethics Commission are outside the coverage of Article Seven of the Public Officers Law, which is the Open Meetings Law. That provision states in relevant part that : "Notwithstanding article seven of the public officers law, no meeting or proceeding...of the commission shall be open to the public..."

In sum, neither the Freedom of Information Law nor the Open Meetings Law is applicable to the State Ethics Commission.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Walter C. Ayres

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DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3665

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August 21, 2003

Mr. Thomas J. Cusker
Attorney for the Town of Mendon
2121 North Clinton Ave.
Rochester, NY 14617

Dear Mr. Cusker:

I have received your letter in which you suggested that an advisory opinion that I prepared on July 14 at the request of Ms. Joan M. Charles "may have been based on incomplete information", and that additional information that you have offered might "enable [me] to render a supplemental opinion."

Based on the information given to me by Ms. Charles, it did not appear that the Mendon Town Board could properly have held an executive session to consider the location for construction of a new library, for it did not appear that the pertinent basis for entry into executive session, §105(1)(h) of the Open Meetings Law, could justifiably have been asserted. You indicated, however, that the "Town Board was of the opinion that publicity regarding the possible acquisition could substantially affect the value thereof", that the Board "discussed several other potential non-Town-owned sites during the executive session", as well as "potential disposal of the current library building and site", and that there "were a total of six sites under review by the Board."

I have carefully reviewed the materials sent to me by Ms. Charles, and despite the information you have provided, if I understand their contents accurately, it remains questionable whether an executive session could properly have been held.

In this regard, first, it appears that the Town Supervisor may not have been fully familiar with §105(1)(h). According to a news article dated June 28, "potential land acquisition matters must be discussed in executive session, she said." That statement, in my view, is inaccurate. The Open Meetings Law nowhere requires that an executive session must be held. On the contrary, the introductory language of §105(1) states that an executive session *may* be held to discuss certain matters specified in the provisions that follow. Further, that a discussion involves a land acquisition matter is not itself sufficient to justify the holding of an executive session. As you are aware and as indicated in the opinion sent to Ms. Charles, §105(1)(h) authorizes a public body to discuss the "proposed acquisition, sale or lease of real property....but only when publicity would substantially affect the value thereof."

The materials sent to me by Ms. Charles included cost breakdowns, apparently prepared by the Supervisor and sent to the Library Board of Trustees on May 13, pertaining to five possible sites, and I assumed that the sixth possible site involved the parcel owned by the Town. If they represent the six sites and were made known prior to the meeting during which the executive session in at issue was held, again, I question how or the extent to which publicity would have "substantially" affected the value of those parcels.

If I have misconstrued the facts or if you or Town officials can provide additional information or clarification indicating how or why publicity would, under the circumstances, have "substantially affected the value" of a parcel, I would be pleased prepare a new opinion.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-14218

OML-AO-3666

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August 27, 2003

Ms. Sandra R. Halberstam
Editor-in-Chief
The Clinton Chronicle
444 West 50th Street #4
New York, NY 10019

The staff of the Committee 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. Halberstam:

As you are aware, I have received your letter and a variety of materials attached to it. You have raised a series of issues concerning the implementation of the Open Meetings and Freedom of Information Laws by Community Board 4 in Manhattan. In consideration of your questions, a review of the materials, and communications with Ms. Michelle Solomon, the Board's records access officer, I offer the following comments.

The initial key issues pertain to the scope and coverage of the Open Meetings Law, which pertains to meetings of public bodies. Based on the language of the law, its legislative history, and judicial decisions, when a committee consists solely of members of a public body, such as a community board, I believe that the Open Meetings Law is applicable, for a committee itself constitutes a "public body."

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

Nevertheless, prior to its passage, the bill that became the Open Meetings Law was debated on the floor of the Assembly. During that debate, questions were raised regarding the status of

"committees, subcommittees and other subgroups." In response to those questions, the sponsor stated that it was his intent that such entities be included within the scope of the definition of "public body" (see Transcript of Assembly proceedings, May 20, 1976, pp. 6268-6270).

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

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

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

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

Next, I believe that an "informal meeting" of a public body falls within the coverage 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 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.

I note that issues involving committees of the Board and informal meetings have been discussed with Ms. Solomon, who assured me that the Board and its committees intend to comply with law.

Reference was made to situations in which perhaps a majority of the members of a Board committee may have attended meetings held by another organization, particularly the Hudson Yards Alliance. It is my understanding that Board members did indeed attend those gatherings, but that they did so as interested citizens, not as members of the Board or a committee of the Board. I was also advised that, in those instances, the members did not situate themselves together, did not function as a committee, and neither intended to nor did in fact conduct public business, collectively, as a body. If that is so, their presence, in my opinion, would not have constituted a "meeting" that would have been subject to the Open Meetings Law.

You also referred to the possibility that meetings might have been held or action taken by means of telephonic communications. As indicated earlier, the definition of "public body" refers to entities that are required to conduct public business by means of a quorum. The term "quorum" is defined in §41 of the General Construction Law, which has been in effect since 1909. The cited provision long stated that:

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

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

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

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

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

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

> "...there is a question as to whether the series of telephone calls among the individual members constitutes a meeting which would be subject to the Open Meetings Law. A meeting is defined as 'the

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

In another, more recent decision, the court cited and concurred with an opinion rendered by this office in which it was advised that "absent specific statutory authority to do so", members of a public body may not take action or vote, by proxy or otherwise, unless they are present at a meeting (Inner City Press/Community on the Move v. The New York State Banking, Supreme Court, New York County, NYLJ, July 20, 2001). Further, the amendments to the Open Meetings Law and the General Construction Law involving videoconferencing to which allusion was made earlier clarify the circumstances in which "meetings" may properly be held. Section 102(1) was amended to define "meeting" to mean "the official convening of a public body for the purpose of conducting public business, *including the use of videoconferencing for attendance and participation by the members of the public body*"; §41 of the General Construction Law was amended to indicate that quorum is "a majority of the whole number of such persons or officers, *gathered together in the presence of each other or through the use of videoconferencing...*" (italics represents the language of amendments added by Ch. 289, L. 2000).

In short, when an entity is subject to the requirements of the Open Meetings Law, I do not believe that it may validly adopt a resolution, take action or conduct a valid meeting by phone. Its authority do so, in my view, is limited to those instances in which a quorum has physically convened or has convened by videoconference.

Next, I believe that a record indicating the manner in which each member voted must be prepared in any instance in which a public body takes final action. Section 87(3)(a) of the Freedom of Information Law provides that:

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

Based upon the foregoing, when a final vote is taken by an "agency" 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)].

Lastly, you complained with respect to delays in responding to your requests for records. In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

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.

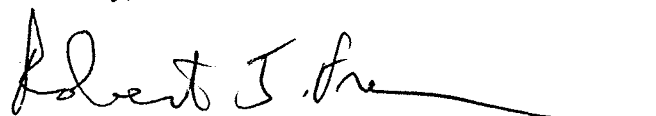
I note that there is no precise time period within which an agency must grant or deny access to records. The time needed to do so may be dependent upon the volume of a request, the possibility that other requests have been made, the necessity to conduct legal research, the search and retrieval techniques 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."

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Michelle Solomon

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-14220
OML-AO-3667

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August 28, 2003

Hon. Rae Proefrock
2nd Ward Councilwoman
North Tonawanda

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 Ms. Proefrock:

As you are aware, I have received your letter concerning the propriety of a disclosure of information acquired during an executive session by a member of the North Tonawanda Common Council. You indicated to me during our conversation that it was your belief that information obtained during an executive session is confidential.

In this regard, it is noted at the outset that 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 city councils, 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.

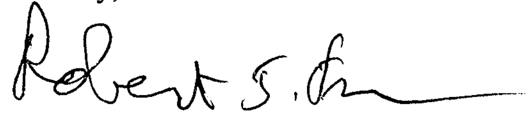
In short, when a governmental entity may choose to disclose or withhold records or to discuss in issue in public or in private, I do not believe that the records or the discussion may be considered "confidential"; only when the government has no discretion and must withhold records or discuss a matter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

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.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14249
OML-AO-3668

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September 10, 2003

Mr. Jeffrey Silman

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. Silman:

I have received your letter and the materials attached to it. You have raised a variety of issues relating to proceedings conducted by the Town of Altamont Board of Assessment Review. In consideration of your remarks, I offer the following comments.

First, although a courtroom located on the ground floor of the Town Hall was available for use, the Board, according to your letter, chose to conduct its proceedings "on the second floor of the building accessible only by 2 flights of stairs..."

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

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

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

From my perspective, every provision of law, including the Open Meetings Law, should be implemented in a manner that gives reasonable effect to its intent. Pertinent to the issue is §103(b) of the Open Meetings Law which states that:

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

The same direction appears in §74-a of the Public Officers Law regarding public hearings. Based upon those provisions, there is no obligation upon a public body to construct a new facility or to renovate an existing facility to permit barrier-free access to physically handicapped persons. However, I believe that the Law imposes a responsibility upon a public body to make "all reasonable efforts" to ensure that meetings are held in facilities that permit barrier-free access to physically handicapped persons. Therefore, if, for example, the Board has the capacity to hold its meetings in a room that is accessible to handicapped persons, I believe that the meetings should be held in the room that is most likely to accommodate the needs of those people.

Second, 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 the Board reached its conclusion; however, I believe that the conclusion itself, i.e., a motion or resolution, must be included in minutes. I note, too, that 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 short, 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. The minutes that you enclosed do indicate how the Board members voted.

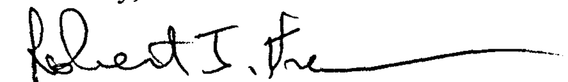
Lastly, I point out that §525(2)(a) of the Real Property Tax Law entitled "Hearing and determination of complaints" states in part that:

> "The assessor shall have the right to be heard on any complaint and upon his request his or her remarks with respect to any complaint shall be recorded in the minutes of the board. Such remarks may be made only in open and public session of the board of assessment review."

Based on the foregoing, insofar as the assessor was present for the purpose of offering information or a point of view, I believe that the public, pursuant to the Real Property Tax Law, had the right to be present.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Hon. Dean Lefebure
Board of Assessment Review

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO - 3669

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September 10, 2003

E-Mail

TO: Steve Knight

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 Councilman Knight:

As you are aware, I have received your letter concerning the application of the Open Meetings Law.

You indicated that you serve as a member of the Woodstock Town Board, and you described the following scenario:

> "The Town Supervisor and [you] were standing outside [y]our Community Center, discussing the possibility that bad weather on Saturday (tomorrow) might make it necessary to abandon a plan to hold the Democratic Party caucus in the open air. Both of us are also members of the Woodstock Democratic Committee (WDC) and expressed our concerns in that capacity. [You] were joined by another Town Board member who is also a member of the WDC, and found ourselves in brief discussion of the same topic, which we were confident was WDC business and not Town business, a distinction to which [you] have always been highly sensitive.
>
> "[You] were approached by one Michael Veitch, an opposition candidate (also a WDC member) who proceeded to accuse [you] of 'sneaking' behind the building to a hold a meeting in violation of the OML. Now it appears he has attempted to make the same point with [me]."

From my perspective, the Open Meetings Law would not have applied to the situation that you described.

In this regard, the Open Meetings Law pertains to meetings of public bodies, and the courts have construed the term "meeting" [§102(1)] expansively. In a landmark decision rendered in 1978, the state's highest court, the Court of Appeals, held that any gathering of a quorum of a public body for the purpose of conducting public business constitutes a "meeting" subject to the Open Meetings Law, whether or not there is an intent to take action, and regardless of the manner in which a gathering may be characterized [see Orange County Publications, Division of Ottoway Newspapers, Inc. v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

In my opinion, inherent in the definition of "meeting" is the notion of intent. If a majority of a public body gathers in order to conduct public business collectively, as a body, I believe that such a gathering would constitute a "meeting" subject to the Open Meetings Law. That being so, if members of a public body meet by chance or at a social gathering, for example, I do not believe that the Open Meetings Law would apply, for there would be no intent to conduct public business, collectively, as a body.

In the context of the facts presented, there appears to have been no intent that majority of the Board gather to discuss public business. If that is so, the gathering would not have constituted a meeting and the Open Meetings Law would not have applied. I point out, too, that §108(2) exempts political caucuses and conferences from the coverage of the Open Meetings Law. Since the discussion appears to have involved purely political party business, again, the Open Meetings Law would not have applied.

I hope that I have been of assistance.

RJF:jm

cc: Michael Veitch
Brian Shapiro
Gordon Wemp
Jeremy Wilber

STATE OF NEW YORK
DEPARTMENT OF STATE
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OML-AO-3670

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September 10, 2003

Ms. Natalie A. Haggart
St. Lawrence County Office of
Economic Development
80 State Highway 310, Suite 6
Canton, NY 13617

The staff of the Committee on 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. Haggart:

I have received your letter in which you indicated that your office routinely mails notices of meetings to "16 or so media contacts" in your vicinity. You asked whether notices of meetings must be mailed "by conventional source (US Post Office), or [whether] can they be emailed."

In this regard, although the Open Meetings Law requires that notice of meetings be given to the news media, it does not specify the manner in which notice must be given. Section 104 states in relevant part that:

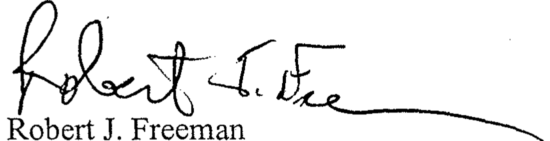
> "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before such meeting.
>
> 2. Public notice of the time and place of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

Again, the law does not specify the means by which notice must be given. If, for example, an unscheduled meeting is to be held within a short time, it has been suggested that notice may be

faxed to the news media. From my perspective, the use of e-mail to transmit information has become commonplace and widely accepted. That being so, I believe that notice regarding meetings of a public body can validly be given and accomplished through the use of e-mail.

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 3671

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September 10, 2003

Mr. Douglas A. Kruger

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

Dear Mr. Kruger:

I have received your letter and the materials attached to it. You have questioned the adequacy of motions for entry into executive session made during meetings of the Connetquot Central School District Board of Education, the scope of executive sessions, and particularly whether an executive session may be held concerning "the advertising and screening process for hiring teachers..."

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

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

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

The provision pertaining to litigation, §105(1)(d), permits a public body to enter into executive session to discuss "proposed, pending or current litigation." While the courts have not sought to define the distinction between "proposed" and "pending" or between "pending" and "current" litigation, they have provided direction concerning the scope of the exception in a manner

consistent with the description of the general intent of the grounds for entry into executive session 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].

Next, 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. In my view, a discussion concerning "the advertising and screening procedures for hiring teachers" would not qualify for consideration in executive session, for it would not focus on a "particular person."

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

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:

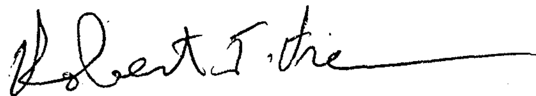
> "...the public body must identify the subject matter to be discussed (See, Public Officers Law § 105 [1]), and it is apparent that this must be accomplished with some degree of particularity, i.e., merely reciting the statutory language is insufficient (see, Daily Gazette Co. v Town Bd., Town of Cobleskill,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

Lastly, it has been held that a motion to enter into executive session to discuss collective bargaining negotiations should identify the union with or about which the negotiations are being conducted. As such, a proper motion might be: "I move to enter into executive session to discuss the collective bargaining negotiations involving the teachers' union" (Doolittle v. Board of Education, Supreme Court, Chemung County, July 21, 1981).

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

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-14256
OML-AO-3672

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September 10, 2003

E-Mail

TO: Jonathon Schilpp

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. Schilpp:

I have received your letter in which you raised a series of questions in relation to compliance with the Open Meetings Law by the Board of Trustees of Suffolk County Community College.

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.

Section 105(1) specifies and limits the subjects that may be considered during an executive session. That being so, a public body, such as the Board, may not conduct an executive session to discuss the subject of its choice.

You referred to several instances in which executive sessions were held to discuss "personnel matters." Although it is used frequently, I note that 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". For example, if a discussion of possible layoffs relates to positions and whether those positions should be retained or abolished, the discussion would involve the means by which public monies would be allocated. In the circumstance that you described, the issue would not have focused on any "particular person", nor would it have involved the subjects relating to a particular person delineated in §105 (1)(f). In short, in order to enter into an executive session pursuant to §105(1)(f), I believe that the discussion must focus on a particular person (or persons) in relation to a topic listed in that provision. As stated judicially, "it would seem that under the statute matters related to personnel generally or to personnel policy should be discussed in public for such matters do not deal with any particular person" (Doolittle v. Board of Education, Supreme Court, Chemung County, October 20, 1981).

It has been advised that a motion describing the subject to be discussed as 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.

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

> "...the public body must identify the subject matter to be discussed (See, Public Officers Law § 105 [1]), and it is apparent that this must be accomplished with some degree of particularity, i.e., merely reciting the statutory language is insufficient (see, Daily Gazette Co. v Town Bd., Town of Cobleskill, 111 Misc 2d 303, 304-305). Additionally, the topics discussed during the executive session must remain within the exceptions enumerated in the statute (see generally, Matter of Plattsburgh Publ. Co., Div. of Ottaway Newspapers v City of Plattsburgh, 185 AD2d §18), and these exceptions, in turn, 'must be narrowly scrutinized, lest the article's clear mandate be thwarted by thinly veiled references to the areas delineated thereunder' (Weatherwax v Town of Stony Point, 97 AD2d 840, 841, quoting Daily Gazette Co. v Town Bd., Town of Cobleskill, supra, at 304; see, Matter of Orange County Publs., Div. of Ottaway Newspapers v County of Orange, 120 AD2d 596, lv dismissed 68 NY 2d 807).

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

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

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

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

I point out 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 a related area, 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 Trustees, 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.

Next, when a committee consists solely of members of a public body, such as a community college 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 board of trustees, 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)].

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

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

As you requested, copies of this opinion will be forwarded to those that you identified.

I hope that I have been of assistance.

RJF:jm

cc: Brian X. Foley
Michael V. Hollander
Salvatore J. LaLima

OML-AO-3623

From: Robert Freeman
To: [redacted]
Date: 9/11/2003 5:42:52 PM
Subject: Dear Michael:

Dear Michael:

I have received your inquiry regarding a situation in which the Board of Education upon which you serve established a committee "and was having a committee meeting with 2 Board members and 10 local citizens." You asked whether you may attend as "a concerned citizen" or whether your presence would result in a quorum "and thus make it a 'Board Meeting.'"

In my view, the facts are unclear. Does the committee consist of two members of the Board who are meeting with citizens, or does it consist of two Board members and ten citizens? If it consists exclusively of Board members, I believe that the committee would constitute a public body required to comply with the Open Meetings Law. In short, the law applies not only to the Board, but to committees consisting solely of two or more Board members. A quorum of a committee would be a majority of its total membership (2 in the case of a 2 member committee). However, judicial decisions suggest that an advisory committee that consists of members (less than a majority) of a governing body plus others, such as an entity consisting of 10 citizens and two board members, does not constitute a "public body" and that the Open Meetings Law would not apply. In either case, if you attended as a citizen, I do not believe that the gathering would be transformed in a meeting of the Board.

Our server is down; otherwise I would connect you to advisory opinions that may be pertinent. It is suggested that you go to our website, then to Open Meetings Law advisory opinions, click on to "A" and scroll down to "advisory body" and then to "C" and scroll to "committees and subcommittees." Numerous opinions will be available in full text, and I believe that they will be useful to you.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
Albany, NY 12231
(518) 474-2518 - Phone
(518) 474-1927 - Fax
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From: Robert Freeman
To: bldgcode@twcny.rr.com
Date: 9/15/2003 10:19:03 AM
Subject: Dear Mr. Jennette:

Dear Mr. Jennette:

I have received a copy of your letter to Town of Danube officials and would like to offer a point of clarification.

Under §104 of the Open Meetings Law, notice of the time and place of meetings must be posted and given to the news media. The law does not require that a municipal body pay to place a legal notice in a newspaper prior to a meeting to comply with that statute. Therefore, when a newspaper, for example, receives notice of a meeting, it is not required to publish the notice. That being so, there have been many instances in which proper notice has been given to the news media, but where no notice of a meeting is published.

In short, that you have not seen any indication in your local newspaper that the Town Board scheduled a meeting does not necessarily lead to the conclusion that the Board failed to comply with the Open Meetings Law.

I hope that I have been of assistance.

Robert J. Freeman
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CC: m.herringshaw@worldnet.net; tbodden@nytowns.org; weldenc@telnet.net

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3675

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September 18, 2003

Ms. Carol D. Stevens
County Attorney
County of Greene
901 Greene County Office Building
Cairo, NY 12413

The staff of the Committee 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. Stevens:

I have received your letter and appreciate your interest in compliance with the Open Meetings Law.

You referred to a situation in which six of the thirteen members of the Greene County Legislature held "a joint press announcement regarding their intent to have Greene County financially support EMS services within the county." Other members expressed the opinion that the Open Meetings Law had been violated. You attached two newspaper accounts of the event, but it is unclear from those articles how the press announcement was carried out, whether action had effectively been taken or whether the legislators merely expressed support for a proposal. Based on our conversation, however, it appears that the gathering would not have been subject to the Open Meetings Law.

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

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

The County Legislature is clearly a public body required to comply with the Open Meetings Law.

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

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

In view of the ordinary definition of "convene", I believe that a "convening" of a quorum requires the physical coming together of at least a majority of the total membership of the Legislature, or a convening by means of videoconferencing. An affirmative vote of a majority would be needed for the Legislature to take action or to carry out its duties.

Since six, less than half of the membership of the Legislature was present at the event at issue, there would not have been a quorum, and consequently, the event would not have constituted a meeting subject to the Open Meetings Law. That being so, no action could have been taken. Based on my understanding of the matter and our conversation, no action was taken or purportedly taken. Rather, you indicated that the six members merely offered a proposal and expressed an intention to seek financial support for EMS services.

I note that 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:

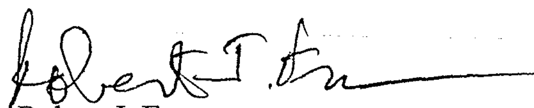
> "Whenever three of more public officers are given any power or authority, or three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of the whole number of such persons or officers, gathered together in the presence 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.

In sum, in this instance, there was no quorum present, and no action was or could have been taken. In consideration of those factors, I do not believe that the gathering constituted a "meeting" or, therefore, that the Open Meetings Law would have applied.

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 - 13809
OML AO - 3571

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January 6, 2003

Ms. Ronda C. Roaring

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

Dear Ms. Roaring:

I have received your correspondence and appreciate your kind words.

You wrote that you are a certified teacher and that you have been employed as a substitute teacher for several school districts in the vicinity of Ithaca. Since substitutes are typically approved by boards of education, minutes of meetings include names of substitutes or others hired by a district. According to your letter, the Lansing Central School District places minutes of meetings of its Board of Education on the District's website, "and that by searching [your] name, one can determine that [you] worked for the Lansing school district and make the association that [you are] working for districts in the area." You have objected to the inclusion of your name in a website and expressed the belief that its publication "is in violation of § 87.2 (b) and (f) and §89.2 (b) (i) of the Freedom of Information Law."

In this regard, I offer the following comments.

First, there is nothing in the Freedom of Information Law pertaining to the placement of records on the internet or an agency's website. In my experience, it is not unusual for a unit of local government to place minutes of meetings of public bodies on their websites. I note, too, that a recipient of minutes of a meeting could place the minutes or the contents of minutes on his or initiative on the internet, with or without approval or consent of the government agency that prepared those records. Further, when records are accessible under the Freedom of Information Law, it has been held that they should be made equally available to any person, regardless of one's status, interest or the intended use of the records [see <u>Burke v. Yudelson</u>, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. Moreover, the Court of Appeals, the State's highest court, has held that:

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

Second, when a board of education takes action during a meeting to employ a particular person or persons, I believe that §106(1) of the Open Meetings Law requires that the action be memorialized through the preparation of minutes.

Third, I disagree with your contention that disclosure of your name in minutes placed on website is "in violation" of the provisions of the Freedom of Information Law to which you referred. As you are likely aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. The provisions to which you referred deal with the ability of a government agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy" or "endanger the life or safety of any person."

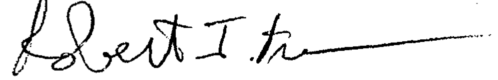
From my perspective, there is nothing secret about the names of substitute teachers; their identities are made known to students and, indirectly to parents and perhaps others. Further, payroll records required to be maintained by all agencies must include reference to the name, public office address, title and salary of every officer or employee of the agency [see Freedom of Information Law, §87(3)(b)]. While substitute teachers may not be "employees", they are paid by the District, and records of payments are public. For those reasons, I do not believe that disclosure of substitute teachers' names would constitute an unwarranted invasion of personal privacy or that it could be demonstrated that disclosure would endanger their lives or safety.

Lastly, it is emphasized that the Freedom of Information Law is permissive, and that the Court of Appeals, the state's highest court, has held that an agency may withhold records in accordance with the grounds for denial, but that it is not required to do so [Capital Newspapers v. Burns, 67 NY2d 562, 567 (1986)]. The only instance in which records must be withheld would involve the case in which a statute prohibits disclosure, and no such statute would be applicable in this instance.

In short, I believe that the name of a substitute teacher appearing in minutes of a meeting must be disclosed, and that there is no restriction regarding the publication of minutes on a school district's website.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Robert J. Service

OML-AO-3572

From: Robert Freeman
To: [redacted]
Date: 1/8/03 8:51AM
Subject: Dear Mr. Schultz:

Dear Mr. Schultz:

I have received your inquiry concerning "recourse" in the event that a public body fails to comply with the Open Meetings Law.

In this regard, section 107 of that statute deals with enforcement, and several advisory opinions on the subject are available via our website. In the index to advisory opinions rendered under the Open Meetings Law, you can click on to "E" and scroll down to "enforcement", and a number of opinions will be available in full text.

As a general matter, when a government agency or officer fails to perform a duty required by law to be performed (i.e., if no motion is made to enter into executive session) or acts unreasonably (in an "arbitrary and capricious" manner, i.e., by withholding records for no justifiable reason under the Freedom of Information Law), an an individual can bring a lawsuit. The vehicle is Article 78 of the Civil Practice Law and Rules, which is initiated in Supreme Court in your county.

Under section 107, if a public body takes action in private that should have been taken in public, a court has discretionary authority, "upon good cause shown", to nullify the action in taken in violation of the Open Meetings Law. Invalidation is not automatic; again, it is discretionary. Both the Freedom of Information and Open Meetings Laws also provide discretionary authority to a court to award attorney fees if certain conditions are present.

I note that the primary function of this office involves offering advice and opinions concerning those statutes. While the opinions rendered by this office are not binding, our hope is that they are educational and persuasive, and that they foster understanding of and compliance with law. You or anyone else may seek an opinion. Copies are routinely sent to the unit of government involved.

Although several state agencies may have some sort of role in relation to the activities of local governments, there is no agency that has general oversight of town government. In many instances, citizens individually, or especially in groups or coalitions, have the ability to influence the course of local government and encourage compliance 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-13821
OML-AO-3573

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January 13, 2003

Mr. Don Slovak

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. Slovak:

I have received your note in which you requested an advisory opinion. You have sought clarification under the Freedom of Information Law with respect to time limits for agencies to respond to requests for records, the degree of specificity required in a request for records, and the availability of "notices of claim." Under the Open Meetings Law, you sought clarification concerning "notice" requirements and the ability of a board member to disclose information acquired during an executive session.

In this regard, I offer the following comments.

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

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgment 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 acknowledgment of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

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

Second, by way of historical background, when the Freedom of Information Law was initially enacted in 1974, it required that an applicant request "identifiable" records. Therefore, if an applicant could not name the record sought or "identify" it with particularity, that person could not meet the standard of requesting identifiable records. In an effort to enhance its purposes, when the Freedom of Information Law was revised, the standard for requesting records was altered. Since 1978, §89(3) has stated that an applicant must merely "reasonably describe" the records sought. I point out that it has been held by the Court of Appeals that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

The Court in Konigsberg found that the agency could not reject the request due to its breadth and also stated that:

> "respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the Department's files were indexed in a manner that would enable the identification and location of documents in their possession (cf. National Cable Tel. Assn. v Federal Communications Commn., 479 F2d 183, 192 [Bazelon, J.] [plausible claim of nonidentifiability under Federal Freedom of Information Act, 5 USC section 552 (a) (3), may be presented where agency's indexing system was such that 'the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency'])" (id. at 250).

In my view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing or record-keeping system. In Konigsberg, it appears that the agency was able to locate the records on the basis of an inmate's name and identification number.

While I am unfamiliar with the record keeping systems of the Town, to the extent that the records sought can be located with reasonable effort, I believe that the request would have met the requirement of reasonably describing the records.

However, as indicated in Konigsberg, if it can be established that an agency maintains its records in a manner that renders its staff unable to locate and identify the records with reasonable effort, the request would have failed to meet the standard of reasonably describing the records.

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

It is possible that some records pertaining to litigation fall within the scope of the attorney-client privilege. Here I point out that the first basis 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." The courts have found that legal advice given by a municipal attorney to his or her clients, municipal officials, is privileged when it is prepared in conjunction with an attorney-client relationship [see e.g., People ex rel. Updyke v. Gilon, and Pennock v. Lane, supra Bernkrant v. City Rent and Rehabilitation Administration, 242 NYS 2d 752 (1963), aff'd 17 App. Div. 2d 392]. As such, I believe that a municipal attorney may engage in a privileged relationship with his or her client and that records prepared in conjunction with an attorney-client relationship are considered privileged under §4503 of the Civil Practice Law and Rules. Further, since the enactment of the Freedom of Information Law, it has also found that records may be withheld when the privilege can appropriately be asserted when the attorney-client privilege is read in conjunction with §87(2)(a) of the Law [see e.g., Mid-Boro Medical Group v. New York City Department of Finance, Sup. Ct., Bronx Cty., NYLJ, December 7, 1979; Steele v. NYS Department of Health, 464 NY 2d 925 (1983)]. Similarly, material prepared for litigation may be confidential under §3101 of the Civil Practice Law and Rules.

Nevertheless, legal papers filed against the Town would not have been prepared by the Town, its officials or its agents. As such, in my opinion, those papers would not be subject to the attorney-client privilege.

Fourth, regarding notices of meetings and special meetings, there is nothing in the Open Meetings Law that directly addresses the matter of notice of special meetings. Nevertheless, that statute requires that notice be posted and given to the news media prior to every meeting of a public body, such as a village board of trustees. Specifically, §104 of that statute provides that:

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

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

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

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

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

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

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

Lastly, you questioned the ability of a board member to disclose information obtained at an executive session of the board. In this regard, the Open Meetings Law requires that meetings of public bodies, 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 under §108(3).

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 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." In my opinion, 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 that context, I believe that a board of education, its members and school district employees would be prohibited from disclosing because a statute requires confidentiality.

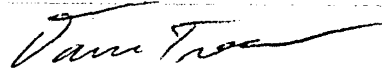
In a case in which the issue was whether discussions occurring during an executive session held by a school board could be considered "privileged", it was held that "there is no statutory

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. 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.

I hope that I have been of assistance.

Sincerely,



David Treacy
Assistant Director

DT:tt

cc: Town Board
Kimberly Pinkowski

OML-AO-3574

From: Robert Freeman
To: [redacted]
Date: 1/15/03 9:50AM
Subject: Dear Mr. Fort:

Dear Mr. Fort:

I have received your inquiry concerning the ability of an individual who is the subject of an executive session to attend the executive session with a person of his or her choice.

In short, there is no right to do so. Under section 105(2) of the Open Meetings Law, only the members of a public body (i.e., a school board, city council, town board, etc.) have the right to attend an executive session. A public body may authorize others to attend, but there is no obligation 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.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
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OML AO-3575

From: David Treacy
To: Peterson, Elisha
Date: 1/15/03 2:21PM
Subject: Re: question re minutes

Elisha,

If a clerk does not prepare minutes and make them available as required by OML 106 and Town Law 30, he or she would have failed to carry out his or her statutory duties. As you are likely aware, OML 106(3) requires that minutes of open meetings be prepared and made available within two weeks. It would be suggested that the clerk be informed of legal requirements regarding the timely preparation of minutes. In addition, I believe that the Town Board has the ability under Town Law 63 to adopt rules and policies to effectuate legal requirements and that it could do so as a means of highlighting the clerk's responsibilities.

A legal remedy would involve the initiation of a proceeding under Article 78 of the CPLR to compel the clerk to carry out his or duties in a manner consistent with law.

The most drastic action that might be taken in my view would involve an effort to remove a public officer pursuant to Public Officers Law 36.

Under OML 107, the court has the authority to nullify any action taken in violation of OML. This office is not aware of any provision of law or judicial decision indicating that a failure to prepare appropriate minutes within the requisite time serves as a means of invalidating a decision made at a meeting of a public body. If no action is taken at a meeting, there would be nothing for the court to invalidate. However, I believe an aggrieved party could seek a declaratory judgment on the matter.

I hope this answers your questions.

David Treacy
Assistant Director
NYS Committee on Open Government
41 State Street
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO- 13837
OML-AO- 3576

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January 24, 2003

Mr. Richard Hathaway

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

Dear Mr. Hathaway:

I have received your letter of December 30 and the materials attached to it. Having reviewed their contents, which in some instances are conflicting, I offer the following comments.

First, the Open Meetings Law contains direction concerning minutes of meetings and provides what might be viewed as minimum requirements pertaining to their contents. 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."

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 generally 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.

Second, it is emphasized that minutes of executive sessions need not include information that may be withheld under the Freedom of Information Law. From my perspective, when a public body makes a final determination during an executive session, that determination will, in most instances, be public. For example, although a discussion to hire or fire a particular employee could clearly be discussed during an executive session [see Open Meetings Law, §105(1)(f), a determination to hire or fire that person would be recorded in minutes and would be available to the public under the Freedom of Information Law. 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 the context of the matter as I understand it, §87(2)(e) of the Freedom of Information Law may have been pertinent. That provision permits an agency, such as a town, to withhold records that:

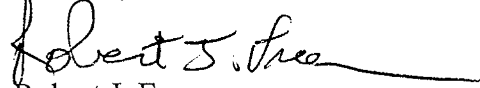
> "are compiled for law enforcement purposes and which if disclosed would:
>
> i. interfere with law enforcement investigation or judicial proceedings'
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation ; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures;"

If, for example, disclosure of action taken by the Town Board, if indeed action was taken, would have interfered with an investigation, I do not believe that the minutes would have to have included that information.

Lastly, with respect to rights of access to records of the investigation, since I am unaware of the specific contents of the records in question, I do not believe that I can offer comments additional to those appearing in the letter addressed to you on December 23.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

Enc.

From: Robert Freeman
To: chenspvr@stny.rr.com

Dear Supervisor Turna:

I have received your inquiry in which you asked whether a volunteer fire company must comply with the Open Meetings Law.

In this regard, it was held more than twenty years ago by the Court of Appeals, the state's highest court, that a volunteer fire company, despite its status as a not-for-profit corporation, performs an essential governmental function and, therefore, falls within the coverage of the Freedom of Information Law (FOIL). While there is no decision of which I am aware involving a volunteer fire company in relation to the Open Meetings Law, due to the precedent concerning the application of FOIL, it has been advised that the same conclusion would be reached concerning the application of the OML.

For a more detailed consideration of the matter, you can go to the index to advisory opinions rendered under the OML on our website, click on to "V" and scroll down to "Volunteer fire company." The three highest numbered opinions are available on line in full text.

I hope that I have been of assistance.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3578

Committee Members

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January 29, 2003

E-MAIL

TO: Elizabeth Clock, <LISARWORK@aol.com

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Ms. Clock:

As you are aware, I have received your letter in which you sought an opinion concerning the propriety of holding a meeting "with no public notice if the official one is canceled" and whether certain matters considered by the Board of Education, upon which you serve, were "appropriate topics for a Board retreat." The topics discussed appear to have included:

> "1. Board relationships communication log, 2. officers representing the Board with the Superintendent, 3. the communication log, 4. future items to be worked such as SDM/CDEP (Shared Decision Making/Comprehensive District Education Plan), 5. employee forums, 6. developing a policy in which all committees report to the BOE on a regular basis giving the Board the power to red or green light the continuation of the proceedings."

You were informed by a Board member who attended that he/she does not recall that the gathering included any discussion of Board relationships.

In this regard, I offer the following comments.

First, the Open Meetings Law applies to meetings of public bodies, and a board of education clearly constitutes a public body required to comply with that statute. Section 102(1) of the Open Meetings Law defines the term "meeting" to mean "the official convening of a public body for the purpose of conducting public business". It is emphasized that the definition of "meeting" has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be convened open to the public, whether or not there is an intent to take

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

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

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

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

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

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

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

From my perspective, if indeed a portion of the gathering involved "Board relationships", i.e., consideration personal interaction or relations among Board members, that portion, in my view, would likely have fallen beyond the coverage of the Open Meeting Law, for the purpose would not have involved conducting public business. However, I believe that the other five areas of discussion

clearly involved matters of public business and constituted a "meeting" that fell within the coverage of that statute.

Second, every meeting, including a rescheduled meeting, must be preceded by notice given in accordance with §104 of the Open Meetings Law. That section 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, rescheduled or emergency meetings, if, for example, there is a need to convene quickly, the notice requirements can generally be met by telephoning or faxing notice of the time and place of a meeting to the local news media and by posting notice in one or more designated locations.

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

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

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

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

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL AO- 13848
OML AO-3579

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January 29, 2003

E-MAIL

TO: Dan Trachman

FROM: Robert J. Freeman

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

Dear Mr. Trachman:

As you are aware, I have received your letter concerning the status of the New York Public Library under the Freedom of Information Law.

In this regard, I offer the following comments.

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

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

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

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

> "The term 'public' library as used in this chapter shall be construed to mean a library, other than professional, technical or public school

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

The leading decision concerning the issue was rendered by the Appellate Division in French v. Board of Education, in which the Court stated that:

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

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

Having reviewed a variety of information on the New York Public Library's website, <www.nypl.org>, it is clear that that entity is a private, not-for-profit institution. It was founded in 1895 by the Astor, Lenox and Tilden foundations to provide "private philanthropy for the public good." That being so, I do not believe that it is subject to the Freedom of Information Law.

It is noted that confusion concerning the application of the Freedom of Information Law to non-governmental libraries open to the public has arisen in several instances, perhaps because its companion statute, the Open Meetings Law, is applicable to meetings of their boards of trustees. The Open Meetings Law, which is codified as Article 7 of the Public Officers Law, is applicable to

public and association libraries due to direction provided in the Education Law. Specifically, §260-a of the Education Law states in relevant part that:

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

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

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

RJF:jm

From: Robert Freeman
To: [redacted]

Dear Ms. Harris:

I have received you inquiry concerning the status of the board of a condominium under the Open Meetings Law.

In this regard, that law applies to public bodies, and the phrase "public body" is defined to mean "any entity, for 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...." A public corporation is a county, city, town, village, school district, etc.

In short, the Open Meetings Law applies only to governmental bodies; it does not apply to meetings of a condominium board or other private entity.

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3581

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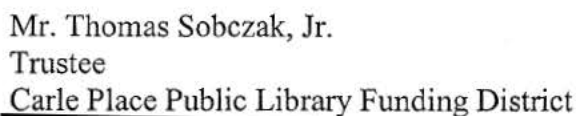
February 4, 2003

Mr. Thomas Sobczak, Jr.
Trustee
Carle Place Public Library Funding District



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

Dear Mr. Sobczak:

As you are aware, I have received your correspondence concerning whether or the extent to which the Board of Trustees of the Carle Place Public Library Funding District may exclude the public from its meetings. You indicated that you are a new trustee and that the District's sole function involves contracting for public library services.

"When discussing the terms of a proposed contract with a neighboring library", you asked whether the Board could enter into executive session. You also asked whether "reports by counsel" must be given in public. 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.

As you described the subject of discussion, discussion of a contract with a neighboring library, none of the grounds for entry into executive session could, in my view, justifiably be asserted. I note that one of the grounds, §105(1)(e), relates to contract negotiations, but it is limited to consideration of collective bargaining negotiations with a public employee union.

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 reports from counsel, 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 stress 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.

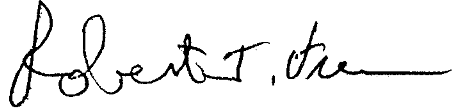
While it is not my intent to be overly technical, as suggested earlier, the procedural methods of entering into an executive session and asserting the attorney-client privilege differ. In the case of the former, the Open Meetings Law applies. In the case of the latter, because the matter is exempted 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.

It is noted that there is no obligation on the part of the Board to seek or receive legal advice in private. On the contrary, the Board may waive the privilege and engage in a discussion with its attorney in public.

Lastly, you asked what the "ramifications" might be if an executive session is improperly held. Pursuant to §107(1) of the Open Meetings Law, any "aggrieved person" may bring suit for review of an alleged violation of law. That provision indicates that if action is taken during an executive session that should have been taken in public, a court may, upon good cause shown, invalidate the action. In addition, subdivision (2) gives a court discretionary authority to award attorney's fees to the successful party in such a proceeding. Aside from the initiation of a lawsuit, ignorance of the law or a pattern of failure to comply may create a climate of distrust among the public.

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 - 13880
OML-AO - 3582

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February 12, 2003

Mr. Jerry Ravnitzky

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

Dear Mr. Ravnitzky:

As you are aware, I have received your letter in which you requested an advisory opinion.

You referred to a recommendation offered some time ago by the Town of Carmel Board of Ethics that the Chairman of the Zoning Board of Appeals recuse himself when applicants before the Board are represented by a particular law firm. You wrote that the Town Board, "at an executive work session", voted to reject the recommendation of the Ethics Board.

In this regard, unless it has adopted its own rule to the contrary, the Board may engage in the same activities during a work session as a regular meeting.

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

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

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

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

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

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

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

With respect to minutes of work sessions, 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 on the foregoing, if an executive session has been properly convened, a public body may take action during the executive session, unless the action is to appropriate public money. If action is taken, minutes indicating the nature of the action taken, the date, and the vote of each member, must be prepared and made available within one week to the extent required by the Freedom of Information Law.

In your second area of inquiry, you wrote that the Town Ethics Code states that the "complaint records and other proceedings related thereto shall remain confidential until the Board of Ethics makes a recommendation for action to the Town Board or dismisses the complaint." You have asked whether the "entire record of this complaint" must be disclosed.

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, an assertion or claim of confidentiality, unless it is based upon a statute, is likely meaningless. When confidentiality is conferred by a statute, records fall outside the scope of rights of access pursuant to §87(2)(a) of the Freedom of Information Law, which states that an agency may withhold records that "are specifically exempted from disclosure by state or federal statute". If there is no statute upon which an agency can rely to characterize records as "confidential" or "exempted from disclosure", the records are subject to whatever rights of access exist under the Freedom of Information Law [see Doolan v.BOCES, 48 NY 2d 341 (1979); Washington Post v. Insurance Department, 61 NY 2d 557 (1984); Gannett News Service, Inc. v. State Office of Alcoholism and Substance Abuse, 415 NYS 2d 780 (1979)]. As such, an assertion of confidentiality without more, would not in my opinion guarantee or require confidentiality.

Moreover, it has been held by several courts, including the Court of Appeals, that an agency's regulations or the provisions of a local enactment, such as an administrative code, local law, charter or ordinance, for example, do not constitute a "statute" [see e.g., Morris v. Martin, Chairman of the State Board of Equalization and Assessment, 440 NYS 2d 365, 82 Ad 2d 965, reversed 55 NY 2d 1026 (1982); Zuckerman v. NYS Board of Parole, 385 NYS 2d 811, 53 AD 2d 405 (1976); Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)]. For purposes of the Freedom of Information Law, a statute would be an enactment of the State Legislature or Congress. Therefore, a local enactment cannot confer, require or promise confidentiality. This not to suggest that many of the records used, developed or acquired in conjunction with an ethics code must be disclosed; rather, I am suggesting that those records may in some instances be withheld in accordance with the grounds for denial appearing in the Freedom of Information Law, and that any local enactment that is inconsistent with that statute in relation to the obligation to disclose would be void to the extent of any such inconsistency. I point out that the Freedom of Information Law permits an agency to disclose record, even though it may have the authority to deny access [see Capital Newspaper v. Burns, 109 AD3d 92, aff'd 67 NY2d 562 (1986)].

It is likely in my view that two the grounds for denial would be particularly relevant with respect to records maintained by a board of ethics.

Section 87(2)(b) of the Freedom of Information Law authorizes an agency to withhold records when 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 officers or 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. The courts have found that, as a general rule, records that are relevant to the performance of a public officer's or employee's official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

Several of the decisions cited above, for example, Farrell, Sinicropi, Geneva Printing, Scaccia and Powhida, dealt with situations in which determinations indicating the imposition of some sort of disciplinary action pertaining to particular public employees were found to be available. However, when allegations or charges of misconduct have not yet been determined or did not result in disciplinary action, the records relating to such allegations may, in my view, be withheld, for disclosure would result in an unwarranted invasion of personal privacy [see e.g., Herald Company v. School District of City of Syracuse, 430 NYS 2d 460 (1980)]. Further, to the extent that charges are dismissed or allegations are found to be without merit, I believe that they may be withheld.

There may also be privacy considerations concerning persons other than those who may be subjects of a board's inquiries. For instance, I believe that the name of a complainant or witness could be withheld in appropriate circumstances as an unwarranted invasion of personal privacy.

The other provision of relevance, §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

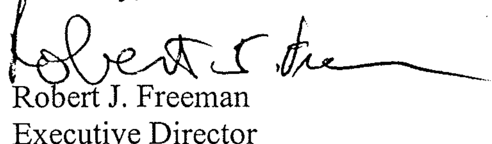
iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

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. Records prepared in conjunction with an inquiry or investigation would in my view constitute intra-agency materials. Insofar as they consist of opinions, advice, conjecture, recommendations and the like, I believe that they could be withheld. Factual information would in my view be available, except to the extent, under the circumstances, that disclosure would result in an unwarranted invasion of personal privacy.

It is unclear whether or the extent to which there have been public disclosures relating to the matter. If little or nothing has been disclosed, it is likely that the records in question could be withheld in great measure as an unwarranted invasion of personal privacy. However, the more that records or other information have been made available to the public, less is the ability to deny access based on consideration of privacy.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Board of Ethics

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3583

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February 12, 2003

TO: Dolores Allt

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. Allt:

I have received your inquiry concerning the legality of "private meetings" described in a news article. The article indicates that the Hyde Park Town Supervisor was involved in "addressing some concerns in private meetings with a group of residents, officials, surveyors and attorneys representing Hyde Park landowners..." Several "private Saturday meetings" were held.

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

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

Based on the foregoing, the Town Board, a planning board, a zoning board of appeals or similar body would constitute a "public body" required to comply with the Open Meetings Law.

The definition of "public body" makes reference to quorum, which according to §41 of the General Construction Law, is a majority of the total membership of a public body. Therefore, if a town board consists of five members, three would constitute a quorum.

A "meeting", according to §102(1) of the Open Meetings Law, is a gathering of a quorum, a majority of a public body, for the purpose of conducting public business.

In the context of your inquiry, if the Supervisor held the "private meetings" on his own and without the presence of two or more other members of the Town Board, those gatherings would not have involved a quorum of the Board, and the Open Meetings Law would not have applied. If that was so, the general public, in my view, would have had no right to attend.

On the other hand, if a majority of the Board attended and participated as a body, I believe that any such gathering would have constitute a meeting of a public body subject to the Open Meetings Law and required to have been held open to the public.

I note further that the term "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)].

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

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

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

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

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

Again, however, if less than a quorum of a public body participates, the Open Meetings Law would not apply.

I hope that I have been of assistance.

RJF:jm

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 13869
OML-AO-3584

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February 12, 2003

Mr. Walter Pasternak

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. Pasternak:

As you are aware, I have received your letter of January 16 in which you raised a series of questions relating to the Open Meetings Law and public access to certain information.

Your first area of inquiry pertains to executive sessions held for "personnel reasons."

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. 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.

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

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

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

> see, Matter of Orange County Publs., Div. of Ottaway Newspapers v County of Orange, 120 AD2d 596, lv dismissed 68 NY 2d 807).
>
> "Applying these principles to the matter before us, it is apparent that the Board's stated purpose for entering into executive session, to wit, the discussion of a 'personnel issue', does not satisfy the requirements of Public Officers Law § 105 (1) (f). The statute itself requires, with respect to personnel matters, that the discussion involve the 'employment history of a particular person" (id. [emphasis supplied]). Although this does not mandate that the individual in question be identified by name, it does require that any motion to enter into executive session describe with some detail the nature of the proposed discussion (see, State Comm on Open Govt Adv Opn dated Apr. 6, 1993), and we reject respondents' assertion that the Board's reference to a 'personnel issue' is the functional equivalent of identifying 'a particular person'" [Gordon v. Village of Monticello, 620 NY 2d 573, 575; 209 AD 2d 55, 58 (1994)].

In short, the characterization of an issue as a "personnel" 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.

The other area of inquiry relates to closed sessions held to discuss property tax litigation and whether a public body is required to disclose the details of a settlement of the litigation "at the subsequent reconvened regular meeting if requested to do so."

Here, I point out that public body (other than a board of education) may take action during a properly convened executive session. If action is taken, §106 of the Open Meetings Law requires that minutes of the executive session reflective of the nature of the action taken, the date and the vote of each member must be prepared and made available to the public to the extent required by the Freedom of Information Law within one week of the executive session.

From my perspective, the minutes, as well as the actual terms of such a settlement must be disclosed under the Freedom of Information Law.

I note that it has been held in variety of circumstances that a promise or assertion of confidentiality cannot be upheld, unless a statute specifically confers confidentiality. In Gannett News Service v. Office of Alcoholism and Substance Abuse Services [415 NYS 2d 780 (1979)], a state agency guaranteed confidentiality to school districts participating in a statistical survey concerning drug abuse. The court determined that the promise of confidentiality could not be sustained, and that the records were available, for none of the grounds for denial appearing in the Freedom of Information Law could justifiably be asserted. In a decision rendered by the Court of Appeals, the state's highest court, it was held that a state agency's:

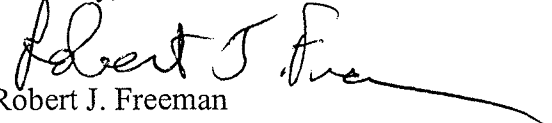
> "long-standing promise of confidentiality to the intervenors is irrelevant to whether the requested documents fit within the Legislature's definition of 'record' under FOIL. The definition does not exclude or make any reference to information labeled as 'confidential' by the agency; confidentiality 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)].

Finally, I believe that any such settlement agreement must be disclosed. 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. Unless records may justifiably be withheld in accordance with one or more of the grounds for denial, a claim, a promise or an agreement to maintain confidentiality would, based on judicial decisions, be meaningless.

From my perspective, none of the grounds for denial could apparently be asserted to withhold a record reflective of a settlement between a local government and a property owner.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13873
OML-AO-3585

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February 12, 2003

Ms. Nancy Holiday

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. Holiday:

I have received materials concerning your request for a tape recording of a meeting of the Wyandanch Union Free School District. You were apparently informed that the tape would not be available until the minutes of the meeting were approved. Further, although you were told by the Business Manager that the fee for a copy would involve the cost of a cassette, in a memorandum to him, the Board President asked "who will pay for the time the District Clerk works copying audio tapes" and "who will take care of the wages?"

In this regard, first, it is noted that §106 of the Open Meetings Law requires that minutes of meetings must be prepared and made available within two weeks. Further, there is nothing in the Open Meetings Law or other statute that requires minutes to be approved. While most public bodies do approve their minutes, they do so based on policy or tradition, not because any provision of law requires that the minutes be approved.

Second, the Freedom of Information Law pertains to records of an agency, such as a school district, 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."

Therefore a tape recording of a meeting constitutes a "record" subject to the Freedom of Information Law.

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

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

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

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

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

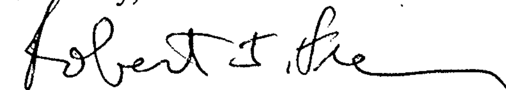
Based upon the foregoing, the fee for reproducing a tape recording as suggested by the business manger, would involve the cost of a cassette.

Although compliance with the Freedom of Information Law involves the use of public employees' time and perhaps other costs, the Court of Appeals, the state's highest court, has found that the Law is not intended to be given effect "on a cost-accounting basis", but rather that "Meeting the public's legitimate right of access to information concerning government is fulfillment of a

governmental obligation, not the gift of, or waste of, public funds" [Doolan v. BOCES, 48 NY 2d 341, 347 (1979)].

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Rev. Michael Talbert
Calvin Wilson

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13872
OML-AO-3586

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February 12, 2003

E-MAIL

TO: Mary Thill <mthill@adirondacklife.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. Thill:

As you are aware, I have received your inquiries concerning what you described as a denial of access to certain records and the propriety of an executive session held by the Village of Saranac Lake Planning Board.

With respect to the first inquiry, you wrote that residents requested a map larger than nine by fourteen inches relating to a proposed subdivision. In response, you were informed that the Village does not have the equipment to copy the maps "in house" and that the maps cannot be removed until action on the proposal is taken by the Planning Board. You asked whether the maps are subject to the Freedom of Information Law.

In this regard, the Freedom of Information Law is applicable to records maintained by or for 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, the maps in my view clearly constitute Village records that fall within the coverage of the Freedom of Information Law.

Section 87(2) of the Freedom of Information Law provides that accessible records must be made available for inspection and copying. In addition, §87(1)(b)(iii) authorizes an agencies to charge up to twenty-five cents per photocopy for records up to nine by fourteen inches, or the actual cost of reproducing other records, i.e., computer tapes or disks, or records in excess of nine by fourteen inches.

In situations similar that described several possibilities have been suggested. First, the maps may be inspected at no charge. Second, a person could photograph the maps with his or her own camera equipment at no charge. Or third, several photocopies of a large map could be made and thereafter cut and pasted together.

Your second question concerns a meeting held by the Planning Board concerning the same proposal during which an executive session was held with the developer.

Here, I refer to the Open Meetings Law, which applies to meetings of public bodies, including planning boards. In brief, the Open Meetings Law is based on a presumption of openness. Stated differently, meetings of public bodies must be held open to the public, except to the extent that an executive session may properly be held. 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 paragraphs (a) through (h) of §105(1) specify and limit the subjects that may be considered in executive session.

In my view, unless the Village owned the property under consideration, it is unlikely that there would have been any basis for conducting an executive session. In that event, the only ground of possible significance would have been §105(1)(h), which authorizes a public body to enter into executive session to discuss:

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

If the issue involved property owned by a private person or entity, I do not believe that §105(1)(h) would have applied. If the property was owned by the Village, only to the extent that publicity would have substantially affected the value of the property could an executive session, in my opinion, have validly been held.

I hope that I have been of assistance.

RJF:tt

cc: Building Officer
Planning Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3587

Committee Members

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February 14, 2003

Mr. Dennis J. Winter

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

Dear Mr. Winter:

I have received your letter concerning rights of access to letters transmitted between the Mayor of the Village of Bronxville and the Counsel to the Village Ethics Board. As I understand the matter, although your initial request for those documents was denied, you later obtained them because they had been attached to minutes of meetings. That being so, I believe that the controversy is now moot. Nevertheless, in an effort to provide guidance, I offer the following comments.

In short, I do not believe that the kinds of records at issue ordinarily must be disclosed, included in or appended to minutes of meetings.

First, the Open Meetings Law contains what might be characterized as minimum requirements concerning the contents of minutes. Section 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, even if an item of correspondence or a letter is referenced during a meeting or relates to action taken, there is no obligation to include a document of that nature as part of or appended to minutes.

Second, two of the grounds for withholding records would typically be pertinent in consideration of the kind of communication to which you referred. As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

The first ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute, §4503 of the Civil Practice Law and Rules, codifies the attorney-client privilege. When a municipal official communicates with an attorney retained or employed by the municipality who is acting in his or her capacity as an attorney, I believe that such communication would fall within the scope of the attorney-client privilege and therefore would be exempt from disclosure unless the privilege is waived.

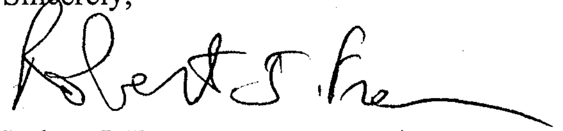
The other ground for denial of significance is §87(2)(g). That provision states that an agency may withhold records that:

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

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

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Nancy D. Hand
William T. Regan

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-13891
OML-AO-3588

Committee Members

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Stephen W. Hendershott
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February 19, 2003

Mr. Gary A. Bennett, Sr.

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. Bennett:

I have received your letter and the materials attached to it. You described a series of difficulties in gaining access to certain records of the Town of Minisink.

Specifically, you requested a letter prepared by the Town Engineer and his staff "read into the minutes" of a meeting of the Planning Board held on November 27. Following your request for the letter, he characterized the document as an "inter-office memo" that need not be made available to the general public. Later, having requested minutes of the meeting, you were told that they are not available until they are read and corrected and "signed off" by the Planning Board Secretary. You added that Planning Board meetings are tape recorded, but that the tapes are not available to the public.

In this regard, I offer the following comments.

First, when a record is read aloud at an open meeting, even if the record may ordinarily be withheld in accordance with§87(2) of the Freedom of Information Law, I believe that it must be disclosed, for the public disclosure of the record 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 apparently purposeful and intentional rather than inadvertent. If that is so, even though there may have been a basis for withholding prior to a public reading of the record, that activity in my view precludes the Town from withholding any portion of the letter that was read aloud.

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

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals,

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

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

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

Lastly, the Freedom of Information law pertains to agency records, such as those of a Town, 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."

In a case involving notes taken by the Secretary to the Board of Regents that he characterized as "personal" in conjunction with a contention that he took notes in part "as a private person making personal notes of observations...in the course of" meetings. In that decision, the court cited the definition of "record" and determined that the notes did not consist of personal property but rather

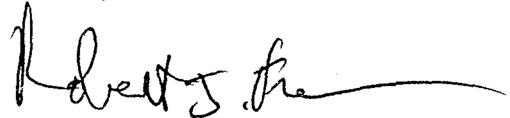
were records subject to rights conferred by the Freedom of Information Law [Warder v. Board of Regents, 410 NYS 2d 742, 743 (1978)].

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

Moreover, since a person present at an open meeting of a public body could have tape recorded the proceedings [see Mitchell v. Board of Education of the Garden City Union Free School District, 113 AD 2d 924 (1985)], I do not believe that there would be a valid basis for withholding the tape, particularly since you were present.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Planning Board
Hon. Carol Van Buren
Town Engineer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3589

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February 19, 2003

E-MAIL

TO: Jeff Greenfield <JeffG@nglgroup.com

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Mr. Greenfield:

I have received your letter in which you raised questions concerning certain procedures of the Board of Education of the Rockville Centre School District.

The initial issue pertains to the "practice of the ...Board to adjourn for executive session and return to public session later on in a room other than where they started the public session." You added that "By coincidence they wait until the public has left and then resume the meeting in their board room without the public having an opportunity to know that they are having a public meeting in a different location."

From my perspective, a basic requirement of the Open Meetings Law is that the public has the right to know when and where a public body is or will be conducting a meeting. In the circumstance that you described, I believe that Board would be required to provide a notice, presumably by means of posting, indicating where the Board will continue its meeting following an executive session or recess.

The other issue involves limitations on the public's ability to speak at meetings.

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 to address it for three, or not at all, such a rule, in my view, would be unreasonable.

In my view, the Board may limit members of the public to "one turn at the microphone", so long as its practice is implemented equally and reasonably.

I hope that I have been of assistance.

RJF:tt

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3590

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
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February 19, 2003

Ms. Alberta Fiori-Gazda

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. Fiori-Gazda:

I have received your letter in which you questioned whether it is "legal for a Mayor and Board of Trustees to enter into executive session during a scheduled work session."

From my perspective, there is no legal distinction between a "meeting" and a "work session." In this regard, I offer the following comments.

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

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

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

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

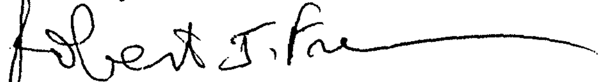
The court also dealt with the characterization of meetings as "informal," stating that:

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

Based upon the direction given by the courts, if a majority of 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.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3591

Committee Members

Randy A. Daniels
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February 19, 2003

Ms. Carol D. Stevens
Greene County Attorney
901 Green County Office Building
Cairo, NY 12413-9509

The staff of the Committee 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. Stevens:

I have received your thoughtful letter in which you referred to a conversation that we had on January 23 concerning the status of Greene County's Task Force on Reapportionment. You have offered background pertaining to the Task Force and requested a written advisory opinion on the matter.

According to your letter:

> "Greene County at its organizational meeting in January, 2002, by executive order appointed a task force to study various proposals for reapportionment of the Greene County Legislature. The task force was and is comprised of 5 sitting members of the Legislature, 4 Republicans and 1 Democrat and myself as counsel. The task force's sole purpose was to make recommendations without the necessity of a quorum. The task force has no power on its own to implement any of its recommendations. It's function was merely to give advice about different scenarios for reapportionment without any other performance of a public duty."

You added that it is your view that the Task Force "does not require a quorum to conduct its business" and that:

> "The recommendations of the task force are not to be executed unilaterally or finally by the Legislature. Nor would they receive a merely perfunctory review or approval. The proposed plan or plans of reapportionment will still have to go through committee and on the Legislative floor for the passing of a public law which is subject to permissive referendum."

From my perspective, the Task Force is essentially equivalent of a committee of the County Legislature. Like the Task Force, committees lack the power or authority to take final and binding action. By their nature, they merely have the authority to offer recommendations to a governing body, which may accept, reject or modify its recommendations. A committee of a county legislature is, in my opinion, clearly subject to the Open Meetings Law. Because the Task Force is a similar

body, I believe that the same conclusion may be reached concerning its responsibility to give effect to the Open Meetings Law. In this regard, I offer the following comments.

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

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

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

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

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

In view of the amendments to the definition of "public body", I believe that any entity consisting of two or more members of a public body, such as a committee, subcommittee or "similar body" consisting of members of a county legislature, would fall within the requirements of the Open Meetings Law, assuming that such entity 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, 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); County of Lewis v. O'Connor, Supreme Court, Lewis County, January 21, 1997].

Based on your description of the matter, the Task Force was created by the County Legislature to conduct public business, to offer recommendations, as an entity, to the Legislature.

Lastly, despite your statement concerning the absence of any "necessity of a quorum", I believe that §41 of the General Construction Law provides that the Task Force must carry out its duties in conjunction with a quorum requirement. That statute as recently amended 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."

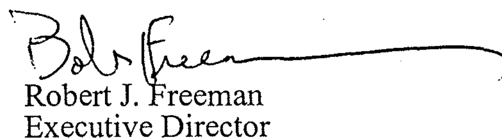
Based on your letter, the members of the Task Force have been designated to conduct public business and carry out a "public duty", collectively, as a body. Consequently, in my view, it may perform that duty only by means of a quorum.

As suggested at the outset, I believe that the Task Force is analogous to a committee of the County Legislature, that it is, as stated in the definition of "public body", a "similar body" of the Legislature, and that, therefore, is itself a public body subject to the Open Meetings Law.

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

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

OML-AO-3592

From: Robert Freeman
To: [redacted]
Date: 2/19/03 4:32PM
Subject: Dear Ms. Gilbert:

Dear Ms. Gilbert:

I have received your inquiry concerning your ability to tape record a meeting of a planning board during which the board's attorney will explain to the members the meaning of your Steep Slopes law.

In my view, your inquiry raises two issues.

First, just as the communications between you and your attorney are subject to the attorney-client privilege, there are cases going back a century indicating that a municipal board and its attorney may create an attorney-client relationship. In short, insofar as the board is seeking legal advice and the attorney is offering legal advice or a legal opinion, their communications would fall within the scope of the attorney-client privilege and would be exempt from the requirements of the Open Meetings Law. Stated differently, I believe that the the board could seek and acquire legal advice or a legal opinion from its attorney in private.

Notwithstanding the foregoing, if the board waives the privilege and opts to obtain its attorney's legal advice in public, I believe that you or anyone else could record the meeting, so long as the use of the recording device is neither obtrusive nor disruptive.

For a more detailed explanation of the issues, you may connect with our website and click on to the Open Meetings Law index to opinions. From there, you can click on to "A" and scroll down to "attorney-client privilege" and then "T", where you can scroll to "tape recorders, use of". The opinions prepared within the past 10 years are available in full text.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
Albany, NY 12231
(518) 474-2518 - Phone
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3593

Committee Members

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February 21, 2003

E-MAIL

TO: Jill S. Knapp <jsk53@cornell.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. Knapp:

As you are aware, I have received your letter of February 5. When an entity subject to the Open Meetings Law conducts a meeting "at the office of a former board member who works for a brokerage firm," you asked whether it is "sufficient to just give the address in the press release as 40 ZZ St. ANYTOWN, when the brokerage office is located in a large office building with many other businesses, none of which have a connection to the [entity] and neither does the office building have any central reception or information office at which an individual might inquire about the meeting location within the building."

In this regard, §104 of the Open Meetings Law requires that every meeting of a public body be preceded by notice of the time and place given to the news media and posted in one or more designated, conspicuous public locations. Although the phrase "time and place" is not specifically defined, I believe that every provision of law, including the Open Meetings Law, must be implemented in a manner that gives reasonable effect to its intent. In the context of your inquiry, a basic requirement of the Open Meetings Law involves the public's right to know when and where public bodies hold their meetings. That being so, to carry out the notice requirements reasonably, a notice concerning the meeting to which you referred must in my view include sufficient detail to enable those interested in attending to locate the area within the building where the meeting will be held. That might involve an indication of a floor, a room number, or perhaps a company name, for example. In addition or perhaps in the alternative, a notice might be conspicuously posted in the lobby of the building providing the detailed information needed by the public to locate the site of the meeting.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3594

Committee Members

Randy A. Daniels
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February 26, 2003

E-MAIL

TO: Doreen Tignanelli [redacted]

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Ms. Tignanelli:

I have received your inquiry in which you questioned the status of a task force designated by the Supervisor of the Town of Poughkeepsie regarding the preparation of a local wetlands ordinance. You indicated that the task force consists of two members of the Town Board and three residents of the Town.

Based on judicial decisions, I do not believe that the task force is required to comply with the Open Meetings Law. In this regard, I offer the following comments.

As you may be 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, 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, assuming that the task force 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 task force 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.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3595

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February 27, 2003

Mr. Edward B. Godwin

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

Dear Mr. Godwin:

I have received your thoughtful letter and commentary concerning "Evolving Policy on the Public's Right to Know." As you requested, I offer the following comments.

First, based on your review of the language of the Open Meetings Law and advisory opinions rendered by this office, you are undoubtedly aware that the term "personnel" appears nowhere in the Open Meetings Law. From my perspective, it has become a catchall that often results in inaccurate implementation of the law and executive sessions held to discuss matters that should be considered in public.

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 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 under that provision 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.

Although the language of §105(1)(f) is not restricted to issues involving prospective, current or former employees, it does not permit a public body to discuss every subject that might arise in relation to a "particular person". The language of that provision is precise and pertains only to certain enumerated subjects that relate to an individual. I agree with your contention that when a matter essentially involves an issue of policy, i.e., whether a staff member should be permitted to accept a gift, the issue should be discussed in public in great measure, if not in its entirety.

Moreover, even though an action taken might relate currently only to one employee, that action might affect or serve as precedent in cases arising in the future pertaining to others. In a decision involving that principle, it was held that the "personnel" exception for entry into executive session was not validly asserted. The court stated that:

> "In relying on the exception contained in paragraph f, the town asserts that its decision 'applied to a particular person, the Appellant herein'. While the town board's decision certainly did affect petitioner, and indeed at the time the decision was made affected only him, the town board's decision was a policy decision to not extend insurance benefits to police officers on disability retirement. Presumably this policy decision will apply equally to all persons who enter into that class of retirees. Thus, it cannot be said that the purpose of the meeting was to discuss 'the medical, financial, credit or employment history of a particular person'" [Weatherwax v. Town of Stony Point, 97 AD 2d 840, 841 (1983)].

In sum and in conjunction with the information that you provided, although a discussion concerning the discipline of a particular staff member regarding the acceptance of a gift could properly be considered in executive session, I believe that a line of demarcation should be drawn, to the extent possible, between that issue and a policy question involving the acceptance of gifts. The latter, in my view, must be discussed in public.

Second, as you are likely aware, it has been advised that a motion describing the subject to be discussed as "personnel" is inadequate, and that the motion should be based upon the specific language of §105(1)(f). For instance, a proper motion might be: "I move to enter into an executive session to discuss the employment history of a particular person (or persons)". Such a motion would not in my opinion have to identify the person or persons who may be the subject of a discussion. By means of the kind of motion suggested above, members of a public body and others in attendance would have the ability to know that there is a proper basis for entry into an executive session.

Absent such detail, neither the members nor others may be able to determine whether the subject may properly be considered behind closed doors.

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

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

Lastly, in your commentary, you suggested that a public body is "prevented" or "prohibited" from "discussing particular individual personnel problems in public." 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 described; whether it would be wise or ethical to do so involves a different question. Further, even when information might have been obtained during an executive session properly held or from records marked "confidential", I note that the term "confidential" in my view has a narrow and precise technical meaning. For records or information to be validly characterized as confidential, I believe that such a claim must be based upon a statute that specifically confers or requires confidentiality.

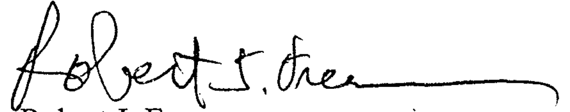
For example, if a discussion by a board of education concerns a record pertaining to a particular student (i.e., in the case of consideration of disciplinary action, an educational program, an award, etc.), the discussion would have to occur in private and the record would have to be withheld insofar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

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

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.

I hope that the foregoing will be useful to you and that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3596

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March 3, 2003

E-MAIL

TO: Cindy Barrett <cid@westelcom.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. Barrett:

I have received your letter in which you asked whether a vote taken during an executive session concerning what appears to have been a proper subject for consideration in executive session remains valid if a public body also considered a topic that should have been discussed in public.

From my perspective, even though the second topic, which you described as "redistricting", would not, in my view, have served as a proper subject for consideration in executive session, that discussion would have no impact on the validity of the action taken regarding a proper subject for consideration in executive session. Even when action is taken behind closed doors that should have been taken in public, I believe that it remains valid unless and until a court determines to the contrary.

The provision dealing with the enforcement of the Open Meetings Law and the possible invalidation of action taken in violation of the law, §107(1), states in relevant part that:

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

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

In view of the foregoing, there is no automatic invalidation of action taken. Further, a court's ability to invalidate action exists only when the action is taken in private in violation of the Open Meetings Law, and the authority to do so, even in that circumstance, is discretionary.

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

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3597

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March 4, 2003

Hon. Roger Higgins
Minority Leader
Dutchess County Legislature
22 Market Street
Poughkeepsie, NY 12601

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

Dear Mr. Higgins:

I have received your letter of February 7 in which you requested an advisory opinion relating to the Open Meetings Law. You wrote that:

> "In Dutchess County, the Legislature is solidly controlled by Republicans, 28 - 6 (one vacancy). A recent vacancy was filled by a registered Democrat, Christopher Baiano. Mr. Baiano has stated publicly that he has re-registered at the Dutchess County Board of Elections as a Republican. However, the new registration does not become effective until after the general election in November 2003. In fact, Mr. Baiano's registration form will remain sealed at the Board of Elections.
>
> "Republicans at the Legislature continually hold caucuses with Mr. Baiano present, in spite of my objections. It is my belief that their closed caucuses with one registered Democrat present constitutes a legal meeting of the Dutchess County Legislature and those meetings should be open to the public. These meetings or 'party caucus' as the Republicans call them, are closed to the public, the press, and to other Democrats."

In this regard, by way of background, the definition of "meeting" [see Open Meetings Law, §102(1)] has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals found that any gathering of a 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.

With respect to the ability to exclude the public, 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 regard 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.

As you suggested in your letter, the member who intends to change his party registration is not yet a member of the majority. 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."

When a similar issue arose, 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 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 seeks to change his enrollment will not be deemed to be a registered republican until after the next general election in November; for purposes of political party registration, he will remain a democrat until that date.

In a variety of decisions, the courts have determined that provisions authorizing the exclusion of the public from meetings of public bodies should be construed narrowly. Notable in the context of the situation described is 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 consideration of the intent of the Open Meetings Law, the exemption concerning political caucuses should be narrowly construed. 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:

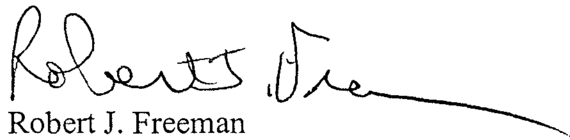
> "The Court of Appeals in *Orange County* (supra) also declared: 'The purpose and intention of the State Legislature in the present context are interpreted as expressed in the language of the statute and its preamble.' The legislative intent, therefore, expressed in Section 108, must be read in conjunction 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).

Lastly, one of the articles attached to your letter suggests that "if it were up to Bob Freeman, if you were on the phone in the bathroom, he would want the door open." In this regard, it is emphasized that every opinion offered by this office is based on the law and its judicial interpretation and that our only goal is to provide accurate legal advice, irrespective of the source of the question. Thousands of opinions rendered by this office are accessible online, and I believe that a review of the opinions will confirm that they are impartial and consistent with law and the direction provided by the courts.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

OML-AO - 3598

From: Robert Freeman
To: Donald Symer
Date: 3/4/03 8:18AM
Subject: Re: Lancaster Rural Cemetery Assoc

Dear Mr. Symer:

I have received your comments concerning the lack of "meaningful access" to an annual meeting of the Lancaster Rural Cemetery Association.

In this regard, I do not believe that meetings of the Association or its board of directors fall within the coverage of the Open Meetings Law. That statute pertains to meetings of public bodies, and section 102(2) defines the phrase "public body" to include entities that perform a "governmental function" and conduct public business for the state or for a unit of local government. The association, based on your comments, is not a governmental entity, but rather is a private, not-for-profit corporation. If that is so, it would not constitute a public body and, therefore, would not be required to comply with the Open Meetings Law.

Since you characterized the Association as "a type of public benefit organization", I nnote that the term "public benefit corporation" is defined in section 66(4) of the General Construction Law to mean "a corporation organized to construct or operate a public improvement wholly or partly within the state, the profits from which inure to the benefit of this or other states or to the people thereof." As I understand the matter, the Association is not a public benefit corporation; again, it appears to be a private non-profit organization.

It is suggested that you review the Association's by-laws, for they will likely include information concerning the conduct of its meetings and access by members and lot owners.

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

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
Albany, NY 12231
(518) 474-2518 - Phone
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OML-AO-3599

From: Robert Freeman
To: [redacted]
Date: 3/6/03 8:44AM
Subject: Dear Mr. Henderson:

Dear Mr. Henderson:

I have received your inquiry concerning a special meeting held by the Fulton Common Council.

In this regard, there is nothing in the Open Meetings Law that deals specifically with "special meetings", and nothing in that law precludes a public body from convening quickly when there is a need to do so.

The only issue, as you described the matter, would likely have involved the adequacy of notice given prior to the meeting. Under section 104 of the Open Meetings Law, if a meeting is scheduled at least a week in advance, notice of the time and place must be given not less than 72 hours prior to the meeting to the news media and by means of posting in one or more designated, public locations. If a meeting is scheduled less than a week in advance, notice of the time and place must be given to the news media and posted "to the extent practicable" at a reasonable time prior to the meeting.

It is also noted that the most significant penalty that may imposed for failure to comply with the Open Meetings involves the situation in which action was taken in private that should have been taken in public. In that instance, should the action be challenged in court, the court may, in its discretion and upon good shown, invalidate the action taken in violation of the Open Meetings Law pursuant to section 107 of that statute. However, the same provision also says that an unintentional failure to fully comply with the notice requirements shall not alone be grounds for invalidating action.

I hope that the foregoing serves to clarify your understanding of the law and that I have been of assistance. If you have questions relating to the matter, 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- 13930
OML-AO- 3600

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Dominick Tocci

Executive Director

Robert J. Freeman

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

March 10, 2003

Mr. William Hanson

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. Hanson:

I have received several letters from you directly, and the Office of the State Comptroller also recently forwarded correspondence from you to this office. You complained that Mr. Leon Campo, Assistant Superintendent and Records Access Officer for the East Meadow Union Free School District, has failed to comply with the Freedom of Information Law. In brief, you sought the "attendance records" of members of the Board of Education concerning meetings and work sessions held by the Board from September, 2001 to January of this year.

In this regard, first, it is emphasized that the Freedom of Information Law pertains to existing records and that §89(3) states in relevant part that an agency, such as a school district, is not required to create or prepare a record in response to a request.

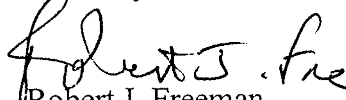
In my experience, it would be unusual for a school district to maintain what might be characterized as attendance records pertaining to school board members' presence at meetings. However, a source of equivalent information typically would be minutes of meetings. Minutes generally identify board members in attendance and must include the manner in which members voted in each instance in which action is taken [see Freedom of Information Law, §87(3)(a); Open Meetings Law, §106]. As such, a review of minutes would indicate which members of the board attended meetings. I note, too, that it was established nearly twenty-five years ago that a "work session" constitutes a meeting that falls within the coverage of the Open Meetings Law [Orange County Publications v. Council of the City of Newburgh, 60 AD2d 409, aff'd 45 NY2d 947 (1978)].

To learn more of the matter, I contacted Mr. Campo. As I surmised, the District does not maintain separate attendance records relating to Board members' presence at meetings. Minutes of meetings, however, include the information of your interest. He also indicated that he attempted to contact you to inform you of the District's practice and the availability of the minutes, and that

copies of the minutes have been sent to you. Based on the information that he provided, I believe that the District has complied with law, that the matter has been resolved and that it has, therefore, become moot.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Leon Campo

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3601

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
Gary Lewi
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March 10, 2003

Mr. Peter B. Boody
Editor
The Shelter Island Reporter
P.O. Box 756
Shelter Island, NY 11964

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. Boody:

I have received your letter, as well as a news article and an editorial, concerning a certain issue considered by the Shelter Island Planning Board. You have questioned the propriety of executive sessions held during recent meetings at which that issue was discussed.

Specifically, in its review of a subdivision application, executive sessions have been held on the ground that the Town, in your words, is "negotiating for the acquisition of real estate - in this case an easement or 'development right' to a particular well-known parcel in town rather than the land itself." You added that "[a]ll parties that might be affected by this proposed purchase are well aware of the property involved and of these negotiations; the owners's representative, in fact, is in attendance at these closed sessions."

In this regard, as you are aware, the Open Meetings Law is based on a presumption of openness. Stated differently, meetings of public bodies must be conducted open to the public, except to the extent that an executive session may properly be conducted in accordance with paragraphs (a) through (h) of §105(1). Consequently, a public body, such as a planning board, 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 ground for entry into executive session that is relevant in relation to the matter that you described.

The only provision of apparent significance, §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.

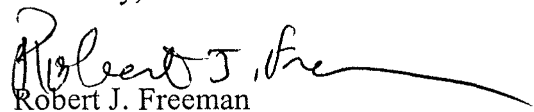
A key question, in my view, involves the extent to which information relating to possible real property transactions is or has become known to the public. The more that is known, the less likely it is that publicity would have an impact on the value of a parcel or would in some way damage the interests of Town 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. 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 may an executive session properly be held.

In this instance, there is nothing secret about the issue; the residents of the community are well aware of the matter, for it is the subject of review by the Planning Board. Moreover, all of the parties affected have been involved in the negotiations. In consideration of the facts as you presented them, I do not believe that a claim could justifiably be made or proven that publicity could have an effect, let alone a "substantial" effect, on the value of the property that is the subject of the discussion. If that is so, I do not believe that §105(1)(h), or any other ground for entry for executive session, could be asserted as a means of closing a meeting of the Board.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt
cc: Planning Board
Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3602

Committee Members

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March 11, 2003

Mr. Joseph W. Sallustio, Jr.

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

Dear Mr. Sallustio:

I have received your letter in which you raised a question concerning compliance with the Open Meetings Law by the City of Rome Common Council.

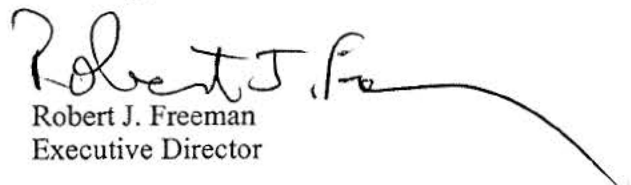
According to your letter, the Common Council entered into executive session "to hear the progress and agreements made between the Rome City administration and the Town of Verona in regards to the selling of water to the Town of Verona by the City of Rome." You added that "[t]he selling of water to Verona includes making the water available to the Oneida Indian Nation, a sovereign nation."

In this regard, as you may be 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 a closed or executive session may properly be held. Paragraphs (a) through (h) of §105(1) specify and limit the subjects that may be considered during an executive session. That being so, a public body cannot enter into executive session to discuss the subject of its choice; again, its authority to do so is restricted to the eight grounds appearing in §105(1).

From my perspective, based on a review of the grounds for entry into executive session and your description of the facts, it is unlikely that any of those grounds could validly have been asserted by the Common Council to consider the issue that is the subject of your inquiry.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Common Council

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 13936
OML-AO-3603

Committee Members

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March 12, 2003

Ms. Vonnie Kessler

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. Kessler:

I have received your letter in which you raised a variety of questions relating to the implementation of the Open Meetings and Freedom of Information Laws by the Elmira City School District and its Board of Education.

The first area of inquiry concerns a gathering of a public body that has been characterized as a "presentation practice", rather than a meeting, and that, therefore, it falls outside the coverage of the Open Meetings Law. Without more specific information pertaining to the event, I cannot provide a precise response. However, in an effort to offer guidance, it is noted 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)].

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 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.

Second, you asked whether the Superintendent may "call for an unscheduled executive session during a school board meeting to 'get legal advice' concerning the issue of discussion and then come out session 20 minutes later and announce board action that was decided on the issue behind closed doors." In this regard, there are two vehicles that may authorize a public body to discuss public business in private. One involves entry into an executive session. Section 102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded, and §105(1) 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. That being so, an executive session, in my view, cannot be scheduled, for it cannot be known in advance that motion to enter into executive will be approved.

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

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

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

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

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

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

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

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

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

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.

Since you referred to action taken in private, I point out that a board of education may do so only in rare instances. As a general rule, a public body may take action during a properly convened executive session [see Open Meetings Law, §105(1)]. In the case of most public bodies, if action is taken during an executive session, minutes reflective of the action, the date and the vote must be recorded in minutes pursuant to §106(2) of the Law. If no action is taken, there is no requirement that minutes of the executive session be prepared. Various interpretations of the Education Law, §1708(3), however, indicate that, except in situations in which action during a closed session is permitted or required by statute, a school board cannot take action during an executive session [see United Teachers of Northport v. Northport Union Free School District, 50 AD 2d 897 (1975); Kursch et al. v. Board of Education, Union Free School District #1, Town of North Hempstead, Nassau County, 7 AD 2d 922 (1959); Sanna v. Lindenhurst, 107 Misc. 2d 267, modified 85 AD 2d

157, aff'd 58 NY 2d 626 (1982)]. Stated differently, based upon judicial interpretations of the Education Law, a school board generally cannot vote during an executive session, except in those unusual circumstances in which a statute permits or requires such a vote.

Those circumstances would arise, for example, when a board initiates charges against a tenured person pursuant to §3020-a of the Education Law, which requires that a vote to do so be taken during an executive session. The other instance would involve a situation in which action taken in public could identify a student. When information derived from a record 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.

The remaining question relating to the Open Meetings Law involves "the legal definition" of "consensus." I know of no "legal definition." However, the notion of a consensus reached at a meeting of a public body was considered in Previdi v. Hirsch [524 NYS 2d 643 (1988)], which 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 session was properly held, it was found that "this was not a 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).

If a public body, such as a board of education, 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 [see Freedom of Information Law, §87(3)(a); Smithson v. Ilion Housing Authority, 130 AD 2d 965, 967 (1987)]. I recognize that the public bodies often attempt to present themselves as being unanimous and that a ratification of a vote is often carried out in public. Nevertheless, if a unanimous ratification does not indicate how the members actually voted behind closed doors, the public may not 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 so-called "straw vote", which 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.

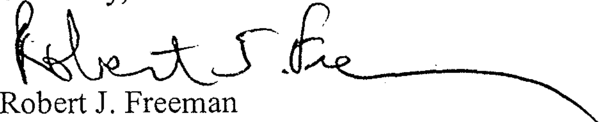
Next, if a request is denied under the Freedom of Information Law, and the denial is sustained following an appeal, the person denied access has the right to seek judicial review of the determination by initiating a proceeding under Article 78 of the Civil Practice Law and Rules. In the alternative, any person may seek an opinion concerning the propriety of the denial of access from this office. While the opinions rendered by this office are not binding, it is our hope that they are educational and persuasive. Further, the courts in many instances have cited and relied upon the Committee's opinions as the basis for their decisions.

Lastly, when seeking records under the Freedom of Information Law, §89(3) requires that an applicant must "reasonably describe" the records sought. Therefore, a person requesting records should provide sufficient detail to enable the staff of an agency to locate and identify the records. Often names, dates, time periods, locations, file designations and similar identifiers can be useful in reasonably describing the records.

As you requested, and in an effort to enhance compliance with and understanding of the Freedom of Information and Open Meetings 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:tt

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO - 3604

Committee Members

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March 24, 2003

Ms. Debra Balestra
Ad Hoc Committee for Leadership
SUNY Rockland Community College
145 College Road
Suffern, NY 10901-3699

The staff of the Committee on 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. Balestra:

I have received your letter in which you sought my views concerning a matter involving the Rockland Community College Board of Trustees and its implementation of the Open Meetings Law.

You referred to a recent meeting held by the Board in the usual location, "a room that holds 49 people." You indicated that, prior to the meeting, you "personally called the president's office to inform them that there were going to be well over 49 people in attendance and they might want to change the location of the room to accommodate the students, faculty, and staff that were planning on attending." Notwithstanding your request, the Board chose not to change the location of the meeting, and you wrote that "[t]here were well over 75 people standing outside the room, unable to listen and observe what took place at this meeting."

You asked whether the Board was "required by the Open Meetings Law to accommodate the public by changing the room, if they know in advance that there is going to be a larger turnout than usual." Based on a judicial decision concerning a similar situation, the Board should have held its meeting in a larger facility.

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

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

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

In view of the foregoing, 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.

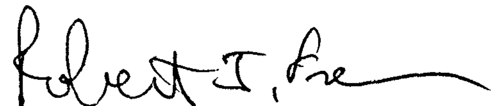
From my perspective, every provision of law, including the Open Meetings Law, should be implemented in a manner that gives reasonable effect to its intent. In my opinion, if it is known in advance of a meeting that a larger crowd is likely to attend than the usual meeting location will accommodate, and 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.

In sum, in consideration of the facts as you presented them, the intent of the Open Meetings Law and the judicial decision referenced above, I believe that the Board of Trustees was required to have chosen a location for its meeting of a size sufficient to have accommodated those likely interested in attending.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13963
OML-AO-3605

Committee Members

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March 25, 2003

E-Mail

TO: Allegra Dengler [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 Trustee Dengler:

I have received your letter of March 3 in which you raised a variety of questions, several of which concern the Open Meetings and Freedom of Information Laws as they relate to certain activities of the Village of Dobbs Ferry.

In this regard, it is emphasized at the outset that the advisory jurisdiction of this office is limited to matters involving the two statutes referenced above. I have neither the authority nor the expertise to respond to your questions concerning the expenditure of public money without public notice. As your questions pertain to those statutes, I offer the following comments.

First, as a general matter, when a public body has properly entered into executive session, it may vote during the executive session, unless the vote is to appropriate public moneys. Section 106(2) of the Open Meetings Law pertains specifically to minutes of executive sessions and states 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."

Subdivision (3) of §106 requires that minutes of executive session must be prepared and made available, to the extent required by the Freedom of Information Law, within one week of the executive session during which the action was taken.

Second, with respect to the map to which you referred, the Freedom of Information Law is expansive in its coverage, for it pertains to all agency records and defines the term "record" broadly to include:

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

Based on the foregoing, Village records include not only those kept in Village Hall, but also those prepared or kept *for* the Village as well. Therefore, if, for example, the Village retains a consultant and the consultant prepares or maintains records for the Village, those records, in my view, fall within the coverage of the Freedom of Information Law. If a request has been made for records in that circumstance, it has been advised that the designated records access officer direct the consultant to disclose the records in a manner consistent with law, or acquire the records to determine the extent to which they must be disclosed.

Lastly, if an agency "does not release records", the person denied access has the right to appeal pursuant to §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 of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

I hope that I have been of assistance.

RJF:jm

cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3606

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
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March 27, 2003

Hon. Florence T. Santini
Town Clerk
Town of Deerpark
P.O. Box A
Huguenot, NY 12746

The staff of the Committee on 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. Santini:

I have received your note and the materials attached to it. As I understand the matter, the Town Board has conducted executive sessions, describing the issue to be discussed as a "personnel matter". Further, situations have arisen in which the Board has entered into executive sessions to discuss certain matters, but immediately thereafter took action on completely different matters.

In this regard, I offer the following comments.

First, 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 public body, such as a town board, indicates that a certain subject or subjects will be discussed during an executive session, it is restricted to consideration of the topics expressed in its motion for entry into executive session. If the board begins to discuss a new or different subject, it should return to the open meeting.

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

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

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

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

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

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

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

Insofar as a discussion involves a particular person in relation to one or more of the subjects described in §105(1)(f), an executive session may justifiably held. On the other hand, when it involves consideration or review of procedures, policies or practices, or positions, irrespective of who might hold those positions, I do not believe that there would be a basis for discussion in executive session. Even though those kinds of subjects might be reflective of "personnel" issues,

they would not focus on any particular person and, therefore, in my opinion, must be discussed in public.

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 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:

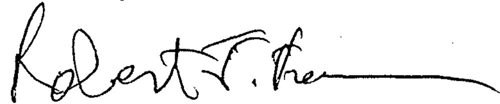
> "...the public body must identify the subject matter to be discussed (See, Public Officers Law § 105 [1]), and it is apparent that this must be accomplished with some degree of particularity, i.e., merely reciting the statutory language is insufficient (see, Daily Gazette Co. v Town Bd., Town of Cobleskill, 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, a motion to enter into executive session should be sufficiently detailed to enable members of the Board and the public in attendance to know that there is clearly a proper basis for conducting an executive session.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML AO - 3607

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March 28, 2003

Mr. William Margrabe

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

Dear Mr. Margrabe:

I have received your letter in which you questioned the propriety of a delay in the disclosure of minutes of meetings of the Board of Education of the Pelham Union Free School District.

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

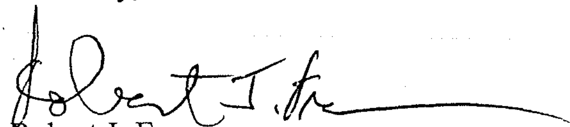
> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.
>
> 2. Minutes shall be taken at executive sessions of any action that is taken by formal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

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

There is nothing in the Open Meetings Law or any other statute of which I am aware that requires that minutes be approved. Nevertheless, as a matter of practice or policy, many public bodies approve minutes of their meetings. In the event that minutes have 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.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3608

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March 28, 2003

Mr. Jim Parker
Clapsaddle Farm

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

Dear Mr. Parker:

I have received your letter in which you wrote that you and others sought to attend a scheduled meeting of Ilion Village Board of Trustees and the boards of directors of the Village's municipal light and water departments. Upon arrival, you were informed that the entities participating in the meeting were entering into executive session to discuss "finances." You have questioned the propriety of the foregoing.

In this regard, first, it was held more than twenty years ago that joint meetings held by two or more public bodies are subject to the Open Meetings Law [Oneonta Star v. Board of Trustees of Oneonta School District, 66 AD 2d 51 (1979)], and later that a gathering of a quorum of a city council for the purpose of holding a "planned informal conference" involving a matter of public business constituted a meeting that fell within the scope of the Open Meetings Law, even though the council was asked to attend by a city official who was not a member of the city council [Goodson-Todman v. Kingston Common Council, 153 AD 2d 103 (1990)]. Therefore, so long as a quorum of at least one public body, such as the Village Board of Trustees, gathered to conduct public business, the event as you described it would have constituted a "meeting" subject to the Open Meetings Law.

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

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

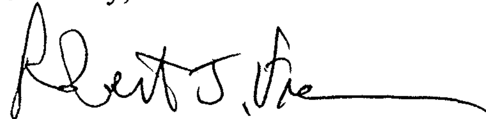
As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed and it must be carried by majority vote of a public body's membership before such a session may validly be held. The ensuing provisions of §105(1) specify and limit the subjects that may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

In my view, describing the matter to be considered in executive session as "finances", without more, would not be sufficient to enable the public to know whether there may indeed have been a proper basis for entry into executive session. Moreover, a discussion concerning municipal finances ordinarily would not fall within any of the grounds for entry into executive session.

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

OML AO - 3609

Committee Members

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March 28, 2003

Ms. Joan M. Charles
President, Mendon Public Library
Board of Trustees
Mendon Public Library
15 Monroe Street
Honeoye Falls, NY 14472

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. Charles:

I have received your letter of March 8 in which you sought clarification concerning the application of the Open Meetings Law to the Mendon Public Library Board of Trustees, as well as committees and subcommittees consisting of members of the Board.

In this regard, I offer the following comments.

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

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

Based on the foregoing, as a general matter, the Open Meetings Law pertains to governmental bodies, such as a board of education, a city council, a county legislature, and the like. It also clearly applies to the board of trustees of a school district or municipal public library. Therefore, if a majority or quorum board of trustees of a governmental library, such as a school district or town library, gathers to conduct public business, the gathering would constitute a "meeting" that falls within the coverage of the Open Meetings. In a board consisting of seven, four would constitute a quorum. Similarly, if the board of a governmental library designates a committee consisting of two or more of its members, that, too, would constitute a public body subject to the Open Meetings Law.

If a committee consists of three, for example, its quorum would be two, and if two of the three gather as committee members to discuss the business of the committee, such a gathering would also be within the scope of the Open Meetings Law.

Many entities characterized as public libraries are not-for-profit corporations that are not governmental in nature. While the Open Meetings Law ordinarily does not apply to meetings of the governing bodies of those entities, the boards of trustees of all public libraries are required to comply with the Open Meetings Law in order to comply with §260-a of the Education Law. That provision states that:

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

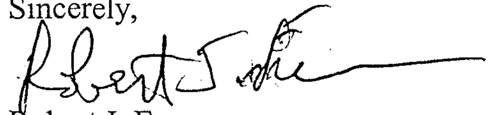
Since Article 7 of the Public Officers Law is the Open Meetings Law, meetings of boards of trustees of various libraries, including public libraries that are not-for-profit corporations, must be conducted in accordance with that statute.

For reasons discussed earlier, a committee of the board of a governmental library would be required to comply with the Open Meetings Law even if §260-a of the Education Law had never been enacted. However, in situations in which the Open Meetings Law would not apply had that law not been enacted, i.e., in the case of the board of a not-for-profit corporation or its committees, the committees and subcommittees of those boards outside of New York City are not subject to Open Meetings Law.

In sum, the boards of trustees of all public libraries are required to comply with the Open Meetings Law; the committees and subcommittees of governmental library boards of trustees are also required to comply with that statute; committees and subcommittees of non-governmental library boards outside of New York City are not subject to the Open Meetings Law. This not to suggest that committees and subcommittees outside the requirements of the Open Meetings Law may not conduct open meetings. On the contrary, they may do so even though the law does not require that they do so.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

OML-AO - 3610

From: Robert Freeman
To: [redacted]
Date: 3/31/03 10:17AM
Subject: Dear Ms. Reeverts:

Dear Ms. Reeverts:

I have received your inquiry concerning the preparation of minutes of certain union meetings.

In this regard, the statutes within the advisory jurisdiction of this office deal with public access to government information. The Open Meetings Law contains provisions concerning committees, subcommittees and the preparation of minutes. However, that statute pertains only governmental entities; it does not apply to private organizations, such as unions.

In short, I cannot offer specific guidance, for the matter is beyond the jurisdiction or expertise of this office. It is suggested, however, that the union's by-laws may address the issue and that it may be worthwhile to review them.

I regret that I cannot be of greater assistance.

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

OML-AO-3611

From: Robert Freeman
To: [redacted]
Date: 3/31/03 10:28AM
Subject: Dear Ms. Simonson:

Dear Ms. Simonson:

I have received your inquiry and, if I understand it correctly, the Town Supervisor intends to take action based on discussion with at least two members of the Town Board that occurred outside of a meeting of the Board. If that is so, I do not believe that he or the Board can validly do so.

The only instances in which the Board may take action in my view would be at a meeting during which a quorum is physically present and a motion is carried by a majority vote of the Board's total membership, or, based on relatively recent legislation, when the members of the Board conduct a meeting by videoconference during which the members of the Board and others present at one or more locations can all observe one another. I note that there is a judicial decision indicating that action purportedly taken by members of a town board by means of a series of telephone calls was invalid and a nullity.

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

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
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(518) 474-2518 - Phone
(518) 474-1927 - Fax
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3612

Committee Members

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April 1, 2003

Ms. Margaret Murphy

<u>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.</u>

Dear Ms. Murphy:

I have received your letter of March 17 and the materials attached to it. According to the correspondence, you arrived at a meeting of the Board of Education of the Sewanhaka Central High School District on March 11 at 7:30 p.m. and found that the meeting was already in progress. During a break, you asked whether you could address the Board concerning a matter of policy, but you were informed by the President that "the Board had already voted prior to 7:00 p.m. and that the Board approved the policy." You wrote that you thought that you "must have gotten the time of the meeting wrong", but you checked further and attached a newspaper article and an agenda, both of which confirmed your belief that the meeting was scheduled to begin at 7:30.

You expressed the understanding "that the Board's vote on this policy issue prior to the published time of 7:30 p.m. is inconsistent with the Open Meetings Law", and you have sought my opinion on the matter.

From my perspective, the Board failed to comply with the Open Meetings Law.

In this regard, if notice was given indicating that the meeting would begin at 7:30 p.m., the Board should have waited until that time to begin conducting its business. Alternatively, if there was a need to convene earlier than the time specified in the original notice, I believe that the Board should have given additional notices to the news media and at the location where notice is posted to reflect the actual time when the meeting would begin. If no notice was given of the actual time that the meeting convened, it would appear that the meeting was held, in effect, in private. When action is taken in private in violation of the Open Meetings Law, a court is authorized to invalidate such action pursuant to §107 of that statute.

Section 104 of the Open Meetings Law pertains to notice of meetings and requires that every meeting be preceded by notice given to the news media and posted. That provision states that:

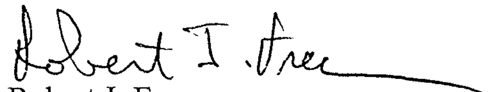
> "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before each meeting.
>
> 2. Public notice of the time and place of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

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

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

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Education
Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-13989
OML-AO-3613

Committee Members

Randy A. Daniels
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April 3, 2003

James T. Crean

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. Crean:

I have received your letter in which you requested an advisory opinion.

According to the materials that you enclosed, you serve as a member of the Orchard Park Central School District Board of Education, and you indicated that "[t]here is e-mail traffic that indicates that some board members receive e-mails concerning official school business when other board members do not." By means of example, you referred to a situation in which a Board member transmitted a draft of a letter he planned to send to an Assemblyman relating to state funding for the School District to all but two members of the Board.

From my perspective, the issues arising from the facts as you described them potentially involve both the Open Meetings and Freedom of Information Laws. In this regard, I offer the following comments.

First, there is nothing in the Open Meetings Law that would preclude members of a public body from conferring individually, 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. With specific respect to email, I believe that it must be considered in terms of two kinds of communications.

By way of background, the Open Meetings Law pertains to public bodies, and §102(2) defines the phrase "public body" to mean:

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

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

Further, §102(1) of the Open Meetings Law defines the term "meeting" to mean "the official convening of a public body for the purpose of conducting public business, including the use of videoconferencing for attendance and participation by the members of the public body." Based upon an ordinary dictionary definition of "convene", that term means:

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

In view of that definition and others, I believe that a meeting, i.e., the "convening" of a public body, involves the physical coming together of at least a majority of the total membership of such a body, i.e., the Board of Education, or a convening that occurs through videoconferencing. I point out, too, that §103(c) of the Open Meetings Law states that "A public body that uses videoconferencing to conduct its meetings shall provide an opportunity to attend, listen and observe at any site at which a member participates."

The provisions in the Open Meetings Law concerning videoconferencing are newly enacted (Chapter 289 of the Laws of 2000), and in my view, those amendments clearly indicate that there are only two ways in which a public body may validly conduct a meeting. Any other means of conducting a meeting, i.e., by telephone conference, by mail, or by e-mail, would be inconsistent with law.

As indicated earlier, the definition of the phrase "public body" refers to entities that are required to conduct public business by means of a quorum. The term "quorum" is defined in §41 of the General Construction Law, which has been in effect since 1909. The cited provision, which was also amended to include language concerning videoconferencing, states that:

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

> officers would have were there no vacancies and were none of the persons or officers disqualified from acting."

Based on the foregoing, again, a valid meeting may occur only when a majority of the total membership of a public body, a quorum, has "gathered together in the presence of each other or through the use of videoconferencing." Moreover, only when a quorum has convened in the manner described in §41 of the General Construction Law would a public body have the authority to carry out its powers and duties. Consequently, it is my opinion that a public body may not take action or vote by means of e-mail.

Conducting a vote or taking action via e-mail would, in my view, be equivalent to voting by means of a series of telephone calls, and in the only decision dealing with a vote taken by phone, the court found the vote to be a nullity. In Cheevers v. Town of Union (Supreme Court, Broome County, September 3, 1998), which cited and relied upon an opinion rendered by this office, the court found that action taken by means of a series of telephone calls was invalid, for there was "no physical gathering", but rather a circumvention of the Open Meetings Law.

As the foregoing relates to email among the members, one kind of email involves the transmission of information from one member to another. In my view, the Open Meetings Law is not implicated by that kind of communication. Similar is the transmission of information to several people, as in the use of a listserve, where each recipient opens the email transmission at a different time. One person might be in front of the monitor constantly and may receive the transmission instantly; another might review his or her email at the end of the day or in the evening at home; a third might not check his or her email for days at a time. In those instances, the transmissions are, in my view, equivalent to the distribution of traditional mail. Each recipient opens and reads the contents at a different time. There is no instantaneous communication, and I do not believe that the Open Meetings Law in that situation is implicated in any way.

The other kind of email involves the use of a chat room or instant messaging. If a majority of the Board communicates instantaneously via a chat room or instant messaging, I believe that it would be conducting, in essence, a virtual meeting that would be inconsistent with the Open Meetings Law. The legislative declaration appearing in §100 of that statute provides 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. If a majority gathers and communicates instaneously by holding a meeting through the use of email, the public would have no notice of the gathering, nor would the public have the right to observe the performance of public officials or the deliberative process.

As the Freedom of Information Law relates to your concerns, I note that that statute pertains to all agency records, and that §86(4) of that statute defines the term "record" expansively to include:

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

Based on the foregoing, I believe that e-mail communications between Board members or to any person when a member is acting in his or her capacity as a Board member would constitute "records" that fall within the coverage of the Freedom of Information Law. Whether those communications come into the physical possession of the District at its offices is, according to case law, irrelevant. So long as the communications exist in some physical form (i.e., if they are stored in a computer and may be transmitted or printed), I believe that they are subject to rights conferred by the Freedom of Information Law. 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; also Encore College Bookstores, Inc. v. Auxiliary Service Corp., 87 NY 2d 410 (1995)]..

This is not to suggest that email is necessarily accessible in its entirety to the public. As in the case of paper records, the nature and content of an email communication are the factors that determine public 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.

Perhaps most pertinent in the context of your comments 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. If, for instance, Board members exchange their opinions regarding an issue via email, those kinds of communications could be withheld. On the other hand, insofar as their exchanges include statistical or factual information, those portions of the communications would ordinarily be accessible to the public under §87(2)(g)(i).

Also potentially relevant is §87(2)(b), which authorizes an agency to deny access to records insofar as disclosure would result in "an unwarranted invasion of personal privacy." That provision might be asserted to withhold identifying details in correspondence between Board members and residents of the District. Similarly, the Family Educational Rights and Privacy Act (20 USC §1232g) may prohibit the disclosure of information identifiable to a student that would make the student's identity easily traceable.

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

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

I hope that the foregoing serves to clarify your understanding of the scope of open government laws and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Education
Mary Pasciak

STATE OF NEW YORK
DEPARTMENT OF STATE
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OML-AO-3614

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April 3, 2003

Mr. H. William VanAllen

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. Van Allen:

As you are aware, I have received your correspondence concerning access to the meetings, records and related activities of the State Board of Elections.

In one of your letters, you referred to the "miss-use [sic] of executive sessions" by the Board. Without additional information concerning the nature of or basis for entry into the executive sessions, I cannot offer specific guidance. However, as a general matter, it is emphasized that every meeting of a public body, such as the Board, must be convened as an open meeting, and that §102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. 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..."

Based on the foregoing, 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. Consequently, a public body may not conduct an executive session to discuss the subject of its choice.

In another letter, you referred specifically to a federal statute, the "Help America Vote Act" (HAVA). As I understand the legislation, it requires each state to designate a HAVA task force charged with duty to offer advice and recommendations designed to enhance participation in the electoral process. If my understanding of the legislation is accurate, while the HAVA task force may hold its meetings open to the public, it would not be required to do so by the Open Meetings Law. Based on a decision rendered by the State's highest court, the Court of Appeals, an entity created pursuant to federal law would not be subject to the New York Open Meetings Law. The decision dealt with a "laboratory animal use committee" (LAUC) required to be established pursuant to federal law and instituted at the State University at Stony Brook, and it was determined that the entity in question fell beyond the scope of the Open Meetings Law.

That statute pertains to meetings of public bodies, and the Court cited §102(2), which defines the phrase "public body" to mean:

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

Following its reference to the definition, the Court found that:

> "It is thus evident that the Open Meetings Law excludes Federal bodies from its ambit.
>
> "The LAUC's constituency, powers and functions derive solely from Federal law and regulations. Thus, even if it could be characterized as a governmental entity, it is at most a *Federal* body that is not covered under the Open Meetings Law" [ASPCA v. Board of Trustees of the State University of New York, 79 NY 2d 927, 929 (1992)].

Assuming that the HAVA task force is a creation of federal law, again, it would not constitute a "public body" required to comply with the Open Meetings Law. This not to suggest that it cannot hold open meetings, but rather that it is not required by the Open Meetings Law to do so.

Since you referred to the Freedom of Information Law as well, I note that it has been held that its scope is more expansive than the Open Meetings Law. The former is applicable to all agency records, for §86(4) defines the term "record" to include:

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

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

In another decision rendered by the Court of Appeals, Citizens for Alternatives to Animal Labs, Inc. v. Board of Trustees of the State University of New York [92 NY2d 357, October 22, (1998)], even though records were kept pursuant to federal law by a state agency, the Court determined that the records fell within the coverage of the New York Freedom of Information Law and were subject to rights conferred by that statute. In short, the fact that records are kept or held by an agency brings them within the coverage of the Freedom of Information Law, irrespective of "the function or purpose for which an agency's documents are generated or held." The Court held further that "FOIL's scope...'is not to be limited based on the [Federal] purpose' for which the certifications were kept 'or the function to which [they] relate [],' i.e., serving to comply with a Federal mandate..." (id., 361).

As in the case of your contentions concerning executive sessions in which no specific allegation was offered, you have not referred to any particular instance in which you believe that the Board has failed to comply with the Freedom of Information Law. That being so, I can only advise that the law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. I note that the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the exceptions that follow. In my view, the phrase quoted in the preceding sentence evidences a recognition on the part of the Legislature that a single record or report, for example, might include portions that are available under the statute, as well as portions that might justifiably be withheld. That being so, I believe that it also imposes an obligation on an agency to review records sought, in their entirety, to determine which portions, if any, might properly be withheld or deleted prior to disclosing the remainder.

The Court of Appeals reiterated its general view of the intent of the Freedom of Information Law in Gould v. New York City Police Department, stating that:

> "To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption' (*Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 *see,* Public Officers Law § 89[4][b]). As this Court has stated, '[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld' (*Matter of Fink v. Lefkowitz*, 47 N.Y.2d, 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)" [89 NY 2d 267, 275 (1996)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Tom Wilkey
Lee Daghlian

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3615

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April 4, 2003

Mr. John Hammond
Executive Director
Northern New York
Library Network
6721 US HWY 11
Potsdam, NY 13676

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. Hammond:

I have received your letter in which you requested an opinion concerning "the applicability of the Open Meetings Law and §260-a of the Education Law to the Northern New York Library Network ("the Network"), a not-for-profit educational corporation chartered by the University of the State of New York and established under §255(3) of the Education Law.

The Provisional Charter of the Network, which had been known as the North Country Reference and Research Resources Council, indicates that its purpose is "to improve reference and research library resources and services, and to provide a means for the development of inter-library cooperative plans and services within the area of the Council", which includes seven counties in northern New York. You wrote that the Network is not a library but rather "a reference and research library resources library system" and that its "voluntary membership includes hospital libraries, museum libraries, public libraries, law libraries, public library systems, school library systems, college and university libraries, corporate libraries, and correctional facility libraries."

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

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

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

In addition, that statute, which is codified as Article 7 of the Public Officers Law, is applicable to boards of trustees of public libraries pursuant to §260-a of the Education Law, which states that:

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

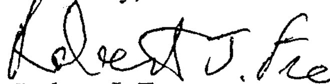
Again, since Article 7 of the Public Officers Law is the Open Meetings Law, meetings of boards of trustees of various libraries, including public libraries that are not-for-profit corporations, must be conducted in accordance with that statute.

As you suggested, the Network does not appear to be a public library system or cooperative library system as those entities are described in §255 of the Education Law, nor is it a public library or a free association library. If that is so, because the network is not a governmental entity, it appears that the meetings of its governing body are not subject to either the Open Meetings Law or §260-a of the Education Law.

Having sought to research the issue, the Network appears to be most analogous to a "reference and research library resources system", which is defined in §272(2)(a) of the Education Law to mean "a duly chartered educational institution resulting from the association of a group of institutions of higher education, libraries, non-profit educational institutions, hospitals and other institutions organized to improve reference and research library resources service." I note, however, that paragraph (b) of §272(2) indicates that the area served by a reference and research library resources system "shall include not less than seven hundred fifty thousand persons", which is more than the Network serves. Nevertheless, again, as I understand its nature, the Network's governing body is not required to give effect to §260-a of the Education Law or, therefore, the Open Meetings Law.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3616

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April 4, 2003

E-Mail

TO: Hon. Margaret A. Kastler <sandycreekny@tcenet.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 Supervisor Kastler:

As you are aware, I have received your letter of March 24 in which you raised a series of questions concerning the Open Meetings Law.

By way of background, you wrote that a motion was made to enter into executive session "to discuss health insurance." When you asked that the Clerk review the eight areas appropriate for consideration in executive session that appear in §105(1) of the Open Meetings Law, you contended that there was no basis for discussing the matter in private. Some time later, the Board member who made the motion referred to Article XIV of the Civil Service Law, the Public Employees Fair Employment Act, which is also known as the "Taylor Law", and expressed the belief that it authorized the Board to conduct an executive session to discuss the matter that was the subject of his motion. He referred specifically to §§204-a and 209. You wrote that since there is "no organized labor" in the Town of Sandy Creek, those provisions appear to be inapplicable.

Sections 204-a and 209 pertain respectively to "[a]greements between public employers and employee organizations" and "[r]esolution of disputes in the course of collective negotiations." An employee organization for the purposes of those provisions is a public employee union, and collective bargaining involves the process of negotiation between a public employer, such as a municipality, and a public employee union. If the employees of the Town of Sandy Creek are not members of an employee organization, a union, I believe that your contention was accurate, for the provisions cited by the Board member would not apply.

Lastly, since "it is at the discretion of the Town Clerk if personal opinions are included in the minutes", you asked whether incorrect and misleading information [may] be deleted from the minutes before they are approved at the next board meeting." In this regard, §106 of the Open Meetings Law pertains to minutes of meetings and states that:

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

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. Reference to personal opinions expressed during meetings need not be included in the minutes at all. Therefore, whether a personal opinion is considered to accurate or misleading, there is no requirement that it be included in the minutes. If information contained in draft or unapproved minutes is inaccurate, I believe that the Board has the authority to take action to attempt to correct the inaccuracy.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML AO - 3617

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April 7, 2003

Mr. Barton D. Graham

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. Barton:

I have received your letter of March 18, which reached this office on March 25. As indicated by phone and now being confirmed, the word "not" was inadvertently omitted from the ninth line from the bottom of page four of the letter addressed to Ms. Vonnie Kessler on March 12.

Additionally, you referred to the shared decision making committee, known in the Elmira City School District as the "District Planning Team", and the quorum requirements established pursuant to the District's plan. The plan indicates that the District Planning Team "will designate its own quorum at the October meeting." In my view, that entity does not have the authority to "designate its own quorum." A statute deals specifically with quorum requirements, and I do not believe that an entity may establish provisions dealing with a quorum that are inconsistent with that statute.

The term "quorum" has been the subject of §41 of the General Construction Law since 1909. That statute provides that:

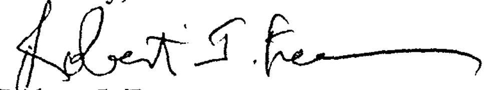
> "Whenever three of more public officers are given any power or authority, or three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of the whole number of such persons or officers, gathered together in the presence 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."

The District Planning Team is, in my view, clearly subject to §41, for it consists of "three or more persons...charged with [a] public duty to be performed or exercised by them jointly...as a board or similar body." That being so, a quorum, by statute, is a majority of the total membership of the Team, notwithstanding absences or vacancies. Unless a statute, an act of the State Legislature, contains direction to the contrary, I do not believe that the District may, on its own initiative, establish a provision concerning a quorum that differs from §41 of the General Construction Law or that eliminates the presence a quorum or the ability to conduct a valid meeting due to the absence of a particular member.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Education
Superintendent Sherwood

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3618

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April 8, 2003

Ms. Debra Balestra
Ad Hoc Committee for Leadership
SUNY Rockland Community College
145 College Road
Suffern, NY 10901-3699

The staff of the Committee on 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. Balestra:

I have received your letter of March 25, which deals in part with a meeting held by the SUNY Rockland Community College Board of Trustees in a room too small for those who sought to attend, even though you informed various officials in advance of the meeting that many more would attend than the meeting room would accommodate.

In this regard, as you are aware, I sent an advisory opinion to you dated March 24 dealing with the issue and transmitted a copy to the Board of Trustees. It is suggested that you might attempt to ensure that copies are reviewed by the Chairman of the Board and as many trustees as possible, as well as the attorney for the College.

You also asked whether the Board of Trustees is required to provide an agenda in advance of its meetings and indicated that: "The BOT begins their meeting by going directly into executive session. This is not done before the public. They then come out, and then open meeting." You expressed the view that the procedure described is inconsistent with law.

With respect to your question concerning an agenda, there no reference in the Open Meetings Law to agendas. Consequently, a public body, such as the Board of Trustees, may choose to prepare or follow an agenda, but there is no obligation to do so. I note that, once an agenda is prepared, it constitutes a "record" subject to rights of access conferred by the Freedom of Information Law.

With regard to the procedure that you described, it is emphasized that a public body cannot conduct an executive session prior to a meeting. Every meeting must be convened as an open meeting, for §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. That being so, 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:

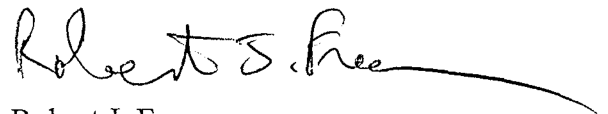
> "Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

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

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

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-13998
OML-AO-3619

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April 8, 2003

Mr. George Yourke

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. Yourke:

I have received your letter in which you raised a variety of questions concerning public access to information relating primarily to municipal boards and similar entities.

In this regard, it is emphasized at the outset that the Committee on Open Government is authorized to offer advice and opinions concerning the Freedom of Information and Open Meetings Laws. The former, as you are likely aware, pertains to access to government records; latter pertains to meetings of public bodies, such as town boards, planning boards, city councils and the like.

In consideration of your question, I point out that there is a difference between a "meeting" and a "hearing." A meeting typically involves a situation in which a majority of a public body gathers for the purpose of discussing public business and perhaps taking action. A hearing is typically held to enable the public to speak and to express views in relation to a particular matter, such as an application for a variance, a proposed local law, or a municipality's budget. The Open Meetings Law is a general law, in that it pertains to all public bodies in the state; the notice requirements imposed by that statute generally relate to all meetings of all public bodies. In contrast, numerous statutes involve public hearings and notice requirements associated with those hearings. Unlike the Open Meetings Law and its applicability to meetings of public bodies, there is no general statute dealing with hearings or notice of hearings. For example, provisions relating to a hearing concerning a town's budget are found in the town law, but different provisions appear in the Village Law and the Education Law concerning hearings and notices relating to village and school district budgets. In short, while I can offer advice and guidance relating to the Open Meetings Law, your questions concerning hearings are, in many instances, beyond the scope of the jurisdiction or expertise of this office. That being so, the following remarks will focus on matters involving the Freedom of Information and Open Meetings Laws.

Your first area of inquiry is "whether there are any specific regulations concerning the public being able to obtain information from various local Town Boards, Planning Boards, Wetlands

Commissions, etc." The statute that generally deals with public access to government records is the Freedom of Information Law. That law applies to agency records, and §86(3) defines the term "agency" to mean:

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

Based on the foregoing, the Freedom of Information Law pertains to records of entities of state and local government in New York.

In addition, §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..."

In short, the records access officer must "coordinate" an agency's response to requests, and again, the functions of the records access officer are separate and distinct from those of the records management officer.

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

Similarly, I know of no law that requires that a public body or a member answer questions raised during a meeting or hearing. Certainly they may choose to do so, but there is no obligation to do so, again, unless a policy or rule imposes such a requirement.

Third, with respect to "obtaining an answer requested through FOIL", I note that the title of that law may be somewhat misleading. It does not deal with information *per se*; rather it is a vehicle under which any person may seek records. It is emphasized that the Freedom of Information Law pertains to existing records, and that §89(3) of the law states in part that an agency is not required to create or prepare a record in response to a request. In the same vein, the Freedom of Information Law does not require that agency staff or officials provide information by responding to questions. Their duty under the law is to respond to requests for and provide access to records in accordance with its provisions.

When a request is made for existing records, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied [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)].

Next, you raised several issues relating to recordings of meetings. Provisions concerning the retention and disposal of records are found in Article 57-A of the Arts and Cultural Affairs Law. In brief, under those provisions, the Commissioner of Education, through the State Archives, establishes schedules indicating minimum retention periods for various kinds of records, and I believe that the retention period applicable to tape recordings of meetings is four months.

You wrote that if a member of the public tape records a meeting, he or she is required to provide the board being recorded with a copy of the tape. I do not believe that there is any such requirement; on the contrary, the tape recording in that circumstance is private property and need not be shared or duplicated. You also asked whether "advance notice" must be given prior to recording a meeting. I point out in this regard neither the Open Meetings Law nor any other statute of which I am aware deals with the use of audio or video recording devices at open meetings of public bodies. There are, however, several judicial decisions concerning the use of those devices at open meetings. In my view, the decisions consistently apply certain principles. One is that a public body has the ability to adopt reasonable rules concerning its proceedings. The other involves whether the use of the equipment would be disruptive.

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

Notwithstanding Davidson, the Committee on Open Government advised that the use of tape recorders should not be prohibited in situations in which the devices are unobtrusive, for the presence of such devices would not detract from the deliberative process. In the Committee's view, a rule prohibiting the use of unobtrusive tape recording devices would not be reasonable if the presence of such devices would not detract from the deliberative process.

This contention was initially confirmed in a decision rendered in 1979. That decision arose when two individuals sought to bring their tape recorders at a meeting of a school board in Suffolk County. The school board refused permission and in fact complained to local law enforcement authorities who arrested the two individuals. In determining the issues, the court in People v. Ystueta, 418 NYS 2d 508, cited the Davidson decision, but found that the Davidson case:

> "was decided in 1963, some fifteen (15) years before the legislative passage of the 'Open Meetings Law', and before the widespread use of hand held cassette recorders which can be operated by individuals without interference with public proceedings or the legislative process. While this court has had the advantage of hindsight, it would have required great foresight on the part of the court in Davidson to foresee the opening of many legislative halls and courtrooms to television cameras and the news media, in general. Much has happened over the past two decades to alter the manner in which governments and their agencies conduct their public business. The need today appears to be truth in government and the restoration of public confidence and not 'to prevent star chamber proceedings'...In the wake of Watergate and its aftermath, the prevention of star chamber proceedings does not appear to be lofty enough an ideal for a legislative body; and the legislature seems to have recognized as much when it passed the Open Meetings Law, embodying principles which in 1963 was the dream of a few, and unthinkable by the majority."

More recently, the Appellate Division, Second Department, unanimously affirmed a decision of Supreme Court, Nassau County, which annulled a resolution adopted by a board of education prohibiting the use of tape recorders at its meetings and directed the board to permit the public to tape record public meetings of the board [Mitchell v. Board of Education of Garden City School District, 113 AD 2d 924 (1985)]. In so holding, the Court stated that:

> "While Education Law sec. 1709(1) authorizes a board of education to adopt by-laws and rules for its government and operations, this authority is not unbridled. Irrational and unreasonable rules will not be sanctioned. Moreover, Public Officers Law sec. 107(1) specifically provides that 'the court shall have the power, in its discretion, upon good cause shown, to declare any action *** taken in violation of [the Open Meetings Law], void in whole or in part.' Because we find that a prohibition against the use of unobtrusive recording goal of a fully informed citizenry, we accordingly affirm the judgement annulling the resolution of the respondent board of education" (id. at 925).

Further, I believe that the comments of members of the public, as well as public officials, may be recorded. As stated by the court in Mitchell.

> "[t]hose who attend such meetings, who decide to freely speak out and voice their opinions, fully realize that their comments and remarks are being made in a public forum. The argument that members of the public should be protected from the use of their

> words, and that they have some sort of privacy interest in their own comments, is therefore wholly specious" (id.).

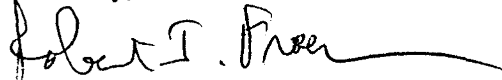
In view of the judicial determination rendered by the Appellate Division, I believe that any person may tape record open meetings of public bodies, so long as tape recording is carried out unobtrusively and in a manner that does not detract from the deliberative process.

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

Lastly, as you suggested, the Open Meetings Law applies when a quorum, a majority of the total membership of a public body, gathers for the purpose of conducting public business. If a gathering includes less than a quorum, that law does not apply. Further, there is no provision in the Open Meetings Law that requires that a gathering of less than a quorum of a public body prepare a record of or otherwise describe its discussions.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3620

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April 8, 2003

Ms. Dione Goldin

The staff of the Committee on 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 letter in which you asked whether, in my view, a board of education may "meet with [the consultant] in executive session to receive his presentation regarding superintendent semi-finalists."

Assuming that the gathering that you described involves consideration of specific candidates for the position, I believe that an executive session could properly be held. Section 105(1)(f) of the Open Meetings Law authorizes a public body to enter into executive session to discuss:

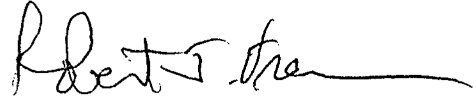
> "the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation..."

If the focus of the discussion involves consideration of the "employment history" of a "particular person" or persons, or matters leading to the "appointment [or] employment" of a particular person or persons, the provision quoted above would serve as a basis for entry into executive session.

On the other hand, when the discussion involves ancillary matters in the search process that do not focus on a "particular person", i.e., when and where to advertise the position, whether to seek candidates from New York only or out of state as well, I do not believe that there would be any ground for conducting an executive session.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO - 3621

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April 15, 2003

Mr. Doug Buchanan
Staff Writer
The Malone Telegram
469 East Main Street
Malone, NY 12953

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. Buchanan:

I have received your letter of March 26, which reached this office on March 31. You have asked whether a political caucus held by the five democrat members of the seven member Franklin County Legislature is "considered an 'official' meeting, and therefore subject to the Open Meetings Law, or...a 'chance' meeting, which is exempt."

In this regard, I offer the following comments.

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

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

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

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

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

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

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

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

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

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

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

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

Based on the foregoing, in general, either the majority or minority party members of a legislative body may conduct closed political caucuses, either during or separate from meetings of the public body. Those caucuses are exempt from the provisions of the Open Meetings Law, which, again, would mean that the Open Meetings Law does not apply.

It is emphasized that the foregoing is not intended to suggest that closed caucuses held to discuss public business represent optimal public policy or further the general goals and intent of the Open Meetings Law. I note, too, that several legislative bodies have relinquished their ability to conduct closed political caucuses when they discuss public business and have instead chosen to conduct public business in public as the law had required prior to the enactment of the amendment in 1985.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Franklin County Legislature

From: Robert Freeman
To: [redacted]
Date: 4/22/2003 4:48:24 PM
Subject: Dear Ms. Schwartzberg:

Dear Ms. Schwartzberg:

I have received your inquiry concerning the status of drafts, particularly draft resolutions.

Since you are somewhat familiar with the Freedom of Information Law, my comments will be brief. If you need additional detail, please let me know.

First, a draft prepared by or for a town officer or employee constitutes a "record" that falls within the coverage of the Freedom of Information Law as soon as it exists. Second, the characterization of a record as a "draft" is not determinative of rights of access; on the contrary, the contents of the record determine the extent to which it may be withheld, or conversely, must be disclosed.

Third, in the context of your inquiry, drafts would likely constitute "intra-agency materials" that fall within §87(2)(g). Under that provision, opinions, advice, recommendations and the like may be withheld. Therefore, in a technical sense, a draft resolution, in my view, may be withheld, for it is a proposal that has not yet been adopted or approved.

It is emphasized that there is no obligation to withhold a draft resolution, and documents of that nature are routinely disclosed, as a matter of practice or rule.
Often it may make little sense to withhold a draft resolution because the resolution will be discussed and essentially disclosed by means of discussion and deliberation at open meetings.

I note that there is what may be viewed as an inconsistency between the Freedom of Information Law and the Open Meetings Law. Again, the former permits (but does not require) a denial of access to a draft resolution; under the latter, however, there would be no basis for entry into executive session to discuss the draft resolution. That being so, while a draft resolution may be withheld, there may be little reason to do so because of its inevitable disclosure at an upcoming meeting.

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

Robert J. Freeman
Executive Director
NYS Committee on Open Government
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3623

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April 25, 2003

E-MAIL

TO: Robert Multer <RETLU1@aol.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 facts presented in your correspondence.

Dear Chairman Multer:

As you are aware, I have received your communication in which you asked whether executive sessions may properly be held by a committee of the Yates County Legislature to consider certain matters.

According to your letter, the committee was created to review vacancies as they occur, consider whether the vacancies should be filled, and to offer recommendations to the full Legislature.. You referred specifically to issues involving the District Attorney and the Sheriff and wrote that:

> "The discussion with the District Attorney involved an assistant DA and the fact that the DA stated that they would plea bargain more cases including the kinds of cases as well as the possibility of dismissal because of the delays in cases. The Sheriff discussion involved discussions about not having personnel on duty at specific times of day."

From my perspective, the only ground for entry into executive session that would be relevant in the situations that you described is §105(1)(a). That provision states that a public body may conduct an executive session to consider "matters which will imperil the public safety if disclosed." As I understand this issues, an executive session be proper with respect to one, but difficult to justify regarding the other.

The first situation concerning the position of assistant district attorney appears to pertain to the ability of staff to carry out functions in relation to matters in which persons are or have been arrested and/or in custody of law enforcement officials. While the inability to fill a vacancy might

result in a greater number of cases being plea bargained or perhaps dismissed, it seems unlikely that problems of that nature if discussed in public would "imperil the public safety." With respect to the second situation, since it involves coverage by law enforcement officials, it appears that an executive session could properly be held. If potential lawbreakers can gain the ability to know when or whether personnel are unavailable or off duty, they could tailor their activities in a manner that would circumvent effective law enforcement. If that may be the result of public consideration of the issue, I believe that §105(1)(a) could justifiably be asserted.

I hope that I have been of assistance. If you would like to discuss the matter, please do not hesitate to contact me.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-14015
OML-AO-3624

Committee Members

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April 29, 2003

Mr. Timothy M. Dodd

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. Dodd:

I have received your inquiry and appreciate your kind words. You have raised a series of questions relating to meetings of the Plattsburgh Town Board.

First, you wrote that the Town Board consists entirely of members of a single political party, and you asked whether the Board can "circumvent, the Open Meetings Law by calling a party Caucus." In this regard, judicial precedent indicates that when all of the members of a legislative body are the same political party, the public business of the Board must be conducted in public, and that a closed political caucus may be held only to discuss political party business.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I point out that the language of the decision in many ways is analogous to that of the Appellate Division in Orange County Publications, supra. Specifically, it was stated in Buffalo News that:

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

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

Based on the foregoing, I believe that consideration of the matter must focus on the overall thrust of the decision. To reiterate a statement in the Buffalo News decision: "any exemption must be narrowly construed so that it will not render Section 100 meaningless" (id., 278). Since all the members of the Board are from a single political party, based on the decision cited above, I do not believe that the Board may validly conduct a closed political caucus to discuss matters of public business. However, when the members are discussing political party business (i.e., fund raising, party leadership, etc.), a closed political caucus may in my view be appropriately held.

Second, you referred to the Board's practice of holding "pre-meetings" without notice and in a "much smaller room adjacent to the main meeting room" that "discourages public participation."

For reasons offered earlier concerning the definition of "meeting", a "pre-meeting" gathering of the Board held to discuss public business would fall within the coverage of the Open Meetings Law. Further, every meeting must be preceded by notice given to the news media and by means of posting pursuant to §104 of the law.

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

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

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

From my perspective, every provision of law, including the Open Meetings Law, should be implemented in a manner that gives reasonable effect to its intent. In my opinion, if it is known in advance of a meeting that a larger crowd is likely to attend than the usual meeting location will accommodate, and if a larger facility is available, it would be reasonable and consistent with the intent of the Law to hold the meeting in the larger facility. Conversely, assuming the same facts, I believe that it would be unreasonable to hold a meeting in a facility that would not accommodate those interested in attending.

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.

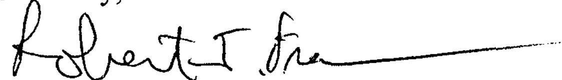
Lastly, you asked when a resolution to be considered at a meeting must be made available and whether you may submit a "standing request" for the Board's "agenda packets."

In most instances, draft or proposed resolutions are disclosed prior to or at meetings, for they are generally disclosed by means of discussion during an open meeting. However, there is nothing in either the Freedom of Information Law or the Open Meetings Law that specifies when proposed resolutions must be disclosed.

With respect to the "standing request", it has been advised that an agency is not required to honor an ongoing or prospective request for records. As you may be aware, the Freedom of Information Law pertains to existing records [see §89(3)]. Consequently, I do not believe that an agency has the ability or is required to grant or deny access to records that do not yet exist. In short the Town may choose to make its agenda packets available in the manner that you suggested, but I do not believe that it is required to do so.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3625

Committee Members

Randy A. Daniels
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May 5, 2003

Mr. Robert A. Axelrod

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. Axelrod:

I have received your letter in which you expressed "dismay" concerning your treatment during a meeting of the Board of Trustees of Rockland Community College and questioned "the Board's use of Executive Session..."

You wrote that you were elected in 2000 as President of the SUNY Faculty Council of Community Colleges (FCCC), which is a full-time two year position that requires approval from the colleges that employs the president of FCCC. You received the requisite approval and will complete your term at the end of this month. In February, you were invited to discuss your activities and accomplishments with the Board of Trustees on March 20. I do not believe that the details of your treatment by certain Board members and staff is significant in relation to the Open Meetings Law. What is significant, in my view, is that you were invited in to speak before the Board when the Board was conducting an executive session, and that your meeting with the Board occurred during that executive session.

In this regard, as you may be aware, the Open Meetings Law is based on a presumption of openness. Stated differently, a public body, such as the Board of Trustees, must conduct public business in public, unless there is a basis for entry into an executive session.

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

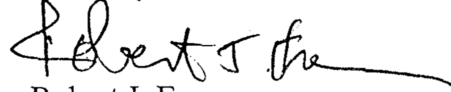
> "Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

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

In consideration of the nature of your presentation and the discussion that you described, I do not believe that there would have been any justifiable basis for the Board conducting that aspect of the meeting during an executive session.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3626

Committee Members

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May 12, 2003

Mr. Allan M. Dorman

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

Dear Mr. Dorman:

Your letter addressed to Secretary of State Daniels has been forwarded to me. As indicated above, the staff of the Committee on Open Government is authorized to respond on behalf of its members. In addition, although the Department of State serves as the secretariat for the Committee and Mr. Daniels is an *ex officio* member, he does not serve as chairman.

The issue that you raised pertains to the implementation of the Open Meetings Law by the Mayor and Board of Trustees of the Village of Islandia. In brief, you wrote with respect to a recent meeting that:

> "Mayor Frank Falco made the statement that the Board will now go into Executive Session. The Mayor did not take a vote to go into Executive Session. He only made a statement. When asked for what reason the executive session was called, the Mayor of our Village said that we could find out the reason later if we wanted to. When the Village Prosecuting Attorney, Frank N. Ambrosino, was asked for help in this matter, he refused to answer. The Attorney said in Public that he would not get involved with this."

In this regard, it is emphasized that every meeting must be convened as an open meeting, and that §102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. As such, it is clear that an executive session is not separate and distinct from an open meeting, but rather that it is a part of an open meeting.

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

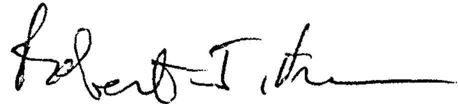
> "Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

Based on the foregoing, 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, such as the Village Board of Trustees, may not conduct an executive session to discuss the subject of its choice.

In an effort to enhance compliance with and understanding of the Open Meetings Law, copies of this response and that statute will be forwarded to the Mayor and the Board of Trustees.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Frank Falco
Board of Trustees

OML-AO-3627

From: Robert Freeman
To: [redacted]
Date: 5/19/2003 12:30:59 PM
Subject: Dear Mr. Solak:

Dear Mr. Solak:

I have received your inquiry concerning the coverage of the Open Meetings Law concerning two kinds of entities.

That statute clearly applies to meetings of a community college board of trustees. With respect to the other entity, which you characterized as "advisory" and consisting of community leaders and a student, the courts have found on several occasions that advisory bodies, other than committees consisting solely of members of a governing body, are not generally required to comply with the Open Meetings Law. That is not to suggest that they cannot hold open meetings, but rather that the law does not require that they do so.

I hope that I have been of assistance.

Robert J. Freeman
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STATE OF NEW YORK
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FOIL-AO-14040
OML-AO-3628

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May 19, 2003

Mr. Vincent Oliveri

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. Oliveri:

I have received your letter in which you sought assistance and an advisory opinion concerning your efforts in gaining access to information from or pertaining to the Long Island Power Authority (LIPA).

By way of background, you requested the service repair log of a named repairman "who made repairs to the electrical wire connectors servicing [your] home." When you were contacted by LIPA customer service representatives, on two occasions, they read the repair log entry to you. However, despite having requested it under the Freedom of Information Law, LIPA has not made the record containing the entry available to you. You added that you would also like to obtain "characteristic information on the electrical distribution system which services [your] home and asked for the name of the agency to which LIPA reports, as well as information concerning its public meetings.

In this regard, I offer the following comments.

First, the Freedom of Information Law is applicable to all agency records, including those of a public authority, 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, the repair log or similar document would, in my view, clearly constitute a record that falls within the coverage of the Freedom of Information Law.

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

In this instance, since the entry was read to you, I believe that LIPA would have waived its ability to deny access to that portion of a record. Even if that were not so, I believe that the entry would be accessible. Pertinent is §87(2)(g). While that provision potentially serves as a basis for a denial of access, due to its structure, it often requires 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. If I understand the situation accurately, the entry in the repair would consist of factual information accessible under subparagraph (i) of §87(2)(g).

With respect to the "characteristic information on the electrical distribution system which services your home", if that information exists in the form of a record or records and was prepared by LIPA, again, it would constitute intra-agency material that would appear to be factual in nature, and, therefore, would be accessible, unless a different ground for denial could justifiably be asserted. If any such record or records were not prepared by LIPA, §87(2)(g) would not apply.

Since I am unfamiliar with the nature or content of "characteristic information", I note that in some instances, depending on the degree of detail and the effects of disclosure, §87(2)(f) may be relevant in consideration of rights of access to what has become known as "critical infrastructure information." That provision permits an agency to withhold records to the extent that disclosure would "endanger the life or safety of any person."

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..."

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."

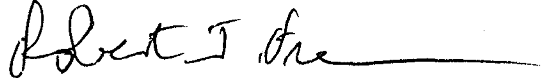
In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge 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)].

Next, the governing body of LIPA in my view clearly constitutes a "public body" required to comply with the Open Meetings Law (Public Officers Law, §§100-111). In brief, meetings of public bodies must be preceded by notice of the time and place given to the news media and by means of posting, and they must be held open to the public, unless there is a basis for entry into a closed or "executive" session.

Lastly, I know of no agency that has general oversight concerning the operations or day to day functioning of LIPA. However, pursuant to §1020 of the Public Authorities Law, it is my understanding that the Public Authorities Control Board reviews and determines certain matters concerning the fund sufficiency of LIPA bonds and provides approval regarding other than routine projects involving a cost above one million dollars.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Stanley Klimberg

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3629

Committee Members

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May 20, 2003

Ms. Tamara O'Bradovich

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

Dear Ms. O'Bradovich:

I have received your letters of April 23 and other materials relating to the Village of Tuckahoe.

You referred specifically to situations in which meetings of neighborhood associations may be attended by the Mayor and members of the Board of Trustees. At one such gathering, you indicated that the Mayor and two trustees "were introduced as mayor and trustees, located themselves together, facing the audience, heard comments and took questions from the audience." You expressed the view that the gathering should have been held in accordance with the Open Meetings Law.

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. If, for example, the members of a public body attend an event as concerned citizens, and not in their capacities or functioning as members of municipal boards, I do not believe that the gathering would constitute a "meeting" subject to the Open Meetings Law.

On the other hand, in the decision cited above, 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.).

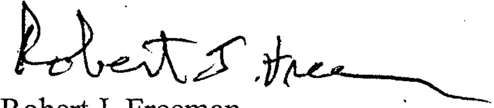
Based upon the direction given by the courts, if a majority of public body gathers for the purpose of conducting public business, collectively, as a body, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law.

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

You also raised issues relating to the swearing in of Village officials that are beyond the scope of the authority or expertise of this office. With respect to the policy regarding disclosure of records, the enclosed advisory opinion was prepared concerning that subject.

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

OML-AO-3630

Committee Members

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May 20, 2003

E-Mail

TO: Michael McGuire <[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. McGuire:

As you are aware, I have received your letter of April 24. You have questioned the authority of the Tuckahoe Village Board of Trustees to enter into executive session "under the guise of 'potential litigation.'"

In this regard, by way of background, 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.

In the context of your inquiry, 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 the potential for or fear of litigation. As the court in Weatherwax suggested, if the potential or fear of litigation served as a valid basis for entry into executive session, there could be little that remains to be discussed in public, and the intent of the Open Meetings Law would be thwarted.

I 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].

In another decision that was 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)].

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

I hope that I have been of assistance.

RJF:jm

cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO - 3631

Committee Members

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May 22, 2003

Ms. Dora Eccleston

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. Eccleston:

I have received your letter of April 16, which reached this office on April 25. You raised a variety of issues relating to the Town of Tuscarora Town Board, the Supervisor and the Town Attorney. In this regard, it is emphasized that the advisory authority of this office involves issues concerning the Freedom of Information and the Open Meetings Laws. In the context of your remarks, the matter that can be addressed involves the obligation of a certain committee to conduct its meetings in accordance with the Open Meetings Law.

As I understand the matter, a committee was created to review minutes of meetings and, in your words, "compose a policy book so newer board members and public would know past policies set by board." You added that the Supervisor indicated, again, in your words, that "the reason for the Committee was to make recommendations of certain policies they think are necessary for smooth government."

If indeed the committee has been created to make recommendations, I do not believe that it is subject to the Open Meetings Law. That statute pertains to meetings of public bodies, and §102(2) defines the phrase "public body" to mean:

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

Based on the foregoing, a public body is, in my view, an entity required to conduct public business by means of a quorum that performs a governmental function and carries out its duties collectively, as a body. In order to constitute a meeting subject to the Open Meetings Law, a majority of the total

membership of a public body, a quorum, must be present for the purpose of conducting public business. I note, too, that the definition refers to committees, subcommittees and similar bodies of a public body. Based on judicial interpretations, if a committee, for example, consists solely of members of a particular public body, it, too, would constitute a public body. For instance, in the case of a board of education consisting of seven members, four would constitute a quorum, and a gathering of that number or more for the purpose of conducting public business would be a meeting that falls within the scope of the Law. If that board designates a committee consisting of three members, the committee would itself be a public body; its quorum would be two, and a gathering of two or more, in their capacities as members of that committee, would be a meeting subject to the Open Meetings Law.

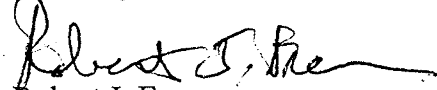
Several judicial decisions, however, indicate generally that advisory bodies, other than those consisting of members of a particular governing body, that have no power to take final action fall outside the scope of the Open Meetings Law. As stated in those decisions: "it has long been held that the mere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

In the context of your inquiry, the committee apparently does not include a majority of any particular public body, and it has no authority to take any final and binding action for or on behalf of the Town. If those assumptions are accurate, the committee, in my view, would not constitute a public body and, therefore, would not be obliged to comply with the Open Meetings Law.

The foregoing is not intended to suggest that the committee cannot hold open meetings. On the contrary, it may choose to conduct meetings in public, and similar entities have done so, even though the Open Meetings Law does not require that they do so.

I hope that the preceding commentary serves to enhance your understanding of the Open Meetings Law and that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board
Town Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3632

Committee Members

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May 22, 2003

Mr. Peter D. Costa, Jr.
County of Westchester
Department of Public Works
148 Martine Ave., Room B-7
White Plains, NY 10601-3361

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

Dear Mr. Costa:

I have received your letter of April 23 in which you inquired with respect to the "legal requirements under the open meetings law for proper postings (72 hours?)" when a meeting is postponed and rescheduled.

It appears that you raised the issue before Ms. Susan Ciamarra, Clerk of the Village of Tuckahoe, who wrote that:

> "...we know that a meeting scheduled at least a week before needs to be sent to the media 72 hours prior to the meeting and be posted as well; however, once a meeting is cancelled that rule does not apply since the second meeting scheduled is considered a new meeting and only needs to be given to the news media to the extent practicable and needs to be posted at a reasonable time prior to the meeting."

I am in general agreement with Ms. Ciamarra's statement.

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

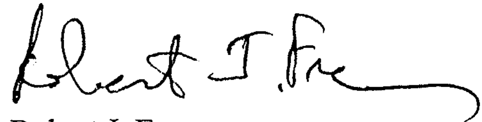
> "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before each meeting.

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

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

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Susan Ciamarra

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3633

Committee Members

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May 22, 2003

Ms. Deda Cedar
Chair
Town of Erin Planning Board
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. Cedar:

As you are aware, I have received your inquiry of April 23.

You indicated that you serve as Chair of the Town of Erin Planning Board and that the Board "set up a Comprehensive Planning Committee with the approval of the Town Board for the purpose of revising [y]our comprehensive zoning plan." The Committee consists of six members of the Planning Board and four residents, and you asked whether the Committee is subject to the Open Meetings Law.

In this regard, the Open Meetings is applicable 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."

Although it has been held that advisory bodies are not required to comply with the Open Meetings Law [see e.g., NYPRIG v. Governor's Advisory Commission, 507 NYS2d 798, aff'd with no opinion, 135 AD2d 1149, motion for leave to appeal denied, 71 NY2d 964 (1988); Poughkeepsie Newspaper v. Mayor's Intergovernmental Task Force on New York City Water Supply Needs. 145 AD2d 65 (1989)], in this instance, the Committee includes a majority of the membership of the Planning Board, which, pursuant to Town Law, must consist of five or seven members. Since six of the seven members of the Planning Board serve on the Committee, I believe that a gathering of

a majority of the Committee for the purpose of conduct public business would constitute a meeting of a public body, the Planning Board, that is subject to the Open Meetings Law.

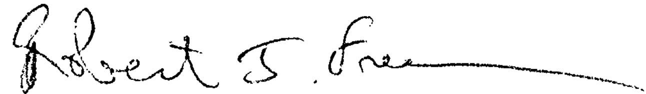
Additionally, it appears that the Committee may be a creation of law. Section 272-a of the Town Law entitled "Town comprehensive plan" includes reference to a "special board." That phrase is defined in subdivision (2)(c) of §272-a to mean:

> "...a board consisting of one or more members of the planning board and such other members as are appointed by the town board to prepare a proposed comprehensive plan and/or amendment thereto."

If the Committee is a "special board", because it would have been created pursuant to a statute, again, I believe that it would constitute a "public body" subject to the Open Meetings Law.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

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COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 14049
OML-AO - 3634

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May 23, 2003

Ms. Jolie Dunham

The staff of the Committee on 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 letter in which you raised a series of questions relating to open government laws and their implementation by the Kingston City School District.

First, you wrote that you appealed a denial of access to records on February 10, but that you received no response as of the date of your letter to this office. Pertinent is §89(4)(a) of the Freedom of Information Law, which states in relevant part that:

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

I note that it has been held that an agency's failure to determine an appeal within the statutory time may be deemed a denial of the appeal, that the person denied access is deemed to have exhausted his or her administrative remedies, and that he or she may seek judicial review of the denial by initiating a proceeding under Article 78 of the Civil Practice Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed, 57 NY2d 774 (1982)].

Second, you referred to a "'student survey' given by the district to its middle and high school students." Although the survey was apparently made available to parents and for your brief inspection, you were denied access and wrote that you were informed, in your words, that "releasing this survey would 'jeopardize its validity and reliability.'"

In this regard, the Freedom of Information Law is applicable to all records maintained by or for an agency, such as a school district, and that §86(4) defines the term "record to mean:

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

In consideration of the language quoted above, the survey would constitute a "record", irrespective of its validity or reliability, that is subject to rights of access.

So long as the survey does not identify any student, I believe that it would be accessible. From my perspective, assuming that the survey does not include information that is personally identifiable to a student, if it was made available to parents, it should be available to anyone. As early as 1976, it was held that records accessible under the Freedom of Information Law should be made equally available to any person, without regard to one's status or interest [Burke v. Yudelson, 51 AD2d 673; see also Farbman v. New York City, 62 NY2d 75 (1984)]. Further, when records are available for inspection, they are also available for copying. In brief, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available for inspection and copying, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Insofar the survey may identify a student, relevant is the initial ground for denial, §87(2)(a), which pertains to records that are "specifically exempted from disclosure by state or federal statute." In the context of your inquiry, insofar as disclosure of the records in question would identify a student, I believe that they must be withheld. A statute that exempts records from disclosure is the Family Education Rights and Privacy Act (20 U.S.C. section 1232g), which is commonly known as "FERPA." In brief, FERPA applies to all educational agencies or institutions that participate in grant programs administered by the United States Department of Education. As such, FERPA includes within its scope virtually all public educational institutions and many private educational institutions. The focal point of the Act is the protection of privacy of students. It provides, in general, that any "education record," a term that is broadly defined, that is personally identifiable to a particular student or students is confidential, unless the parents of students under the age of eighteen waive their right to confidentiality, or unless a student eighteen years or over similarly waives his or her right to confidentiality. Further, the federal regulations promulgated under FERPA define the phrase "personally identifiable information" to include:

> "(a) The student's name;
> (b) The name of the student's parents or other family member;
> (c) The address of the student or student's family;
> (d) A personal identifier, such as the student's social security number or student number;

(e) A list of personal characteristics that would make the student's identity easily traceable; or

(f) Other information that would make the student's identity easily traceable" (34 CFR Section 99.3).

Based upon direction provided by FERPA and the regulations that define "personally identifiable information", references to students' names or other aspects of records that would make a student's identity easily traceable must in my view be withheld in order to comply with federal law.

On the other hand, if the survey does not identify students, it would appear to be accessible, for none of the grounds for denial access would appear to be accessible. I note that "statistical or factual tabulations or data" contained within internal governmental communications are accessible under paragraph (i) of §87(2)(g).

Third, with respect to the disclosure of information that is characterized as confidential, 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)].

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 indicated earlier, FERPA generally prohibits an educational agency from disclosing education records or information derived from those records that are identifiable to a student, unless the parents of the student consent to disclosure. In the context of the Open Meetings Law, a discussion concerning a student would constitute a matter made confidential by federal law and would be exempted from the coverage of that statute [see Open Meetings Law, §108(3)]. In the context of the Freedom of Information Law, an education record would be specifically exempted from disclosure by statute in accordance with §87(2)(a). In both contexts, I believe that a board of education, its members and school district

employees would be prohibited from disclosing, because a statute requires confidentiality. In other situations, even though a record *may* be withheld or information is derived from an executive session, I do not believe that there would be a prohibition regarding disclosure.

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

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.

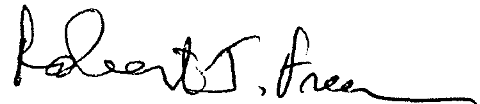
Lastly, you raised questions relating to the District's proposed budget. The key provision in my view is §1716 of the Education Law, entitled "Estimated expenses for ensuing year." Subdivision (1) of that provision requires that the Board present "a detailed statement in writing", specifying the amounts needed for school purposes in the ensuing year. That statement must be made available at least fourteen days prior to the vote on the budget. However, in consideration of the definition of "record" cited earlier, I believe that the proposed budget and related records are accessible under the Freedom of Information Law as soon as they exist.

I note that subdivision (4) requires that the proposed budget "shall be presented in three components: a program component, a capital component and an administrative component which shall be separately delineated...." and states in part that:

> "The program component shall include, but need not be limited to, all program expenditures of the school district, including the salaries and benefits of teachers and any school administrators or supervisors who spend a majority of their time performing teaching duties, and all transportation operating expenses. The capital component shall include, but need not be limited to, all transportation capital, debt service, and lease expenditures; costs resulting from judgements in tax certiorari proceedings or the payment of awards from court judgments, administrative orders or settled or compromised claims; and all facilities costs of the school district, including facilities lease expenditures, the annual debt service and total debt for all facilities financed by bonds and notes of the school district, and the costs of construction, acquisition, reconstruction, rehabilitation or improvement of school buildings, provided that such budget shall include a rental, operations and maintenance section that includes base rent costs, total rent costs, operation and maintenance charges, cost per square foot for each facility leased by the school district, and any and all expenditures associated with custodial salaries and benefits, service contracts, supplies, utilities, and maintenance and repairs of school facilities."

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Bernard A. Feeney
Carol A. Bell

STATE OF NEW YORK
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OML-AO-3635

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Dominick Tocci

Executive Director

Robert J. Freeman

June 3, 2003

E-MAIL

TO: Bonnie Barkley [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. Barkley:

As you are aware, I have reviewed your letter of May 12. You asked whether a member of the public may tape record meetings of a board of education.

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

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

Notwithstanding Davidson, the Committee on Open Government advised that the use of tape recorders should not be prohibited in situations in which the devices are unobtrusive, for the presence of such devices would not detract from the deliberative process. In the Committee's view, a rule prohibiting the use of unobtrusive tape recording devices would not be reasonable if the presence of such devices would not detract from the deliberative process.

This contention was initially confirmed in a decision rendered in 1979. That decision arose when two individuals sought to bring their tape recorders at a meeting of a school board in Suffolk

County. The school board refused permission and in fact complained to local law enforcement authorities who arrested the two individuals. In determining the issues, the court in People v. Ystueta, 418 NYS 2d 508, cited the Davidson decision, but found that the Davidson case:

> "was decided in 1963, some fifteen (15) years before the legislative passage of the 'Open Meetings Law', and before the widespread use of hand held cassette recorders which can be operated by individuals without interference with public proceedings or the legislative process. While this court has had the advantage of hindsight, it would have required great foresight on the part of the court in Davidson to foresee the opening of many legislative halls and courtrooms to television cameras and the news media, in general. Much has happened over the past two decades to alter the manner in which governments and their agencies conduct their public business. The need today appears to be truth in government and the restoration of public confidence and not 'to prevent star chamber proceedings'...In the wake of Watergate and its aftermath, the prevention of star chamber proceedings does not appear to be lofty enough an ideal for a legislative body; and the legislature seems to have recognized as much when it passed the Open Meetings Law, embodying principles which in 1963 was the dream of a few, and unthinkable by the majority."

More recently, the Appellate Division, Second Department, unanimously affirmed a decision of Supreme Court, Nassau County, which annulled a resolution adopted by a board of education prohibiting the use of tape recorders at its meetings and directed the board to permit the public to tape record public meetings of the board [Mitchell v. Board of Education of Garden City School District, 113 AD 2d 924 (1985)]. In so holding, the Court stated that:

> "While Education Law sec. 1709(1) authorizes a board of education to adopt by-laws and rules for its government and operations, this authority is not unbridled. Irrational and unreasonable rules will not be sanctioned. Moreover, Public Officers Law sec. 107(1) specifically provides that 'the court shall have the power, in its discretion, upon good cause shown, to declare any action *** taken in violation of [the Open Meetings Law], void in whole or in part.' Because we find that a prohibition against the use of unobtrusive recording goal of a fully informed citizenry, we accordingly affirm the judgement annulling the resolution of the respondent board of education" (id. at 925).

Further, I believe that the comments of members of the public, as well as public officials, may be recorded. As stated by the court in Mitchell:

> "[t]hose who attend such meetings, who decide to freely speak out and voice their opinions, fully realize that their comments and remarks are being made in a public forum. The argument that members of the public should be protected from the use of their words, and that they have some sort of privacy interest in their own comments, is therefore wholly specious" (id.).

In view of the judicial determination rendered by the Appellate Division, I believe that any person may tape record open meetings of public bodies, so long as tape recording is carried out unobtrusively and in a manner that does not detract from the deliberative process.

I point out that the same conclusion was reached last month by the Appellate Division in a decision involving the use of a video recorder at a meeting of a board of education (Csorny v. Shorham-Wading River Central School District, NYLJ, May 20, 2003).

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3636

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June 3, 2003

Ms. Maria Peterson

The staff of the Committee 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. Peterson:

As you are aware, I have received your letter of May 1. Based on its content and our discussion, your inquiry involves the sufficiency of a motion for entry into executive session expressed at meetings of the Highland Central School District Board of Education. Specifically, you referred to a motion to "discuss teacher contracts."

In this 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 ensuing provisions of §105(1) specify and limit the subjects that may appropriately be considered during an executive session.

In my view and in consideration of the intent of the Open Meetings Law, a motion to enter into executive session must include information sufficient to enable members of a public body and others in attendance to 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.

A motion to discuss "teacher contracts" in my opinion is inadequate. The provision that relates to the subject matter under consideration, §105(1)(e), 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 or involving a public employee union.

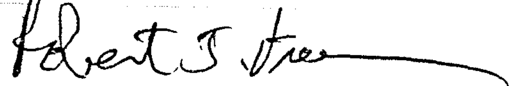
In terms of a motion to enter into an executive session held pursuant to §105(1)(e), it has been held that:

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

A proper motion might be: "I move to enter into executive session to discuss the collective bargaining negotiations involving the teachers union." I believe that a motion of that nature would indicate that the Board seeks to discuss a subject that may properly be considered during an executive session.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

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COMMITTEE ON OPEN GOVERNMENT FOIL-AO-14057
OML-AO-3637

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June 3, 2003

Ms. Kathy Snyder

The staff of the Committee on 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. Snyder:

As you are aware, I have received your letter of May 7. You wrote that the Village of Brockport "hired a consultant for environmental matters approx one and a half years ago", but that "[t]his employment was never approved at an open meeting." Additionally, although efforts have been made to obtain the consultant's "resume and/or qualifications", the denials of those requests indicate that the Village does "not maintain such a record or that such a record does not exist."

In this regard, I offer the following comments.

First, assuming that only the Village Board of Trustees was empowered to hire, retain or enter into a contract with the consultant, I believe that it could validly have done so only at a meeting of the Board. The meeting would have been required to have involved the convening of the Board, and an affirmative vote of a majority of its total membership. When action is taken in public, the Open Meetings Law, §106, requires that minutes reflective of the nature of the action taken, the date and the vote of each member be prepared and made available to the public within two weeks. If action was taken during an executive session, minutes consisting of the same information in this instance would have been required to have been prepared and made available within one week.

If action was taken by the Board is private, in violation of the Open Meetings Law, and if no minutes reflective of this action taken were prepared, any aggrieved person would have the ability to challenge the action pursuant to §107 of the Open Meetings Law by initiating a proceeding under Article 78 of the Civil Practice Law and Rules. In such a proceeding, a court would have discretionary authority, upon good cause shown, to nullify the action taken in contravention of the Open Meetings Law.

Second, with respect to a resume or similar or related records, I note that the Freedom of Information Law is expansive in its coverage. That statute is applicable to all agency records, such as those of a Village, regardless of the physical location of the records. Section 86(4) of defines the term "record" to include:

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

Therefore, if a record is transmitted to a Village official in conjunction with that person's duties, I believe that it would fall within the coverage of the Freedom of Information Law, whether it is maintained in a Village office, at the home of a Village official or, for example, at the Village Attorney's private office.

It is emphasized, however, that if no resume or similar record is maintained by or for the Village, i.e., if no such record exists, the Freedom of Information Law would not apply. 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.

If a resume or similar documentation indicating the consultant's qualifications exists, it would likely be available in part.

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 resumes and similar records is §87(2)(b). That provision permits an agency to withhold records or portions of records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." Additionally, §89(2)(b) includes a series of examples of unwarranted invasions of personal privacy.

In a decision rendered by the Court of Appeals, the state's highest court, reference was made to the authority to withhold "certain personal information about private citizens" [see Federation of New York State Rifle and Pistol Clubs, Inc. v. New York City Police Department, 73 NY2d 92 (1989)]. In another decision rendered by the Court of Appeals and a discussion of "the essence of the exemption" concerning privacy, the Court referred to information "that would ordinarily and reasonably regarded as intimate, private information" [Hanig v. State Dept. of Motor Vehicles, 79 NY 2d 106, 112 (1992)]. In view of the direction given by the state's highest court, again, I believe that the authority to withhold the information based upon considerations of privacy is restricted to those situations in which records contain *personal* information about natural persons.

Several judicial decisions, both New York State and federal, pertain to records about individuals in their business or professional capacities and indicate that the records are not of a "personal nature." For instance, one involved a request for the names and addresses of mink and ranch fox farmers from a state agency (ASPCA v. NYS Department of Agriculture and Markets, Supreme Court, Albany County, May 10, 1989). In granting access, the court relied in part and quoted from an opinion rendered by this office in which it was advised that "the provisions concerning privacy in the Freedom of Information Law are intended to be asserted only with respect to 'personal' information relating to natural persons". The court held that:

> "...the names and business addresses of individuals or entities engaged in animal farming for profit do not constitute information of a private nature, and this conclusion is not changed by the fact that a person's business address may also be the address of his or her residence. In interpreting the Federal Freedom of Information Law Act (5 USC 552), the Federal Courts have already drawn a distinction between information of a 'private' nature which may not be disclosed, and information of a 'business' nature which may be disclosed (see e.g., Cohen v. Environmental Protection Agency, 575 F Supp. 425 (D.C.D.C. 1983)."

In another decision, Newsday, Inc. v. New York State Department of Health (Supreme Court, Albany County, October 15, 1991)], data acquired by the State Department of Health concerning the performance of open heart surgery by hospitals and individual surgeons was requested. Although the Department provided statistics relating to surgeons, it withheld their identities. In response to a request for an advisory opinion, it was advised by this office, based upon the New York Freedom of Information Law and judicial interpretations of the federal Freedom of Information Act, that the names should be disclosed. The court agreed and cited the opinion rendered by this office.

Like the Freedom of Information Law, the federal Act includes an exception to rights of access designed to protect personal privacy. Specifically, 5 U.S.C. 552(b)(6) states that rights conferred by the Act do not apply to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." In construing that provision, federal courts have held that the exception:

> "was intended by Congress to protect individuals from public disclosure of 'intimate details of their lives, whether the disclosure be of personnel files, medical files or other similar files'. Board of Trade of City of Chicago v. Commodity Futures Trading Com'n supra, 627 F.2d at 399, quoting Rural Housing Alliance v. U.S. Dep't of Agriculture, 498 F.2d 73, 77 (D.C. Cir. 1974); see Robles v. EOA, 484 F.2d 843, 845 (4th Cir. 1973). Although the opinion in Rural Housing stated that the exemption 'is phrased broadly to protect individuals from a wide range of embarrassing disclosures', 498 F.2d at 77, the context makes clear the court's recognition that the disclosures with which the statute is concerned are those involving matters of an intimate personal nature. Because of its intimate

> personal nature, information regarding 'marital status, legitimacy of children, identity of fathers of children, medical condition, welfare payment, alcoholic consumption, family fights, reputation, and so on' falls within the ambit of Exemption 4. Id. By contrast, as Judge Robinson stated in the Chicago Board of Trade case, 627 F.2d at 399, the decisions of this court have established that information connected with professional relationships does not qualify for the exemption" [Sims v. Central Intelligence Agency, 642 F.2d 562, 573-573 (1980)].

In Cohen, the decision cited in ASPCA v. Department of Agriculture and Markets, supra, it was stated pointedly that: "The privacy exemption does not apply to information regarding professional or business activities...This information must be disclosed even if a professional reputation may be tarnished" (supra, 429). Similarly in a case involving disclosure of the identities of those whose grant proposals were rejected, it was held that:

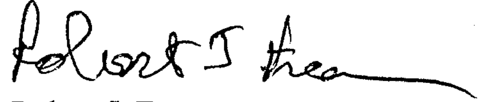
> "The adverse effect of a rejection of a grant proposal, if it exists at all, is limited to the professional rather than personal qualities of the applicant. The district court spoke of the possibility of injury explicitly in terms of the applicants' 'professional reputation' and 'professional qualifications'. 'Professional' in such a context refers to the possible negative reflection of an applicant's performance in 'grantsmanship' - the professional competition among research scientists for grants; it obviously is not a reference to more serious 'professional' deficiencies such as unethical behavior. While protection of professional reputation, even in this strict sense, is not beyond the purview of exemption 6, it is not at its core" [Kurzon v. Department of Health and Human Services, 649 F.2d 65, 69 (1981)].

It is clear in my opinion that items of a personal nature, such as a social security number, home address, marital status and the like may be withheld. Those kinds of details are irrelevant to the performance of one's duties as an employee or contractor retained by an agency. Further, §89(2)(b)(i) refers to the ability to withhold one's employment history. In my view, and based on Kwasnik v. City of New York and City University of New York [691 NYS2d 525, 262 AD2d 171 (1999)[, employment history refers to a person's private employment, and indications of the names of a person's private employers may be withheld. However, the indication of a person's prior public employment has been found to be available (see Kwasnik, supra), as has one's general educational background [see Ruberti, Girvin & Ferlazzo v. NYS Division of State Police, 641 NYS2d 411, 218 AD2d 494 (1996)].

A license, a permit or a certification is typically conferred by a government agency, and insofar as a Village record includes reference to a license, permit or certification, I believe that the Village would be required to disclose to comply with the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees

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COMMITTEE ON OPEN GOVERNMENT

OML-AO-3638

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June 9, 2003

Mr. George R. Frantz

The staff of the Committee 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. Frantz:

I have received your letter concerning a public hearing held by the City of Ithaca Landmarks Preservation Commission on May 6 that began at 7 p.m. In brief, you indicated that you attended the hearing but left at approximately 7:40 to make a phone call. When you attempted to return to hearing, the doors were locked, and you could not get back into the building until "about 8:10." In relation to the foregoing, you raised the following question:

> "Did the Commission violate the law by voting on matters before it, in that same meeting, knowing full well that the doors to the building were locked and that any member of the public who arrived after 7:40 - - possibly even earlier than that time - - was barred from attending the proceedings?"

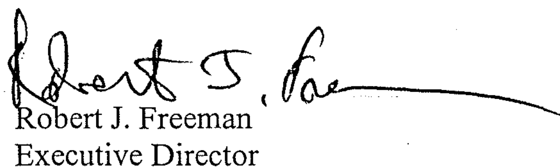
In an effort to learn more of the matter, I contacted the City Attorney, Ms. Norma Schwab, who is familiar with the matter. Based on my conversation with her, it clear that there was neither an intent to exclude any member of the public from the hearing, nor was there knowledge that the building was locked.

She indicated that the doors were open and blocked from being closed, and that at least 25 people attended. However, at some point, the doors were inadvertently closed and automatically locked. No City official "knew full well" that the public could not enter the building; on the contrary, Ms. Schwab stressed that the doors would have been reopened had it been known that they had closed. Since you missed a portion of the hearing, she indicated that you were offered a tape recording of the hearing and added that a second hearing was held during which you and others were given the opportunity to speak.

In consideration of the action taken by the City to ensure that you and others could have heard statements or testimony that might have been missed and to enable you to express your opinions, and in view of the fact that your exclusion was unintentional, I believe that the City and the Commission effectively corrected the problem. That being so, from my perspective, the Commission did not engage in what could be characterized as a violation of law.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Norma Schwab, City Attorney

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

OML AO - 3639

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June 12, 2003

Ms. Bertha Jenson

The staff of the Committee on 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. Jenson:

I have received your letter of May 21 in which you expressed concern with respect to the location of meetings of the Board of Trustees of the Village of Deposit.

According to your letter, the Board had held its meetings at the fire hall. However, a new facility is being constructed, and apparently the Board can no longer meet at that location. You wrote that the Board seeks to conduct its meetings "upstairs at the Village Hall." That building, however, is not "handicapped accessible."

In this regard, subdivision (a) of §103 of the Open Meetings Law states in relevant part that "Every meeting of a public body shall be open to the general public..." Subdivision (b) provides that:

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

The same direction appears in §74-a of the Public Officers Law regarding public hearings. Based upon those provisions, there is no obligation upon a public body to construct a new facility or to renovate an existing facility to permit barrier-free access to physically handicapped persons. However, I believe that the law does impose a responsibility upon a public body to make "all reasonable efforts" to ensure that meetings and hearings are held in facilities that permit barrier-free access to physically handicapped persons. Therefore, if, for example, the Board has the capacity to hold its meetings in a facility that is accessible to handicapped persons, I believe that the meetings should be held in the location that is most likely to accommodate the needs of those persons.

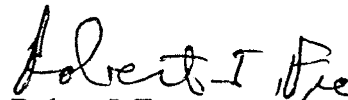
I note that in 1977, the initial year of the implementation of the Open Meetings Law, judicial direction was consistent with the advise offered here. Specifically, it was held that if a public body has the ability to conduct meetings in a location that is barrier free accessible, it is required to do so to comply with the Open Meetings Law [Fenton v. Randolph, 400 NYS 2d 987 (1977)].

It has been suggested in the past that a person who cannot attend a meeting held on a second floor should inform a public body in advance of his or her intention to attend so that appropriate arrangements can be made to transport that person to the meeting. Nevertheless, requiring handicapped persons who could not attend a meeting on the second floor to call in advance of a meeting is in my view unreasonable and inconsistent with law and would provide an impediment with respect to handicapped persons that does not exist with regard to others. There may be any number of reasons why a person may be precluded from notifying the Village of his or her intent to attend a meeting in advance of a meeting. For instance, an individual may not be aware of a meeting until just prior to the meeting; a person may not know so far in advance that he or she would want to attend; a handicapped person may not know if transportation can be arranged, etc. In short, to fully comply with the Open Meetings Law, I believe that every meeting subject to that statute should be convened and held in a barrier-free accessible facility.

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

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO- 14072
OML-AO-3640

Committee Members

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June 12, 2003

Ms. Regina Riely
United Pro-Life Committee on Gannett

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. Riely:

I have received your letter of May 16. You wrote that the Chairman of the Westchester Medical Center Hospital Board has failed to respond to your requests made under the Freedom of Information Law. In addition, although you offered no specifics, you contend that the Board conducts executive sessions inappropriately.

In this regard, I offer the following comments.

First, pursuant to regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), each agency is required 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, and requests should ordinarily be made to that person. While I believe that the Chairman should have responded to your requests or forwarded your requests to the records access officer, it is suggested that you might resubmit your requests to the records access officer.

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.

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)].

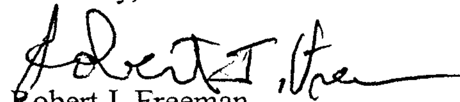
Lastly, with respect to meetings of the Board, I point out that every meeting must be convened as an open meeting, and that §102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. As such, it is clear that an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

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

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

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Gene Capello, Chairman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML AO - 3641

Committee Members

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June 12, 2003

Ms. Mary Thill
Co-Editor
Adirondack Life Magazine
P.O. Box 410
Jay, NY 12491

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

Dear Ms. Thill:

I have received your letter in which you questioned the status of certain gatherings in relation to the Open Meetings Law. You wrote that:

> "The New York State Department of Environmental Conservation (DEC) Region 5 is facilitating meetings of citizens it has selected to participate in what it calls a 'discussion group' to provide input as it develops management policies for the Saranac Lake Wild Forest.
>
> "The DEC has previously convened a 'citizen advisory committee' to serve a similar function for another parcel of Forest Preserve. However, meetings of the citizen advisory committee were open to the public; meetings of the discussion group are not."

It is your view that "the meetings of these groups, no matter how they are characterized, should be open to the public since public business is being conducted." Nevertheless, based on judicial decisions, I do not believe that the discussion group is required to comply with the Open Meetings Law. In this regard, I offer the following comments.

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

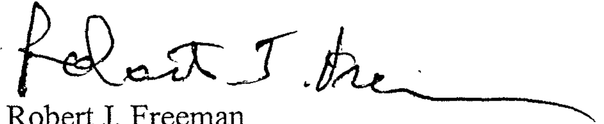
Several judicial decisions, however, indicate generally that advisory bodies, other than those consisting of members of a particular governing body, that have no power to take final action fall outside the scope of the Open Meetings Law. As stated in those decisions: "it has long been held that the mere 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 discussion group does not consist of members of a public body, and since it 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 group cannot hold open meetings. On the contrary, it may choose to conduct meetings in public, and similar entities have done so, even though the Open Meetings Law does not require that they do so.

I hope that the preceding commentary serves to enhance your understanding of the Open Meetings Law and that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: David Winchell

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-14077
OML-AO-3642

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June 12, 2003

Mr. Jerome A. Mirabito, Esq.
Fulton Savings Bank
75 South First Street
Fulton, NY 13069

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. Mirabito:

I have received your letter of May 23 and the materials attached to it. Your inquiry involves the status of the board of directors of the Fulton Community Revitalization Corporation ("the FCRC") under the Open Meetings Law.

You wrote that the FCRC has been asked by the City of Fulton to:

> "1. Employ a person(s) who will be in charge of implementation of the comprehensive plan and report to the legislative body on a periodic basis as to the progress; and
>
> 2. Seek private funding and public funding/grants to retain personnel to implement the comprehensive plan."

You added that it is expected that the board will consist of eleven to thirteen members and include the Mayor and President of the Common Council of the City of Fulton, and perhaps the Executive Director of the City's Community Development Agency. No other members of the Board "will be voting members of the executive branch of the legislative branch of the City of Fulton."

A review of FCRC's certificate of incorporation and its by-laws indicate that it is a not-for-profit corporation and that eligibility for membership on the board is conditioned on residence in the City or "some interest in the City which relate to the purposes of the Corporation..." One-third of the directors are elected at an annual meeting by a majority of the directors then in office. There is nothing in the provisions specifying that the board must include City officials, their representatives or their designees.

In this regard, in general, the Open Meetings Law and its companion, the Freedom of Information Law, are applicable to governmental entities, including not-for-profit corporations that are, in essence, creations or extensions of government.

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

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

In 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, 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 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).

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."

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).

As I understand it by-laws, FCRC has a relationship with government, but its purposes are not exclusively governmental in nature. Further, although two and perhaps three members of the FCRC board are expected to be City officials, the by-laws do not require that any board member be a City official. Further, City government has no official role in the designation or selection of members of the board. If my understanding is accurate, the FCRC board would not constitute a "public body", and its meetings, therefore, would not be subject to the Open Meetings Law.

Similarly, I do not believe that the FCRC would constitute an "agency" that falls within the coverage of that statute. However, some of its records likely would be subject to rights of access conferred by that statute.

The Freedom of Information Law is applicable to agency records, and based on the definition of "agency" cited earlier, the City of Fulton clearly falls within the scope of that law. Significant in this instance is the definition of "record." Section 86(4) defines that term 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."

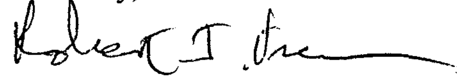
Based on the foregoing, the Court of Appeals has found that documents maintained by a not-for-profit corporation providing services for a branch of the State University were kept on behalf of the University and constituted agency "records" falling within the coverage of the Freedom of Information Law. 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.

Further, due to the breadth of the definition, when records involving FCRC come into possession of City officials, I believe that they would constitute agency records that fall within the coverage of the Freedom of Information Law.

In sum, it does not appear that the FCRC is an agency for purposes of the Freedom of Information Law or a public body subject to the Open Meetings Law. Nevertheless, records maintained by the City of Fulton or for the City pursuant to its relationship with the FCRC would, in my opinion, be subject to rights of access conferred by the Freedom of Information Law.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Mayor, City of Fulton
President of the Common Council
Carol Rutledge

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14079
OML-AO-3643

Committee Members

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June 16, 2003

E-MAIL

TO: Toni Delmonte <tdf@daddandnelson.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. Delmonte:

I have received your letter in which you questioned the status of a "private, nonprofit hospital" under the Open Meetings Law.

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. That being so, based on your description of the hospital as private, it does not appear that its governing body would constitute a public body required to comply with the Open Meetings Law.

I note that the companion of the Open Meetings Law, the Freedom of Information Law, is applicable to all government agency records. While the hospital, a private entity, is not subject to that statute, records submitted by or pertaining the hospital that are maintained by a municipal or state agency fall within the coverage of the Freedom of Information Law and would be subject to rights of access.

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

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO - 14084
OML-AO - 3644

Committee Members

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June 18, 2003

Ms. Stephanie Kushner

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. Kushner:

I have received our letter in which you questioned the propriety of a response to your request for records of the East Williston School District.

According to your letter, your challenge to the nomination of a candidate for the Board of Education was denied by the "nominating petition Review Board and the School Board." Although you obtained the Review Board's written decision and were permitted to inspect minutes of the Board of Education meeting during which Board rendered its decision, your were not permitted to obtain a copy of the minutes, for they had not been "accepted" by the Board. Further, you wrote that "the portion of the written decision of the Review Board given to [you] did not contain the basis on which they made their decision, which, subsequently, the School Board cited as what they used to make their decision." That portion of the record was withheld on that ground that it is "intra-agency information not foilable."

In this regard, I offer the following comments.

First, it is emphasized that the Freedom of Information Law is expansive in its scope, for it pertains to all agency records, such as those of a school district, and defines the term record expansively in §86(4) 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, once information exists in some physical form, i.e., a draft, or "unaccepted" minutes, it constitutes a "record" subject to rights conferred by the Freedom of Information Law.

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

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

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

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

Third, returning to the Freedom of Information Law, when records are available under that law, they are available for inspection and copying. Further, §89(3) states that an agency must make a copy of an accessible record upon payment of or offer to pay the requisite fee, which cannot exceed twenty-five cents per photocopy. In short, the minutes, irrespective of whether they were "accepted" or approved should, in my opinion, have been copied upon request.

With respect to the portion of the record that indicated the basis of the decision, I agree that it may be characterized as "intra-agency material." However, due to the structure of the provision pertaining to intra-agency materials, it often requires disclosure. Specifically, §87(2)(g) authorizes an agency to withhold records that:

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

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

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

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

With respect to the substance of §87(2)(g) and the capacity to withhold records similar to that at issue, it has been held that:

> "There is no exemption for final opinions which embody an agency's effective law and policy, but protection by exemption is afforded for all papers which reflect the agency's group thinking in the process of working out that policy and determining what its law ought to be. Thus, an agency may refuse to produce material integral to the agency's deliberative process and which contains opinions, advice, evaluations, deliberations, policy formulations, proposals, conclusions, recommendations or other subjective matter (National Labor Relations Bd. v. Sears, Roebuck & Co., supra, pp 150-153; Wu v. National Endowment for Humanities, 460 F2d 1030, 1032-1033, cert den 410 US 926). The exemption is intended to protect the deliberative process of government, but not purely factual deliberative material (Mead Data Cent. v United States Dept. of Air Force, 566 F2d 242, 256, supra). While the purpose of the exemption is to encourage the free exchange of ideas among government policy-makers, it does not authorize an agency to throw a protective blanket over all information by casting it in the form of an internal memo (Wu v. National Endowment for Humanities, supra, p1033). The question in each case is whether production of the contested document would be injurious to the consultative functions of government that the privilege of nondisclosure protects..." [Miracle Mile Associates v. Yudelson, 68 AD 2d 176, 182-183; motion for leave to appeal denied, 48 NY 2d 706 (1979)].

Insofar as intra-agency materials in which members of the Board of Education, the Review Board or staff expressed their opinions in relation to Board's final decision, I believe that those records ordinarily may be withheld. However, insofar as the document in question includes opinions or

recommendations adopted by the Board and reflective of the Board's collective determination, it would, in my view, be available.

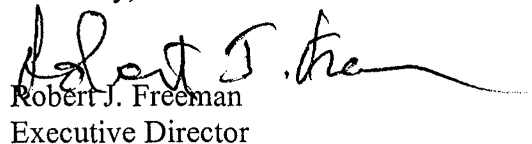
A decision rendered in Nassau County indicates that a record adopted by a decision-maker as the agency's determination is accessible under §87(2)(g)(iii). In Miller v. Hewlett-Woodmere Union Free School District #14 [Supreme Court, Nassau County, NYLJ, May 16, 1990], the court wrote that:

> "On the totality of circumstances surrounding the Superintendent's decision, as present in the record before the Court, the Court finds that petitioner is entitled to disclosure. It is apparent that the Superintendent unreservedly endorsed the recommendation of the Term [sic; published as is], adopting the reasoning as his own, and made his decision based on it. Assuredly, the Court must be alert to protecting 'the deliberative process of the 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 Construction Corp. v. Stubing, 82 A.D. 2d 546, 549 [2d Dept. 1981], but the Court bears equal responsibility to ensure that final decision makers are accountable to the public. When, as here, a concord exists as to intraagency views, when deliberation has ceased and the consensus arrived it represents the final decision, disclosure is not only desirable but imperative for preserving the integrity of governmental decision making. The Team's decision no longer need be protected from the chilling effect that public exposure may have on principled decisions, but must be disclosed as the agency must be prepared, if called upon, to defend it."

In sum, I do not believe that §87(2)(g) may serve as a basis for withholding to the extent that the documentation in question represents a final agency determination. If that is the case, I believe that it would be accessible under §87(2)(g)(iii).

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14086
OML-AO-3615

Committee Members

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June 18, 2003

Mr. Michael A. Kless

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

Dear Mr. Kless:

I have received your letter of May 30 in which you asked whether a newly created control board in the City of Buffalo will be subject to "any special rules" or whether "the normal rules relating to freedom of information and open meetings apply."

In this regard, the Freedom of Information Law is applicable to agency records, and §86(3) of that statute defines the term "agency" to include:

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

If the control board in Buffalo is typical of others, it would constitute an agency and would, therefore, but subject to the Freedom of Information Law.

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

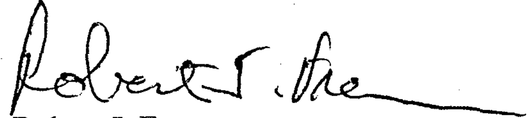
> "...any entity for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction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

In my view, the control board would constitute a public body required to comply with the Open Meetings Law.

In short, in both instances, the control board would be subject to the same rules as other agencies and public bodies, unless there is statutory direction to the contrary.

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-3646

Committee Members

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June 23, 2003

Mr. John Kwasnicki

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

Dear Mr. Kwasnicki:

As you are aware, I have received your letter of June 9. You indicated that you requested minutes of meetings of the Board of Trustees of the Village of Sloatsburg and were informed that the minutes are maintained on tape. You questioned whether there must be written minutes of meetings.

In this regard, first, while a tape recording would likely contain the elements of minutes, I believe that minutes should be nonetheless reduced to writing in order that they constitute a permanent, written record that can be viewed by the public. Perhaps just as important, a municipality often might need a permanent written record readily accessible to its officials who must refer to or rely upon the minutes in the performance of their duties. I point out, too, that in an opinion rendered by the State Comptroller, it was found that, although tape recordings may be used as an aid in compiling minutes, they do not constitute the "official record" (1978 Op. St. Compt. File #280).

I note that the State Archives and Records Administration, pursuant to provisions of the Arts and Cultural Affairs Law, develops schedules indicating minimum retention periods for various kinds of records. A town or village clerk, in that person's capacity as "records management officer", would have a copy of the retention schedule, which indicates that tape recordings of meetings must be retained for a minimum of four months. In contrast, minutes of meetings, presumably written minutes, must be kept permanently according to the schedule.

Second, the Open Meetings Law provides direction concerning the content of minutes and the time within which they must be prepared. Section 106 provides that:

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

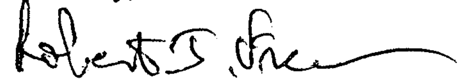
> 2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.
>
> 3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such 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, a public body, such as a village board of trustees, has two weeks from a meeting to prepare minutes and make them available.

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

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Thomas Bollato, Village Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3647

Committee Members

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June 25, 2003

Ms. Elaine Herrick

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. Herrick:

Your letter addressed to David Treacy of this office has been forwarded to me for response.

According to your letter, the Elma Town Board recently held a meeting and hearing concerning a large development. Because a petition containing the signatures of six hundred residents opposed to the plan was submitted to the Board in advance of the event, it is your belief that the Board was aware in advance that the Town Hall would be too small to accommodate those interested in attending or expressing their opinions. You added that the Supervisor "closed the hearing at 8:29 p.m. with only 16 people giving their input while the rest of us, out in the hall, on the stairway and out the door couldn't hear the vote being called for before we had our chance to speak."

You have asked that I prepare an opinion advising the Supervisor that "he should hold another hearing in a place large enough to accommodate all those wanting to participate."

In this regard, it is emphasized that the authority of this office is purely advisory and that the Committee on Open Government is not empowered to direct a government agency or official to follow a certain course of action. However, in an effort to assist you, I offer the following comments.

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.

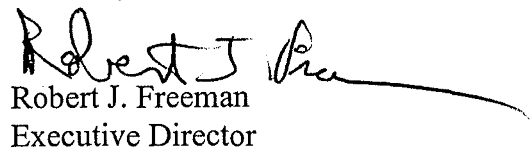
From my perspective, every provision of law, including the Open Meetings Law, should be implemented in a manner that gives reasonable effect to its intent. In my opinion, if it is known in advance of a meeting that a larger crowd is likely to attend than the usual meeting location will accommodate, and 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.

With respect to the closing of the hearing, I believe that the purpose of holding a public hearing is to provide those interested in speaking or expressing a point of view to have a reasonable opportunity to do so. I am unaware of when the hearing began, the number of those who spoke, or whether those who did speak represented the views of all the residents who attended or who wanted to speak. If, however, a reasonable opportunity to be heard or to express opinions or points of view was not offered, I would agree with your inference that a second hearing should be held, presumably in a location that can better accommodate those desiring to attend or speak.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt
cc: Town Board
Supervisor Dudek

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14100
OML-AO-3648

Committee Members

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June 25, 2003

Mr. Steven G. Poyzer

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. Poyzer:

I have received your letter of June 13 and the materials attached to it. You have sought advice concerning requests made under the Freedom of Information Law to the City of Canandaigua and the Canandaigua Recreation Development Corporation ("CRDC").

In this regard, first, having reviewed the correspondence, it is noted at the outset that the CRDC has been found by both the Supreme Court and the Appellate Division to be subject to the requirements of the Freedom of Information and Open Meetings Laws [Canandaigua Messenger, Inc. v. Wharmby, Supreme Court, Ontario County, May 11, 2001; affirmed, 739 NYS2d 508, 292 AD2d 835 (2002)].

Second, I am in general agreement with Ms. Wharmby's comments. In some respects, your request to the City involved the making of judgments or subjective conclusions. For example, seeking records indicating the City's knowledge of the operations of the CRDC, in my view, would involve questioning City officials as to what they may have known and locating records reflective of their knowledge. Further, knowledge can be derived from any number of sources, including newspapers, journals, financial documentation, etc. It is suggested that in the future, you attempt to "reasonably describe" the records sought as required by §89(3) of the Freedom of Information Law. If, for instance, minutes of meetings are not indexed by subject matter but rather are kept chronologically, a proper request would involve minutes prepared within a certain time period. If you know or can reasonably estimate that officials were considering issues concerning the CRDC from June, 2000 through March, 2001, you might request minutes of City Council meetings covering that period. Similarly, when seeking minutes of CRDC meetings, it is recommended that you request them by indicating a time period rather than subject matter.

Third, since both the City and the CRDC are agencies required to comply with the Freedom of Information Law, I note that that statute provides direction concerning the time and manner in

which agencies must respond to requests for records. 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)].

Lastly, since much of your requests focuses on minutes of meetings, I point out that §106 of the Open Meetings Law contains what might be characterized as minimum requirements concerning the contents of minutes. 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."

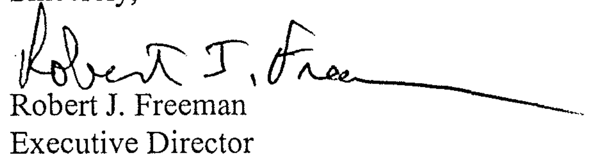
Based upon the foregoing, it is clear that minutes need not consist of a verbatim account of all commentary expressed at a meeting. It is also clear that minutes must be prepared and made available within two weeks of meetings.

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.

I point out, too, that since its enactment in 1974, the Freedom of Information Law has included an "open vote" requirement. Section 87(3)(a) states that "[e]ach agency shall maintain a record of the final vote of each member in every agency proceeding in which the member votes." Therefore, in each instance in which a public body, such as the City Council or the Board of Directors of the CRDC, takes action, a record must be prepared specifying the manner in which each member cast his or her vote. Typically, the record of votes appears in minutes of meetings.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Laura Kay Wharmby
Dennis Morga

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO - 3649

Committee Members

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July 2, 2003

E-Mail

TO: June Smith [redacted]

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Ms. Smith:

I have received your inquiry in which you asked whether the Open Meetings Law "covers Home Owners Association meetings in New York State."

From my perspective, the Open Meetings Law does not include those gatherings within its coverage. That statute applies 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, the Open Meetings Law generally pertains to meetings of governmental bodies; it does not apply to private entities that are not governmental in nature.

I note that confusion has arisen on occasion with reference to the phrase "public corporation." As that phrase is used in this context, it is defined in §66 of the General Construction Law to mean a county, city, town, school district, fire district or similar political subdivision.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-14114
OML-AO-3650

Committee Members

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July 3, 2003

Ms. Carol D. Stevens
County of Greene
Office of the County Attorney
901 Green County Office Building
Cairo, NY 12413-9509

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. Stevens:

I have received your letter of June 13 concerning the "Applicability of Open Meetings Law and FOIL to Settlement Agreements with Greene County." Specifically, you raised the following question:

> "May a County keep the details of the settlement of a lawsuit by the County against another when the litigation has been authorized by Legislative resolution but not actually commenced?"

You added that "[a]n exchange of mutual releases is expected but no other documents would be generated."

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to existing records, and §89(3) states in part that "[n]othing in this article shall be construed to require any entity to prepare any record not possessed or maintained by such entity..." Also significant is §86(4), which defines the term "record" to mean:

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

Based on the foregoing, information existing in a physical form maintained by or for the County would constitute a record that falls within the coverage of the Freedom of Information Law. If, however, information does not exist in the form of a record or records, that statute would not be applicable.

Second, situations have arisen in which the parties to an agreement or stipulation of settlement have agreed to refrain from speaking about or disclosing the terms of the agreement or stipulation on their own initiative. In my view, the parties may validly agree not to speak about a settlement or agreement. However, the Freedom of Information Law pertains to records, not to speech. In a decision that may be pertinent to the matter that you described, Paul Smith's College of Arts and Sciences v. Cuomo, it was stated that:

> "Plaintiff was the subject of a complaint made by a former employee who alleged that he was a victim of age discrimination. Prior to a scheduled hearing and with the assistance of an employee of defendant State Division of Human Rights (hereinafter SDHR), plaintiff entered into a stipulation of settlement with the complaining employee. Plaintiff's stated purpose for settling was to eliminate any negative publicity resulting from a public hearing on the allegations. The order after stipulation signed by defendant Commissioner of Human Rights on August 23, 1989 provided for absolute confidentiality except for enforcement purposes. The order also provided for the withdrawal of the charges and discontinuance of the administrative proceeding. Plaintiff did not admit to a Human Rights violation. On October 27, 1989, SDHR issued a press release detailing the allegations, disclosing that the matter hade been settled and set forth certain parts of the settlement terms" [589 NYS2d 106,107, 186 AD2d 888 (1992)].

Although the Appellate Division determined that the issuance of the press release "was both arbitrary and capricious and an abuse of discretion" (id.), it also found that the stipulation of settlement was subject to rights of access conferred by the Freedom of Information Law.

I note that it has been held in variety of circumstances that a promise or assertion of confidentiality cannot be upheld, unless a statute specifically confers confidentiality. In Gannett News Service v. Office of Alcoholism and Substance Abuse Services [415 NYS 2d 780 (1979)], a state agency guaranteed confidentiality to school districts participating in a statistical survey concerning drug abuse. The court determined that the promise of confidentiality could not be sustained, and that the records were available, for none of the grounds for denial appearing in the Freedom of Information Law could justifiably be asserted. In a decision rendered by the Court of Appeals, it was held that a state agency's:

> "long-standing promise of confidentiality to the intervenors is irrelevant to whether the requested documents fit within the Legislature's definition of 'record' under FOIL. The definition does

> not exclude or make any reference to information labeled as 'confidential' by the agency; confidentiality is relevant only when determining whether the record or a portion of it is exempt..." [Washington Post v. Insurance Department, 61 NY 2d 557, 565 (1984)].

Third, I believe that, insofar as it exists in the form of a record or records, a settlement or similar agreement must be disclosed. 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. Unless records may justifiably be withheld in accordance with one or more of the grounds for denial, a claim, a promise or an agreement to maintain confidentiality would, based on judicial decisions, be meaningless.

In Geneva Printing Co. v. Village of Lyons (Supreme Court, Wayne County, March 25, 1981), a public employee charged with misconduct and in the process of an arbitration hearing engaged in a settlement agreement with a municipality. One aspect of the settlement was an agreement to the effect that its terms would remain confidential. Notwithstanding the agreement of confidentiality, the court found that no ground for denial could justifiably be cited to withhold the agreement.

It was also found that the record indicating the terms of the settlement constituted a final agency determination available under the Freedom of Information Law [see FOIL, §87(2)(g)(iii)].

In another decision, the matter involved the subject of a settlement agreement with a town that included a confidentiality clause who 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, absent the assertion of a ground for denial appearing in §87(2) of the Freedom of Information Law, and none in my view would apply, I believe that a record reflective of a settlement must be disclosed in response to a request made under the Freedom of Information Law, notwithstanding any condition regarding confidentiality in the agreement.

With respect to the "Applicability of the Open Meetings Law", it appears that only issue of significance involves minutes and the extent to which information regarding settlement agreements must be included. Section 106 of that statute pertains to minutes and provides that:

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

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.

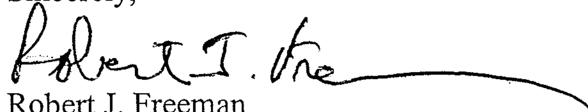
It is noted that minutes of executive sessions need not include information that may be withheld under the Freedom of Information Law. From my perspective, when a public body makes a final determination during an executive session, that determination will, in most instances, be

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, I believe that the minutes of the County Legislature must indicate in general terms that settlements were reached or approved; I do not believe they are required to include a detailed description of a settlement.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3651

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July 8, 2003

Mr. Robert L. Leonard
CSEA
332 Jefferson Road
Rochester, NY 14623

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

Dear Mr. Leonard:

I have received your letter and the materials attached to it. You have asked that I "look at the way the Geneva City School District Board of Education conducts meetings", particularly with respect to "possible violations of the open meeting law."

You referred to the absence of any reference on an agenda of a recent meeting to the "abolishment" of a certain position, specifically, the position held by the CSEA unit president. According to the minutes of the meeting, the Board entered into executive session:

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

Immediately after the executive session, a motion to eliminate the position was approved. In minutes of another meeting, reference was made to an executive session held "to discuss personnel issues."

In this regard, I offer the following comments.

First, there is nothing in the Open Meetings Law or any other statute of which I am aware that requires that an agenda be prepared or followed. If an agenda has been prepared, unless it has adopted a rule or policy to the contrary, the Board in my view could choose to discuss topics not referenced on the agenda or pass over items that appear on an agenda.

Second, I do not believe that the "abolishment" or elimination of a position could validly have been considered during an executive session. Further, the motion for entry into executive session reflected in the minutes is inconsistent with the direction provided by the courts.

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. 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.

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, §105(1)(f) cannot 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, the educational needs of students, etc. 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).

I note that it was held long ago that personnel layoffs are primarily budgetary matters that would not qualify for consideration in executive session (Orange County Publications v. City of Middletown, Supreme Court, Orange County, December 6, 1978). The same conclusion was reached in a case specifically dealing with the creation and termination of positions [Gordon v. Village of Monticello, Supreme Court, Ulster County, August 5, 1993; modified, 207 AD2d 55 (1994); reversed on other grounds, 87 NY2d 124 (1995). The Supreme Court in that decision awarded attorney's fees to the petitioners; the Appellate Division agreed that there had been a violation of the Open Meetings Law, but reversed the award of attorney's fees on the ground that there was no indication that the Village Board of Trustees had repeatedly violated the law or had acted in bad faith; the Court of Appeals reversed that determination, reinstating the award of attorney's fees and tacitly confirming that the Board had no basis for discussing the creation or elimination of positions in executive session.

Lastly, the motion for entry into executive session as indicated in the minutes is a word for word recitation of the language of §105(1)(f). In a similar situation, it was held that a motion to enter into executive session cannot "merely regurgitate the statutory language" and that such a "boilerplate recitation does not comply with the intent of the statute" [Daily Gazette v. Town Board, Town of Cobleskill, 444 NYS2d 44, 46 (1981)]. Further, with respect to the "personnel" exception, 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.

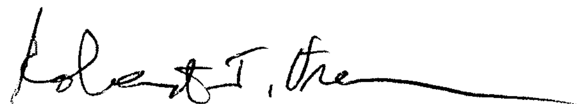
The Appellate Division in Gordon, supra, confirmed the advice rendered by this office. In discussing §105(1)(f) in relation to a matter involving the establishment and functions of a position, the Court stated that:

> "...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, supra, 207 AD 2d 55, 58).

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

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14127
OML-AO-3652

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July 9, 2003

Ms. Stephanie Kushner

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. Kushner:

I have received your letter of June 26 and the materials attached to it. You referred to an advisory opinion prepared at your request on June 18 and interpreted that opinion to mean that you are "entitled to receive a copy of the minutes from the Board meeting, even if not approved, and the backup information when decisions are made." You wrote, however that the East Williston Union Free School District views the opinion "differently" and attached a copy of a response to your request granting access to "approved minutes" of a meeting of the Board of Education and a denial of access to "notes that formed the basis" for a certain decision on the ground that are "an intra-agency communication and not subject to disclosure under the Freedom of Information Law."

In this regard, it is not clear that either you or District officials have construed my opinion or the law accurately. To attempt to clarify both the opinion and the law, I offer the following remarks.

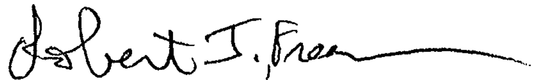
First, based on the language of the Open Meetings Law, §106(3), minutes of meetings must be prepared and made available to the public within two weeks of the date of the meetings to which they relate. As indicated in the earlier opinion, there is nothing in the law that requires that minutes be approved.

Second, if I accurately understand the situation, the decision of the "nominating petition review board" was made available to you, but documentation indicating the basis of its decision was withheld. That documentation was described as "notes that formed the basis for Mrs. Gaglio's original decision." The notes are clearly "intra-agency material", and in the context of your request, I believe that portions consisting of statistical or factual information or which represent a final agency determination must be disclosed, respectively, pursuant to subparagraphs (i) and (iii) of §87(2)(g). Not all "backup information" leading to or used in the decision making process is necessarily available. If five recommendations were made to a decision maker and he or she in some

way considered all of them in reaching a decision, but that person did not specifically adopt a recommendation or recommendations, I believe that those records may be withheld. Similarly, if the notes to which you referred were merely used to aid in reaching a decision, I believe that those portions consisting of opinions, advice, recommendations, conjecture and the like may be withheld. An example of a situation in which "backup" material would be available would involve a proceeding in which a hearing officer prepares a recommendation and the commissioner or other decision maker adopts the recommendation as his or her decision. In that kind of situation, the recommendation becomes the decision. It would be unlikely in my view that notes would become a decision.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Education
Edward J. Cigna

OML-AO- 3653

From: Robert Freeman
To: [redacted]
Date: 7/9/2003 9:07:51 AM
Subject: Re: (no subject)

Hi - -

I hope that you are well and happy and enjoying the summer.

In brief, the Open Meetings Law exempts political caucuses from its coverage, irrespective of the nature of a discussion. If, for example, a town board consists of four members from one party and one from the other, the four can legally conduct a closed political caucus to discuss any topic, including matters of public business.

I should point out that the answer is different, based on case law, if all of the board members are from the same political party. In that situation, if a majority gathers to discuss public business, the gathering would be a "meeting" covered by the Open Meetings Law. The exemption regarding political caucuses would apply only when the discussion involves political party business.

For more detailed analyses of the issue, you can go to the index to advisory opinions on our website dealing with the Open Meetings Law, click on to "P" and scroll down to "political caucus". Several opinions will be accessible in full text.

I hope that this helps.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
Albany, NY 12231
(518) 474-2518 - Phone
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3651

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July 10, 2003

Ms. Marion Brown

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

Dear Ms. Brown:

I have received your letter and appreciate your kind words. You have sought guidance concerning a proper motion for entry into executive session under §105(1)(d). That provision authorizes a public body to conduct an executive session to discuss "proposed, pending or current litigation."

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

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

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

In construing the exception concerning litigation, 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' (<u>Matter of Concerned Citizens to Review Jefferson Val. Mall v. Town Bd. Of Town of Yorktown</u>, 83 AD 2d 612, 613, 441 NYS 2d 292). The belief of the town's attorney that a decision adverse to petitioner 'would

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

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

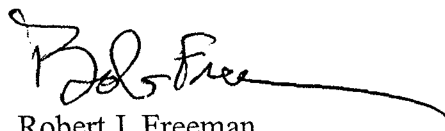
With regard to the sufficiency of a motion to discuss litigation, it has been held that:

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

The emphasis in the passage quoted above on the word "*the*" indicates that when the discussion relates to litigation that has been initiated, the motion must name the litigation. For example, a proper motion might be: "I move to enter into executive session to discuss our litigation strategy in the case of the XYZ Company v. the Town of Brighton." If the Town Board seeks to discuss its litigation strategy in relation to a person or entity that it intends to sue, and if premature identification of that person or entity could adversely affect the interests of the Town and its residents, it has been suggested that the motion need not identify that person or entity, but that it should clearly indicate that the discussion will involve the litigation strategy. Only by means of that kind of description can the public know that the subject matter may justifiably be considered during an executive session.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

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DEPARTMENT OF STATE
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FOIL-AO- 14131
OML-AO- 3655

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July 10, 2003

Ms. Judy Kessler-Rix
Editor
Arcade Herald
223 Main Street
Arcade, NY 14009

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. Kessler-Rix:

I have received your letter in which you raised issues concerning the implementation of the Open Meetings and Freedom of Information Laws by the Pioneer Central School District and its Board of Education.

You referred initially to an executive session held recently to discuss, in your words, "five specific personnel appointments." Two representatives of the Management Group of New York were asked to join the Board in executive session, and you learned that "this consulting group did a comprehensive management study and evaluation of the Pioneer district, the results of which were not favorable." A request for the study was rejected on the ground that it "is still in draft form and has not been finalized." When questioned about the function of the consultants who attended the executive session, the interim superintendent replied, "I can't say." After the executive session, the Board approved four personnel appointments but gave no indication that any different kind of discussion occurred. You also referred to a contract with District administrators that expired on June 30 and wrote that, while you "realize contract negotiations are discussed during closed sessions, the public was not advised that they were even taking place."

In this regard, I offer the following comments.

First, the Open Meetings Law is based on a presumption of openness. Meetings of a public body, such as a board of education, must be conducted in public, except to the extent an executive session may validly be held. Paragraphs (a) through (h) of §105(1) specify and limit the subject matter that may properly be considered during an executive session. Additionally, as you are aware, a procedure must be accomplished in public before an executive session may be held. Specifically, the introductory language of §105(1) states that:

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

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 language of the provision to which Board alluded in relation to the executive session, 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 appointment 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)].

A "specific personnel appointment" could involve consideration of the merits of a particular candidate for a position, and in that circumstance, I believe that an executive session could properly be held. However, that phrase might also relate to the process of seeking a candidate for the position, i.e., whether the District will advertise in a newspaper or trade publication, the criteria needed to apply, and other subjects that do not focus on a particular person. A discussion of that nature, even though it relates to a specific personnel appointment, would not, in my view, qualify for consideration in executive session.

Moreover, as indicated in the language of the law and confirmed in Gordon, "the topics discussed during the executive session must remain within the exceptions enumerated in the statute..." From my perspective, a management study typically focuses on practices, policies, procedures and the like, rather than the performance of specific employees. To the extent that the Board, with or without the presence of the consultants, discussed those kinds of issues, I do not believe that there would have been a basis for conducting the executive session. Again, only to the extent that the discussion focused on a particular person or persons in conjunction with a topic appearing in §105(1)(f) could an executive session appropriately have been held.

With respect to the issue relating to the expiration of the administrators' contract, if the Board has not been involved in discussions of that subject, there is no issue involving the Open Meetings Law. If, however, the Board has discussed the matter, it appears that §105(1)(e) would be pertinent. That provision authorizes a public body to enter into executive session to consider "collective negotiations pursuant to article fourteen of the civil service law." Article 14 is commonly known as the "Taylor Law" and deals with the relationship between public employers and public employee unions, which are characterized in §201(5) of the Civil Service Law as "employee organizations." That being so, not all contract negotiations fall within the coverage of §105(1)(e).

According to the Public Employment Relations Board (PERB), to be considered an employee organization for purposes of the Taylor Law, certain criteria must be met. The organization must be certified by PERB or recognized by an employer in order to engage in collective bargaining negotiations. I was also informed that to be an employee organization, an entity must function as a collective bargaining unit in an ongoing manner with respect to all issues involving the terms and conditions of employment.

If District administrators have formed an employee organization, I believe that the Board could conduct executive sessions to discuss or engage in collective negotiations relating to the organization pursuant to §105(1)(e). 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 District Administrator's organization."

If there is no employee organization, I do not believe that §105(1)(e) would serve as a basis for conducting an executive session.

Next, with regard to the management study, that the study is in draft or may not be final would not necessarily provide a basis for denying access to its contents or portions thereof. The Freedom of Information Law is applicable to all 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, the document in question, irrespective of its characterization as a draft or not "finalized", or that it has not been accepted or approved, in my view clearly constitutes an agency record that is subject to rights of access. Further, even if it never came into the physical custody of the District, it would fall within the coverage of the Freedom of Information Law, because it was prepared "for" the District.

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

The Court of Appeals, the state's highest court, confirmed its general view of the intent of the Freedom of Information Law in Gould v. New York City Police Department, stating that:

> "To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption' (*Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 *see,* Public Officers Law § 89[4][b]). As this Court has stated, '[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld' (*Matter of Fink v. Lefkowitz*, 47 N.Y.2d, 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)" [87 NY2d 267, 275 (1996)].

Just as significant, the Court in Gould repeatedly specified that a categorical denial of access to records is inconsistent with the requirements of the Freedom of Information Law. In that case,

the Police Department contended that complaint follow up reports could be withheld in their entirety on the ground that they fall within the exception regarding intra-agency materials, §87(2)(g). The Court, however, wrote that: "Petitioners contend that because the complaint follow-up reports contain factual data, the exemption does not justify complete nondisclosure of the reports. We agree" (id., 276), and stated as a general principle that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government" (id., 275). The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, stating that:

> "...to invoke one of the exemptions of section 87(2), the agency must articulate 'particularized and specific justification' for not disclosing requested documents (*Matter of Fink v. Lefkowitz, supra*, 47 N.Y.2d, at 571, 419 N.Y.S.2d 467, 393 N.E.2d 463). If the court is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an in camera inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material (*see, Matter of Xerox Corp. v. Town of Webster*, 65 N.Y.2d 131, 133, 490 N.Y.S. 2d, 488, 480 N.E.2d 74; *Matter of Farbman & Sons v. New York City Health & Hosps. Corp., supra*, 62 N.Y.2d, at 83, 476 N.Y.S.2d 69, 464 N.E.2d 437)" (id.).

The provision to which the Court referred in Gould, §87(2)(g), is likely the only ground for denial of significance with respect to the document at issue. While that provision potentially serves as a basis for denying access, due to its structure, it often requires substantial disclosure. Specifically, that provision states that an agency may withhold records that:

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

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

In a discussion of the issue of records prepared by consultants for agencies, the Court of Appeals stated that:

> "Opinions and recommendations prepared by agency personnel may be exempt from disclosure under FOIL as 'predecisional materials, prepared to assist an agency decision maker***in arriving at his decision' (McAulay v. Board of Educ., 61 AD 2d 1048, aff'd 48 NY 2d 659). Such material is exempt 'to protect the deliberative process of government by ensuring that persons in an advisory role would be able to express their opinions freely to agency decision makers (Matter of Sea Crest Const. Corp. v. Stubing, 82 AD 2d 546, 549).
>
> "In connection with their deliberative process, agencies may at times require opinions and recommendations from outside consultants. It would make little sense to protect the deliberative process when such reports are prepared by agency employees yet deny this protection when reports are prepared for the same purpose by outside consultants retained by agencies. Accordingly, we hold that records may be considered 'intra-agency material' even though prepared by an outside consultant at the behest of an agency as part of the agency's deliberative process (see, Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD 2d 546, 549, supra; Matter of 124 Ferry St. Realty Corp. v. Hennessy, 82 AD 2d 981, 983)" [Xerox Corporation v. Town of Webster, 65 NY 2d 131, 132-133 (1985)].

Based upon the foregoing, records prepared by a consultant for an agency may be withheld or must be disclosed based upon the same standards as in cases in which records are prepared by the staff of an agency. It is emphasized that the Court in Xerox specified that the contents of intra-agency materials determine the extent to which they may be available or withheld, for it was held that:

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

Therefore, a record prepared by a consultant for an agency would be accessible or deniable, in whole or in part, depending on its contents.

I note that in Gould, one of the contentions was that certain reports could be withheld because they were not final and because they related to incidents for which no final determination had been made. The Court rejected that finding and stated that:

> "...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers Law §87[2][g][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, I believe that the report may be characterized as intra-agency material. However, that it is internal, not final, not officially accepted or approved would not remove it from rights of access. Again, I believe that those portions consisting of statistical or factual information must be disclosed.

The Court in Gould considered the intent of §87(2)(g) and what constitutes "factual" information, stating 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).]

I would conjecture that the study consists of opinions and recommendations, which may be withheld, as well as statistical or factual information, which should be accessible. It is also important to reiterate that if a discussion by the Board relating to the study does not focus on a particular person, it is likely that the discussion must occur in public to comply with the Open Meetings Law. If that is so, public discussion and, therefore, disclosure of certain aspects of the report would in my opinion result in a waiver of the ability to withhold records reflective of those aspects of the report under the Freedom of Information Law.

Lastly, you wrote that the interim superintendent replied, "I can't say", when asked about the nature of the discussion during the executive session. In my view, neither he nor others present during the executive session would have been required to inform those who questioned them about the executive session. However, they would not have been prohibiting from responding or generally indicating what transpired during the executive session. Stated differently, it would have been more accurate to reply, "I choose not to say", rather than "I can't say."

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

I am unaware of any statute that would prohibit a Board member or other person who attended the executive session 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 characterized as 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

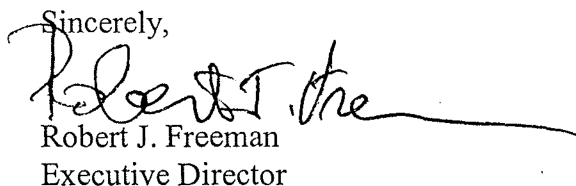
by federal law and would be exempted from the coverage of that statute [see Open Meetings Law, §108(3)]. In the context of the Freedom of Information Law, an education record would be specifically exempted from disclosure by statute in accordance with §87(2)(a). In both contexts, I believe that a board 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).

In an effort to enhance compliance with and understanding of the Freedom of Information and Open Meetings Laws, copies of this opinion will be sent to District officials.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Education
Michael Medden

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3656

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Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
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July 14, 2003

Ms. Joan M. Charles
President
Mendon Public Library Board of Trustees
15 Monroe Street
Honeoye Falls, NY 14472

The staff of the Committee 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. Charles:

I have received your letter and the materials attached to it. You have requested an advisory opinion in your capacity as President of the Mendon Public Library Board of Trustees concerning the propriety of an executive session held by the Mendon Town Board to discuss a site for your new public library.

As I understand the matter, the Board of Trustees met last September and informed the Town Supervisor of its recommendation to include the library as part of the Village Square development on Main Street. In March of this year, a presentation was made concerning that proposal at a joint meeting of the Town Board and the Board of Trustees. At a special meeting of the Town Board held on May 28, an executive session was held "for the purpose of discussing land acquisition", and immediately thereafter, a motion was made and approved stating that:

> "WHEREAS, the Mendon Library Board of Trustees conducted a search for potential sites for a new or expanded library building and performed an extensive evaluation of several potential sites, and
>
> "WHEREAS, this Town Board has studied the evaluation performed by the Library Board of Trustees and has supplemented the data presented by the Board of Trustees with additional information, engineering and architectural data and financial and tax-rate projections, and
>
> "WHEREAS, this Town Board has utilized all of the available information, as well as the Board members' overall knowledge of the

> Town and the collective sense of the future direction of the Town. NOW, THEREFORE, BE IT RESOLVED, that this Town Board determines that the most appropriate site for a new library building is the parcel of land directly north of the current library building because it is already owned by the Town, and in the same village-center location as the current building."

You indicated to me by phone that the executive session, upon information and belief, was held solely for the purpose of discussing the site of the new library. If that is so, I believe that the executive session was improperly held. In this regard, I offer the following comments.

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 town board, 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 only ground for entry into executive session that appears to be relevant in relation to the matter that you described.

Specifically, §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.

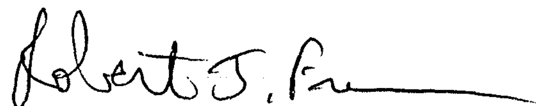
A key question, in my view, involves the extent to which information relating to possible real property transactions has become known to the public. The more that is known, the less likely it is that publicity would have an impact on the value of a parcel or in some way damage the interests of taxpayers. 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 this instance, the site suggested by the Board of Trustees became well known to the public some time ago, and the site chosen by the Town Board is owned by the Town. In consideration of those factors and the language of the Open Meetings Law, it does not appear that publicity would have had any impact, let alone a "substantial" impact, on the value of either Village Square or the parcel owned by the Town. If that is so, I do not believe that there would have been any basis for entry into executive session by the Town Board to discuss the issue of your interest.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board

From: Robert Freeman
To: augustine@hws.edu
Date: 7/21/2003 12:12:48 PM
Subject: Dear Ms. Augustine:

Dear Ms. Augustine:

As I understand the situation that you described, the Open Meetings Law would not apply for two reasons.

First, the application of that statute is not triggered unless and until a majority of a public body, such as a city council, gathers for the purpose of conducting public business collectively as a body. It appears that a majority of a public body would not be present at the gathering that you described.

And second, even if a majority attended, the gathering would in my view be exempt from the coverage of the Open Meetings Law based on §108(2) of that statute. That provision exempts political committees, conferences and caucuses from the Open Meetings Law.

I note that the Open Meetings Law is available in full text on our website. Additional information can be found in advisory opinions accessible on line. You might go the website, click on to advisory opinions under the Open Meetings, click on to "p" and scroll down to "political caucus."

I hope that I have been of assistance.

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

OML-AO - 3658

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July 28, 2003

Hon. April L. Scheffler
Town Clerk
Town of Groton
101 Conger Boulevard
Groton, NY 13073

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. Scheffler:

I have received your letter in which you sought assistance in relation to a new responsibility imposed upon you, the Groton Town Clerk, by the Town Board. Specifically, the Board recently approved a resolution requiring that you prepare "completely verbatim minutes" of meetings.

From my perspective, the Board cannot require that you prepare verbatim minutes of its meetings. To reiterate points offered in other opinions dealing with similar or related matters, I believe that four provisions law are pertinent to the matter.

First, §106 of the Open Meetings Law deals directly with minutes of meetings and states that:

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

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

Based on the foregoing, it is clear that minutes need not consist of a verbatim account of what is said. Rather, at a minimum, minutes must consist of a record or summary of motions, proposals, resolutions, action taken and the vote of each member. Second, subdivision (1) of §30 of the Town Law states in relevant part that the town clerk "shall attend all meetings of the town board, act as clerk thereof, and keep a complete and accurate record of the proceedings of each meeting". Third, subdivision (11) of §30 of the Town Law provides that the clerk "shall have such additional powers and perform such additional duties as are or hereafter may be conferred or imposed upon him by law, and such further duties as the town board may determine, not inconsistent with law". And fourth, §63 of the Town Law states in part that a town board "may determine the rules of its procedure".

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

While I know of no case law that focuses on this particular issue, the courts have offered guidance concerning the authority of governing bodies to adopt rules and the requirement that those rules must be reasonable. For example, as in the case of town boards having the authority to adopt rules and procedures pursuant to §63 of the Town Law, boards of education have essentially the same authority under §1709 of the Education Law. However, 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 town board 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, despite the authority conferred upon a town board by §63 of the Town Law.

In my opinion, a rule requiring that a town clerk prepare a verbatim account of everything said at every town board meeting would be found by a court to be unreasonable and beyond the authority granted to town boards by both §§30(11) and 63 of the Town Law. In consideration of the numerous statutory obligations imposed upon town clerks by a variety of statutes, a clerk would be effectively precluded from carrying out those duties if he or she is required to prepare verbatim minutes of every meeting. Meetings may be held frequently, often they are lengthy, and the time needed to type verbatim minutes would force the clerk to put aside other duties and likely engage in failures to comply with law. Moreover, if the Board or others have a need years from now to determine the nature of action taken by the Board, the task of wading through lengthy documentation in an effort to find the crucial portions will be unnecessarily frustrating and time consuming.

In short, I believe that a requirement that you, as clerk, prepare verbatim minutes is not only unreasonable; a requirement of that nature also results in inefficiency and a lesser capacity to conduct town business in a manner that enables you to meet your statutory responsibilities.

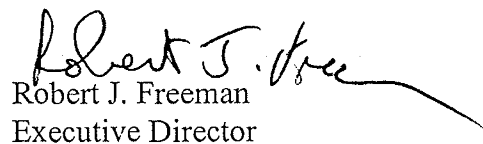
It is suggested that reasonable alternative exists and is practiced by many municipalities. In order to have a verbatim account of statements made at meetings, the meetings can be audio tape recorded or perhaps video recorded. If there is a question concerning the accuracy of minutes or a need for detail not ordinarily included in typical minutes of a meeting, the tape can be reviewed to ensure accuracy, to resolve a dispute or to refresh one's memory. I note, too, that minutes of meetings must be retained permanently pursuant to the records retention schedule issued by the State Archives at the State Education Department, but that tapes are required to be maintained for a period of months. At the expiration of the retention period, the tapes could be preserved, or if they are no longer of value, they could be erased and reused.

Lastly, although your letter indicates that Kevin Crawford, Counsel to the Association of Towns, is not familiar with opinions prepared by this office, I am sure that is inaccurate. Kevin and I have known one another for more than twenty years, I have spoken at the Association of Towns annual meeting in New York City for every year since 1977 (or perhaps earlier), and he is very familiar with the work of this office.

In an effort to resolve the matter, a copy of this opinion will be sent to the Town Board.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board
Kevin Crawford

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3659

Committee Members

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July 30, 2003

Dr. Janusz R. Richards, D.C.
150 Purchase Street
Rye, NY 10580

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

Dear Dr. Richards:

I have received your letter in which you indicated that you are a member of the Port Chester Housing Authority and raised questions concerning the Authority's obligation to comply with the Open Meetings Law.

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

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

Based on provisions within the Public Housing Law, a municipal housing authority clearly constitutes a public body. Section 414 established the Port Chester Housing Authority and specifies that the Authority "shall constitute a body corporate and politic, be perpetual in duration and consist of five members"; that provision also states that the Authority "shall have the powers and duties now or hereafter conferred...upon municipal housing authorities." Section 37 delineates the governmental powers of municipal housing authorities; §30(3) states that a "majority of the members of an authority shall constitute a quorum."

In short, each of the ingredients necessary to find that the Port Chester Housing Authority constitutes a public body subject to the Open Meetings Law is present: it is an entity consisting of five members, a quorum is required, and it clearly conducts public business and performs a governmental function for the Village of Port Chester, which is a public corporation (see General Construction Law, §66). I note, too, that it has been determined by the Appellate Division, Second

Department, which includes Port Chester, that a municipal housing authority is subject to and required to comply with the Freedom of Information Law [Westchester-Rockland Newspapers v. Fischer, 101 AD2d 840 (1985)].

Section 104 of the Open Meetings Law pertains to notice of meetings and requires that every meeting be preceded by notice given to the news media and posted. That provision states that:

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

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

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

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

However, the same provision states further that:

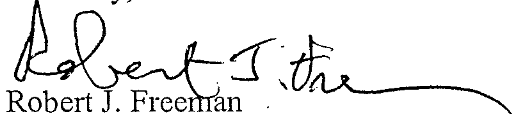
> "An unintentional failure to fully comply with the notice provisions required by this article shall not alone be grounds for invalidating any action taken at a meeting of a public body."

As such, when a legal challenge is initiated relating to a failure to provide notice, a key issue is whether a failure to comply with the notice requirements imposed by the Open Meetings Law was "unintentional".

Aside from the issue of notice, §107 also indicates that if action is taken in private that should have been taken in public, a court has discretionary authority to invalidate the action taken in violation of the law.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14168
OML-AO-3660

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August 5, 2003

Dr. Janusz R. Richards, D.C.
Chiropractic Office
150 Purchase Street
Rye, NY 10580

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

Dear Dr. Richards:

I have received your letter in which you asked whether the Graceland Terrace Housing Development Fund Corporation is subject to the Freedom of Information and Open Meetings Laws.

In this regard, the Freedom of Information Law is applicable to agencies, and §86(3) defines the term "agency" to mean:

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

The Open Meetings Law pertains to 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."

In consideration of the foregoing, as a general matter, the two statutes to which you referred pertain to records and meetings of governmental entities.

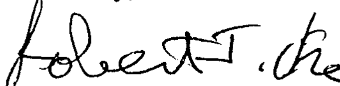
According to the Private Housing Finance Law, a housing development fund corporation is a private entity. Section 571, which is the "Statement of legislative findings and purposes", refers to "eleemosynary institutions, settlement houses, fraternal and labor organizations, foundations and other non-profit associations [that] are desirous of organizing companies to build or rehabilitate housing for low income families", and that the purpose of the law is to "provide temporary financial and technical assistance to enable such companies to participate in" government assistance programs. Further, §573 states that a housing development fund company shall be incorporated pursuant to the Business Corporation Law or as a not-for-profit corporation.

In short, while a housing development fund corporation may have a relationship with one or more units of government, it is not itself a governmental entity and, therefore, in my view, is not subject to either the Freedom of Information Law or the Open Meetings Law.

I note, however, that records maintained by an agency that is subject to the Freedom of Information Law which pertain to a housing development fund corporation fall within the scope of that statute and may be requested from the agency.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO - 3661

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August 6, 2003

E-Mail

TO: <lgordon2@optonline.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./Ms. Gordon:

As you are aware, I have received your letter in which you questioned the propriety of a provision in the by-laws of a free association library "which allow[s] for discussion of...'salaries, wages and personnel policies.'" You asked whether that provision can be "reconciled with the language of 105(1)(f)...or...fall under 105(1)(e)."

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

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

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

Second, insofar as a provision of a by-law restricts access to meetings in a manner inconsistent with the Open Meetings Law, I believe that it has no legal effect. Section 110 of the Open Meetings Law pertains to the relationship between that statute and other provisions of law, and subdivision (1) of §110 states that:

> "Any provision of a charter, administrative code, local law, ordinance, or rule or regulation affecting a public body which is more restrictive with respect to public access than this article shall be deemed superseded hereby to the extent that such provision is more restrictive than this article."

Based on the foregoing, to the extent that the by-laws are "more restrictive with respect to public access" that the Open Meetings Law, I believe that they would be "deemed superseded." In this instance, the provision of the by-laws to which you referred is likely "more restrictive with respect to public access" than the Open Meetings Law. To that extent, therefore, it would, in my view, be of no effect.

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

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

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

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

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

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

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

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

> "...the medical, financial, credit or employment history of a 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, Chemumg County, October 20, 1981).

In the context of your inquiry, again, consideration of "personnel policies" would not, in my opinion, qualify for consideration in executive session. Assuming that no public employee union

is involved, a discussion of salaries and wages concerning staff generally or employees as a group would not focus on a "particular person" and should occur in public. On the other hand, to the extent that the matter deals with a particular employee and, for example, whether he or she merits an increase in salary, the issue would involve the "employment history of a particular person" and could be discussed during an executive session.

Lastly, §105(1)(e) authorizes a public body to enter into an executive session regarding "collective negotiations pursuant to article fourteen of the civil service law." Article 14 of the Civil Service Law, commonly known as the "Taylor Law," pertains to the relationship between public employers and public employee unions. As such, §105(1)(e) deals with collective bargaining negotiations between a public employer and a public employee union. If employees of the library are represented by a public employee union, discussions regarding collective bargaining negotiations involving the union could be conducted in executive session. If, however, there is no public employee union, §105(1)(e) would not apply.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO- 14169
OML-AO-3662

Committee Members

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August 6, 2003

Mr. Hugh M. Spoljaric
President
Kingston Teachers' Federation
P.O. Box 4481
Kingston, NY 12402

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. Spoljaric:

I have received your letter in which you sought an opinion concerning rights of access to certain records of the Kingston City School District.

According to your letter, the District:

> "....has refused to disclose to the leadership of the Kingston Teachers' Federation, as well as to members of the public, information relative to the elimination of and the restoration of positions that were and are a part of the budget process for funding the schools."

You added that:

> "Prior to the June 3, 2003 budget vote, the Superintendent stated that several positions would not be retained and produced a list of those positions. Additionally, the Superintendent indicated that several positions would be eliminated if the budget failed to pass. Among the stated positions were seven administrative jobs. The Superintendent stated that the exact list of positions had been discussed with the Board of Education, but he refused to disclose the exact list of positions.
>
> "After the budget passed, some of the 'not to be retained' positions were, in fact, retained... The Superintendent indicated that some other positions would be reinstated. He said that a list had been prepared

> and presented to the Board of Education, but that he was not disclosing the list...
>
> "In both instances, public information was discussed in private and the Superintendent refused to share that information with the Federation and with the members of the school district community.
>
> "We believe that the district and Superintendent refusal to disclose public information that was discussed in executive session is in violation of the Open Meetings Law..."

Based on the language of the Open Meetings Law and its judicial interpretation, it appears that the matters to which you referred could not properly have been discussed during executive session. Further, records reflective of determinations made either by the Board of Education or the Superintendent must, in my view, be disclosed. In this regard, I offer the following comments.

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

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

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

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

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

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

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

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

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

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

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

In Doolittle, it was stated that:

> "The court agrees with petitioner's contention that personnel lay-offs are primarily budgetary matters and as such are not among the specifically enumerated personnel subjects set forth in Subdiv. 1.f. of §100, for which the Legislature has authorized closed 'executive

> sessions'. Therefore, the court declares that budgetary lay-offs are not personnel matters within the intention of Subdiv. 1.f of §100 and that the November 16, 1978 closed-door session was in violation of the Open Meetings Law" (Orange County Publications v. the City of Middletown, Supreme Court, Orange County, December 26, 1978).

In consideration of the foregoing, and subject to the qualifications described in the preceding commentary, I do not believe that discussions relating to the budgetary matters, such as the retention or elimination of positions or programs, could appropriately be discussed during an executive session.

I note, too, that 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 confirmed that advice. 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)].

Insofar as records indicate positions that have been retained or eliminated, I believe that they would be available under the Freedom of Information Law. In brief, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

While one of the exceptions to rights of access is pertinent to the matter, due to its structure, it often requires disclosure, and I believe that to be so in this instance. Specifically, §87(2)(g) authorizes an agency to withhold records that:

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

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

From my perspective, records or portions of records indicating the positions that have been retained or eliminated would constitute factual information accessible under §87(2)(g)(i) or alternatively would reflect a final agency determination accessible under §87(2)(g)(iii).

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Education
Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14172
OML-AO-3663

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August 7, 2003

Ms. Dorothy Stundtner

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. Stundtner:

I have received your letter and enclosed copies of the Open Meetings Law and "Your Right to Know", which describes that law and the Freedom of Information Law.

You have raised a variety of questions relating to "grievance day", and in this regard, I must inform you that many provisions of law relating to the assessment of real property are found in statutes separate from the Open Meetings Law. To obtain information focusing on the assessment of real property and the right to challenge an assessment, it is suggested that you seek the assistance of the Office of Real Property Services, 16 Sheridan Avenue, Albany, NY 12210-2714. That agency's website address is <www.orps.state.ny.us> and its public information office can be reached by phone at (518)486-5446. Insofar as your questions relate to the Open Meetings Law, I offer the following comments.

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

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

prior to grievance day. Again, that is a matter that can be addressed with expertise by staff at the Office of Real Property Services.

Second, I believe that a board of assessment review is 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.

Third, you asked whether there is a requirement that "in an open meeting for Grievance day the Committee members the meeting give their names." I know of no such requirement. However, I know of no reason why those persons would not disclose their identities. Further, a record maintained by a municipality identifying those persons would be available under the Freedom of Information Law. That statute is also pertinent to your final question, whether you can ask for the credentials of those who serve on the Board.

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 to an analysis of rights of access is §87(2)(b), which states that an agency may withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy."

Based on the judicial interpretation of the Freedom of Information Law, it is clear that public officers and employees, as well as those performing duties for agencies, 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 those persons 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 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].

In a judicial decision that focused resumes of public employees, 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 portions of resumes must be disclosed in accordance with the previous commentary. The Committee's opinion stated that:

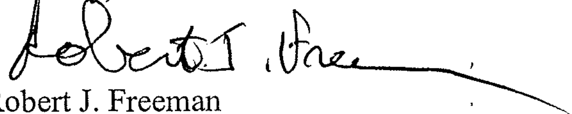
> "If, for example, an individual must have certain types of experience, educational accomplishments or certifications as a condition precedent to serving in [a] particular position, those aspects of a resume or application would in my view be relevant to the performance of the official duties of not 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."

I note that Kwasnik was affirmed by the Appellate Division [691 NYS2d 525, 262 AD2d 171 (1999)]. Based on that decision and others dealing involving analogous principles, those portions of a resume or similar records that are relevant to the performance of one's duties, including certification, must be disclosed. In addition, it has been held that those portions of records indicating one's general education background must be disclosed [Ruberti, Girvin and Ferlazzo v. NYS Division of State Police, 218 AD2d 494 (1996)].

Lastly, it is suggested that you ask staff at the Office of Real Property Services whether particular qualifications must be met to hold the positions of your interest.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 14176
OML-AO- 3664

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August 8, 2003

Mr. Michael A. Kless

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. Kless:

I have received your letter in which you asked whether the New York State Ethics Commission "is exempt from the Freedom of Information Law" and "any other NYS sunshine laws...."

In this regard, as you are aware, the Freedom of Information Law generally requires that government agency records be made available for inspection and copying, unless a ground for denial of access may properly be asserted. In the context of your question, the initial ground for denial, §87(2)(a), is relevant. That provision authorizes an agency to withhold records that "are specifically exempted from disclosure by state or federal statute." One such statute deals directly with records of the State Ethics Commission. Section 94 of the Executive Law deals with the powers and duties of the Commission, and subdivision (17), paragraph (a), states that:

> "Notwithstanding the provisions of article six of the public officers law, the only records of the commission which shall be available for public inspection are:
>
> (1) the information set forth in an annual statement of financial disclosure filed pursuant to section seventy-three-a of the public officers law except the categories of value or amount, which shall remain confidential, and any other item of information deleted pursuant to paragraph (h) of subdivision nine of this section:
>
> (2) notices of delinquency sent under subdivision eleven of this section;
>
> (3) notice of reasonable cause sent under paragraph (b) of subdivision twelve of this section; and

(4) notices of civil assessments imposed under this section."

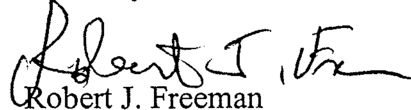
Article Six of the Public Officers Law is the Freedom of Information Law, and based on the foregoing, the only records required to be disclosed by the Commission are those identified in (1) through (4) of paragraph (a). I note, too, that the introductory portion of the provision quoted above refers to certain records that are "available for inspection." Based on that language, it has been held that the Ethics Commission is not required to prepare photocopies of those records [John v. NYS Ethics Commission, 178 AD2d 51 (1992)].

Similarly, subdivision (18) of §94 of the Executive Law specifies that the meetings of the Ethics Commission are outside the coverage of Article Seven of the Public Officers Law, which is the Open Meetings Law. That provision states in relevant part that : "Notwithstanding article seven of the public officers law, no meeting or proceeding...of the commission shall be open to the public..."

In sum, neither the Freedom of Information Law nor the Open Meetings Law is applicable to the State Ethics Commission.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Walter C. Ayres

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3605

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August 21, 2003

Mr. Thomas J. Cusker
Attorney for the Town of Mendon
2121 North Clinton Ave.
Rochester, NY 14617

Dear Mr. Cusker:

I have received your letter in which you suggested that an advisory opinion that I prepared on July 14 at the request of Ms. Joan M. Charles "may have been based on incomplete information", and that additional information that you have offered might "enable [me] to render a supplemental opinion."

Based on the information given to me by Ms. Charles, it did not appear that the Mendon Town Board could properly have held an executive session to consider the location for construction of a new library, for it did not appear that the pertinent basis for entry into executive session, §105(1)(h) of the Open Meetings Law, could justifiably have been asserted. You indicated, however, that the "Town Board was of the opinion that publicity regarding the possible acquisition could substantially affect the value thereof", that the Board "discussed several other potential non-Town-owned sites during the executive session", as well as "potential disposal of the current library building and site", and that there "were a total of six sites under review by the Board."

I have carefully reviewed the materials sent to me by Ms. Charles, and despite the information you have provided, if I understand their contents accurately, it remains questionable whether an executive session could properly have been held.

In this regard, first, it appears that the Town Supervisor may not have been fully familiar with §105(1)(h). According to a news article dated June 28, "potential land acquisition matters must be discussed in executive session, she said." That statement, in my view, is inaccurate. The Open Meetings Law nowhere requires that an executive session must be held. On the contrary, the introductory language of §105(1) states that an executive session *may* be held to discuss certain matters specified in the provisions that follow. Further, that a discussion involves a land acquisition matter is not itself sufficient to justify the holding of an executive session. As you are aware and as indicated in the opinion sent to Ms. Charles, §105(1)(h) authorizes a public body to discuss the "proposed acquisition, sale or lease of real property....but only when publicity would substantially affect the value thereof."

The materials sent to me by Ms. Charles included cost breakdowns, apparently prepared by the Supervisor and sent to the Library Board of Trustees on May 13, pertaining to five possible sites, and I assumed that the sixth possible site involved the parcel owned by the Town. If they represent the six sites and were made known prior to the meeting during which the executive session in at issue was held, again, I question how or the extent to which publicity would have "substantially" affected the value of those parcels.

If I have misconstrued the facts or if you or Town officials can provide additional information or clarification indicating how or why publicity would, under the circumstances, have "substantially affected the value" of a parcel, I would be pleased prepare a new opinion.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT FOIL-AO-14218

OML-AO-3666

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August 27, 2003

Ms. Sandra R. Halberstam
Editor-in-Chief
The Clinton Chronicle
444 West 50th Street #4
New York, NY 10019

The staff of the Committee 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. Halberstam:

As you are aware, I have received your letter and a variety of materials attached to it. You have raised a series of issues concerning the implementation of the Open Meetings and Freedom of Information Laws by Community Board 4 in Manhattan. In consideration of your questions, a review of the materials, and communications with Ms. Michelle Solomon, the Board's records access officer, I offer the following comments.

The initial key issues pertain to the scope and coverage of the Open Meetings Law, which pertains to meetings of public bodies. Based on the language of the law, its legislative history, and judicial decisions, when a committee consists solely of members of a public body, such as a community board, I believe that the Open Meetings Law is applicable, for a committee itself constitutes a "public body."

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

Nevertheless, prior to its passage, the bill that became the Open Meetings Law was debated on the floor of the Assembly. During that debate, questions were raised regarding the status of

"committees, subcommittees and other subgroups." In response to those questions, the sponsor stated that it was his intent that such entities be included within the scope of the definition of "public body" (see Transcript of Assembly proceedings, May 20, 1976, pp. 6268-6270).

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

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

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

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

Next, I believe that an "informal meeting" of a public body falls within the coverage 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 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.

I note that issues involving committees of the Board and informal meetings have been discussed with Ms. Solomon, who assured me that the Board and its committees intend to comply with law.

Reference was made to situations in which perhaps a majority of the members of a Board committee may have attended meetings held by another organization, particularly the Hudson Yards Alliance. It is my understanding that Board members did indeed attend those gatherings, but that they did so as interested citizens, not as members of the Board or a committee of the Board. I was also advised that, in those instances, the members did not situate themselves together, did not function as a committee, and neither intended to nor did in fact conduct public business, collectively, as a body. If that is so, their presence, in my opinion, would not have constituted a “meeting” that would have been subject to the Open Meetings Law.

You also referred to the possibility that meetings might have been held or action taken by means of telephonic communications. As indicated earlier, the definition of "public body" refers to entities that are required to conduct public business by means of a quorum. The term "quorum" is defined in §41 of the General Construction Law, which has been in effect since 1909. The cited provision long stated that:

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

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

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

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

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

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

> "...there is a question as to whether the series of telephone calls among the individual members constitutes a meeting which would be subject to the Open Meetings Law. A meeting is defined as 'the

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

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

In another, more recent decision, the court cited and concurred with an opinion rendered by this office in which it was advised that "absent specific statutory authority to do so", members of a public body may not take action or vote, by proxy or otherwise, unless they are present at a meeting (Inner City Press/Community on the Move v. The New York State Banking, Supreme Court, New York County, NYLJ, July 20, 2001). Further, the amendments to the Open Meetings Law and the General Construction Law involving videoconferencing to which allusion was made earlier clarify the circumstances in which "meetings" may properly be held. Section 102(1) was amended to define "meeting" to mean "the official convening of a public body for the purpose of conducting public business, *including the use of videoconferencing for attendance and participation by the members of the public body*"; §41 of the General Construction Law was amended to indicate that quorum is "a majority of the whole number of such persons or officers, *gathered together in the presence of each other or through the use of videoconferencing...*" (italics represents the language of amendments added by Ch. 289, L. 2000).

In short, when an entity is subject to the requirements of the Open Meetings Law, I do not believe that it may validly adopt a resolution, take action or conduct a valid meeting by phone. Its authority do so, in my view, is limited to those instances in which a quorum has physically convened or has convened by videoconference.

Next, I believe that a record indicating the manner in which each member voted must be prepared in any instance in which a public body takes final action. Section 87(3)(a) of the Freedom of Information Law provides that:

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

Based upon the foregoing, when a final vote is taken by an "agency" 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)].

Lastly, you complained with respect to delays in responding to your requests for records. In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

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.

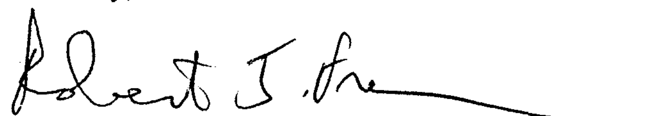
I note that there is no precise time period within which an agency must grant or deny access to records. The time needed to do so may be dependent upon the volume of a request, the possibility that other requests have been made, the necessity to conduct legal research, the search and retrieval techniques 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."

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Michelle Solomon

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14220
OML-AO-3667

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August 28, 2003

Hon. Rae Proefrock
2nd Ward Councilwoman
North Tonawanda

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 Ms. Proefrock:

As you are aware, I have received your letter concerning the propriety of a disclosure of information acquired during an executive session by a member of the North Tonawanda Common Council. You indicated to me during our conversation that it was your belief that information obtained during an executive session is confidential.

In this regard, it is noted at the outset that 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 city councils, 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.

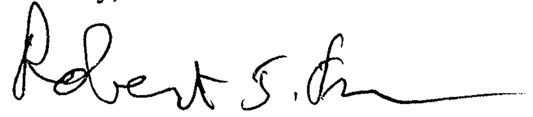
In short, when a governmental entity may choose to disclose or withhold records or to discuss in issue in public or in private, I do not believe that the records or the discussion may be considered "confidential"; only when the government has no discretion and must withhold records or discuss a matter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

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.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14249
OML-AO-3668

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September 10, 2003

Mr. Jeffrey Silman

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. Silman:

I have received your letter and the materials attached to it. You have raised a variety of issues relating to proceedings conducted by the Town of Altamont Board of Assessment Review. In consideration of your remarks, I offer the following comments.

First, although a courtroom located on the ground floor of the Town Hall was available for use, the Board, according to your letter, chose to conduct its proceedings "on the second floor of the building accessible only by 2 flights of stairs..."

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

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

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

From my perspective, every provision of law, including the Open Meetings Law, should be implemented in a manner that gives reasonable effect to its intent. Pertinent to the issue is §103(b) of the Open Meetings Law which states that:

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

The same direction appears in §74-a of the Public Officers Law regarding public hearings. Based upon those provisions, there is no obligation upon a public body to construct a new facility or to renovate an existing facility to permit barrier-free access to physically handicapped persons. However, I believe that the Law imposes a responsibility upon a public body to make "all reasonable efforts" to ensure that meetings are held in facilities that permit barrier-free access to physically handicapped persons. Therefore, if, for example, the Board has the capacity to hold its meetings in a room that is accessible to handicapped persons, I believe that the meetings should be held in the room that is most likely to accommodate the needs of those people.

Second, 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 the Board reached its conclusion; however, I believe that the conclusion itself, i.e., a motion or resolution, must be included in minutes. I note, too, that 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 short, 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. The minutes that you enclosed do indicate how the Board members voted.

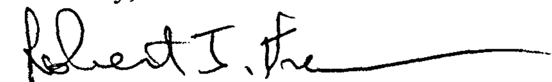
Lastly, I point out that §525(2)(a) of the Real Property Tax Law entitled "Hearing and determination of complaints" states in part that:

> "The assessor shall have the right to be heard on any complaint and upon his request his or her remarks with respect to any complaint shall be recorded in the minutes of the board. Such remarks may be made only in open and public session of the board of assessment review."

Based on the foregoing, insofar as the assessor was present for the purpose of offering information or a point of view, I believe that the public, pursuant to the Real Property Tax Law, had the right to be present.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Hon. Dean Lefebure
Board of Assessment Review

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO - 3669

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September 10, 2003

E-Mail

TO: Steve Knight

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 Councilman Knight:

As you are aware, I have received your letter concerning the application of the Open Meetings Law.

You indicated that you serve as a member of the Woodstock Town Board, and you described the following scenario:

> "The Town Supervisor and [you] were standing outside [y]our Community Center, discussing the possibility that bad weather on Saturday (tomorrow) might make it necessary to abandon a plan to hold the Democratic Party caucus in the open air. Both of us are also members of the Woodstock Democratic Committee (WDC) and expressed our concerns in that capacity. [You] were joined by another Town Board member who is also a member of the WDC, and found ourselves in brief discussion of the same topic, which we were confident was WDC business and not Town business, a distinction to which [you] have always been highly sensitive.
>
> "[You] were approached by one Michael Veitch, an opposition candidate (also a WDC member) who proceeded to accuse [you] of 'sneaking' behind the building to a hold a meeting in violation of the OML. Now it appears he has attempted to make the same point with [me]."

From my perspective, the Open Meetings Law would not have applied to the situation that you described.

In this regard, the Open Meetings Law pertains to meetings of public bodies, and the courts have construed the term "meeting" [§102(1)] expansively. In a landmark decision rendered in 1978, the state's highest court, the Court of Appeals, held that any gathering of a quorum of a public body for the purpose of conducting public business constitutes a "meeting" subject to the Open Meetings Law, whether or not there is an intent to take action, and regardless of the manner in which a gathering may be characterized [see Orange County Publications, Division of Ottoway Newspapers, Inc. v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

In my opinion, inherent in the definition of "meeting" is the notion of intent. If a majority of a public body gathers in order to conduct public business collectively, as a body, I believe that such a gathering would constitute a "meeting" subject to the Open Meetings Law. That being so, if members of a public body meet by chance or at a social gathering, for example, I do not believe that the Open Meetings Law would apply, for there would be no intent to conduct public business, collectively, as a body.

In the context of the facts presented, there appears to have been no intent that majority of the Board gather to discuss public business. If that is so, the gathering would not have constituted a meeting and the Open Meetings Law would not have applied. I point out, too, that §108(2) exempts political caucuses and conferences from the coverage of the Open Meetings Law. Since the discussion appears to have involved purely political party business, again, the Open Meetings Law would not have applied.

I hope that I have been of assistance.

RJF:jm

cc: Michael Veitch
Brian Shapiro
Gordon Wemp
Jeremy Wilber

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3670

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September 10, 2003

Ms. Natalie A. Haggart
St. Lawrence County Office of
Economic Development
80 State Highway 310, Suite 6
Canton, NY 13617

The staff of the Committee on 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. Haggart:

I have received your letter in which you indicated that your office routinely mails notices of meetings to "16 or so media contacts" in your vicinity. You asked whether notices of meetings must be mailed "by conventional source (US Post Office), or [whether] can they be emailed."

In this regard, although the Open Meetings Law requires that notice of meetings be given to the news media, it does not specify the manner in which notice must be given. Section 104 states in relevant part that:

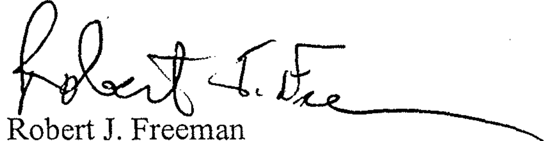
> "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before such meeting.
>
> 2. Public notice of the time and place of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

Again, the law does not specify the means by which notice must be given. If, for example, an unscheduled meeting is to be held within a short time, it has been suggested that notice may be

faxed to the news media. From my perspective, the use of e-mail to transmit information has become commonplace and widely accepted. That being so, I believe that notice regarding meetings of a public body can validly be given and accomplished through the use of e-mail.

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-3671

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September 10, 2003

Mr. Douglas A. Kruger

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

Dear Mr. Kruger:

I have received your letter and the materials attached to it. You have questioned the adequacy of motions for entry into executive session made during meetings of the Connetquot Central School District Board of Education, the scope of executive sessions, and particularly whether an executive session may be held concerning "the advertising and screening process for hiring teachers..."

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

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

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

The provision pertaining to litigation, §105(1)(d), permits a public body to enter into executive session to discuss "proposed, pending or current litigation." While the courts have not sought to define the distinction between "proposed" and "pending" or between "pending" and "current" litigation, they have provided direction concerning the scope of the exception in a manner

consistent with the description of the general intent of the grounds for entry into executive session 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].

Next, 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. In my view, a discussion concerning "the advertising and screening procedures for hiring teachers" would not qualify for consideration in executive session, for it would not focus on a "particular person."

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

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:

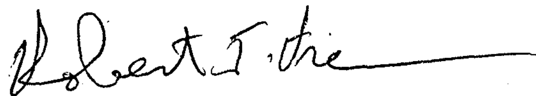
> "...the public body must identify the subject matter to be discussed (See, Public Officers Law § 105 [1]), and it is apparent that this must be accomplished with some degree of particularity, i.e., merely reciting the statutory language is insufficient (see, Daily Gazette Co. v Town Bd., Town of Cobleskill,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

Lastly, it has been held that a motion to enter into executive session to discuss collective bargaining negotiations should identify the union with or about which the negotiations are being conducted. As such, a proper motion might be: "I move to enter into executive session to discuss the collective bargaining negotiations involving the teachers' union" (Doolittle v. Board of Education, Supreme Court, Chemung County, July 21, 1981).

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

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-14256
OML-AO-3672

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September 10, 2003

E-Mail

TO: Jonathon Schilpp

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. Schilpp:

I have received your letter in which you raised a series of questions in relation to compliance with the Open Meetings Law by the Board of Trustees of Suffolk County Community College.

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.

Section 105(1) specifies and limits the subjects that may be considered during an executive session. That being so, a public body, such as the Board, may not conduct an executive session to discuss the subject of its choice.

You referred to several instances in which executive sessions were held to discuss "personnel matters." Although it is used frequently, I note that 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". For example, if a discussion of possible layoffs relates to positions and whether those positions should be retained or abolished, the discussion would involve the means by which public monies would be allocated. In the circumstance that you described, the issue would not have focused on any "particular person", nor would it have involved the subjects relating to a particular person delineated in §105 (1)(f). In short, in order to enter into an executive session pursuant to §105(1)(f), I believe that the discussion must focus on a particular person (or persons) in relation to a topic listed in that provision. As stated judicially, "it would seem that under the statute matters related to personnel generally or to personnel policy should be discussed in public for such matters do not deal with any particular person" (Doolittle v. Board of Education, Supreme Court, Chemung County, October 20, 1981).

It has been advised that a motion describing the subject to be discussed as 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.

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

> "...the public body must identify the subject matter to be discussed (See, Public Officers Law § 105 [1]), and it is apparent that this must be accomplished with some degree of particularity, i.e., merely reciting the statutory language is insufficient (see, Daily Gazette Co. v Town Bd., Town of Cobleskill, 111 Misc 2d 303, 304-305). Additionally, the topics discussed during the executive session must remain within the exceptions enumerated in the statute (see generally, Matter of Plattsburgh Publ. Co., Div. of Ottaway Newspapers v City of Plattsburgh, 185 AD2d §18), and these exceptions, in turn, 'must be narrowly scrutinized, lest the article's clear mandate be thwarted by thinly veiled references to the areas delineated thereunder' (Weatherwax v Town of Stony Point, 97 AD2d 840, 841, quoting Daily Gazette Co. v Town Bd., Town of Cobleskill, supra, at 304; see, Matter of Orange County Publs., Div. of Ottaway Newspapers v County of Orange, 120 AD2d 596, lv dismissed 68 NY 2d 807).

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

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

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

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

I point out 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 a related area, 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 Trustees, 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.

Next, when a committee consists solely of members of a public body, such as a community college 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 board of trustees, 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)].

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

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

As you requested, copies of this opinion will be forwarded to those that you identified.

I hope that I have been of assistance.

RJF:jm

cc: Brian X. Foley
Michael V. Hollander
Salvatore J. LaLima

OML-AO-3673

From: Robert Freeman
To: [redacted]
Date: 9/11/2003 5:42:52 PM
Subject: Dear Michael:

Dear Michael:

I have received your inquiry regarding a situation in which the Board of Education upon which you serve established a committee "and was having a committee meeting with 2 Board members and 10 local citizens." You asked whether you may attend as "a concerned citizen" or whether your presence would result in a quorum "and thus make it a 'Board Meeting.'"

In my view, the facts are unclear. Does the committee consist of two members of the Board who are meeting with citizens, or does it consist of two Board members and ten citizens? If it consists exclusively of Board members, I believe that the committee would constitute a public body required to comply with the Open Meetings Law. In short, the law applies not only to the Board, but to committees consisting solely of two or more Board members. A quorum of a committee would be a majority of its total membership (2 in the case of a 2 member committee). However, judicial decisions suggest that an advisory committee that consists of members (less than a majority) of a governing body plus others, such as an entity consisting of 10 citizens and two board members, does not constitute a "public body" and that the Open Meetings Law would not apply. In either case, if you attended as a citizen, I do not believe that the gathering would be transformed in a meeting of the Board.

Our server is down; otherwise I would connect you to advisory opinions that may be pertinent. It is suggested that you go to our website, then to Open Meetings Law advisory opinions, click on to "A" and scroll down to "advisory body" and then to "C" and scroll to "committees and subcommittees." Numerous opinions will be available in full text, and I believe that they will be useful to you.

I hope that I have been of assistance.

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

From: Robert Freeman
To: bldgcode@twcny.rr.com
Date: 9/15/2003 10:19:03 AM
Subject: Dear Mr. Jennette:

Dear Mr. Jennette:

I have received a copy of your letter to Town of Danube officials and would like to offer a point of clarification.

Under §104 of the Open Meetings Law, notice of the time and place of meetings must be posted and given to the news media. The law does not require that a municipal body pay to place a legal notice in a newspaper prior to a meeting to comply with that statute. Therefore, when a newspaper, for example, receives notice of a meeting, it is not required to publish the notice. That being so, there have been many instances in which proper notice has been given to the news media, but where no notice of a meeting is published.

In short, that you have not seen any indication in your local newspaper that the Town Board scheduled a meeting does not necessarily lead to the conclusion that the Board failed to comply with the Open Meetings Law.

I hope that I have been of assistance.

Robert J. Freeman
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CC: m.herringshaw@worldnet.net; tbodden@nytowns.org; weldenc@telnet.net

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3675

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September 18, 2003

Ms. Carol D. Stevens
County Attorney
County of Greene
901 Greene County Office Building
Cairo, NY 12413

The staff of the Committee 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. Stevens:

I have received your letter and appreciate your interest in compliance with the Open Meetings Law.

You referred to a situation in which six of the thirteen members of the Greene County Legislature held "a joint press announcement regarding their intent to have Greene County financially support EMS services within the county." Other members expressed the opinion that the Open Meetings Law had been violated. You attached two newspaper accounts of the event, but it is unclear from those articles how the press announcement was carried out, whether action had effectively been taken or whether the legislators merely expressed support for a proposal. Based on our conversation, however, it appears that the gathering would not have been subject to the Open Meetings Law.

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

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

The County Legislature is clearly a public body required to comply with the Open Meetings Law.

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

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

In view of the ordinary definition of "convene", I believe that a "convening" of a quorum requires the physical coming together of at least a majority of the total membership of the Legislature, or a convening by means of videoconferencing. An affirmative vote of a majority would be needed for the Legislature to take action or to carry out its duties.

Since six, less than half of the membership of the Legislature was present at the event at issue, there would not have been a quorum, and consequently, the event would not have constituted a meeting subject to the Open Meetings Law. That being so, no action could have been taken. Based on my understanding of the matter and our conversation, no action was taken or purportedly taken. Rather, you indicated that the six members merely offered a proposal and expressed an intention to seek financial support for EMS services.

I note that 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:

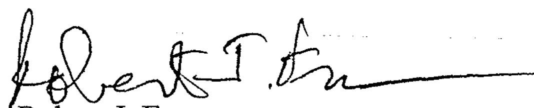
> "Whenever three of more public officers are given any power or authority, or three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of the whole number of such persons or officers, gathered together in the presence 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.

In sum, in this instance, there was no quorum present, and no action was or could have been taken. In consideration of those factors, I do not believe that the gathering constituted a "meeting" or, therefore, that the Open Meetings Law would have applied.

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-3676

Committee Members

Randy A. Daniels
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September 22, 2003

Mr. William N. Blenkinsopp

<u>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.</u>

Dear Mr. Blenkinsopp:

I have received your letter and the materials attached to it. You referred to the issuance of a permit by the Mayor of the Village of Buchanan without prior approval to do so by the Board of Trustees. You added that when questioned about his authority to issue the permit on his own and without knowledge of the Board, the Mayor, in your words, said that he "had given the permission under his executive privilege."

If indeed the issuance or grant of the permit involves a matter within the authority of the Board of Trustees, I do not believe that the Mayor could validly have acted alone or on his own initiative. Based on the assumption that only the Board has the authority to issue or grant the permit, I offer the following comments.

As you are likely aware, the Open Meetings Law pertains to meetings of public bodies, and §102(2) of that statute defines the term "public body" to mean:

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

The Board of Trustees is clearly a public body required to comply with the Open Meetings Law.

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

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

In view of the ordinary definition of "convene", I believe that a "convening" of a quorum requires the physical coming together of at least a majority of the total membership of the Board, or a convening by means of videoconferencing. An affirmative vote of a majority would be needed for the Board to take action or to carry out its duties.

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 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."

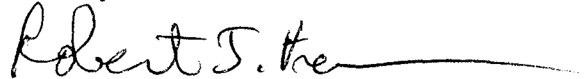
Based on the foregoing, again, a valid meeting may occur only when a majority of the total membership of a public body, a quorum, has "gathered together in the presence of each other or through the use of videoconferencing." Moreover, only when a quorum has convened in the manner described in §41 of 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.

I note that 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 or take action. Any other means of conducting a meeting, i.e., by telephone, by mail, or by e-mail, would be inconsistent with law. The provisions of §41 also make clear that a public body can only take action or assert its

authority at a meeting during which a majority is present, and only by means of an affirmative vote of a majority of its total membership.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Trustees
Hon. Daniel E. O'Neill

OML-AO-3677

From: Robert Freeman
To: [redacted]
Date: 9/25/2003 9:20:19 AM
Subject: Dear Mayor Slagle:

Dear Mayor Slagle:

I have received your letter in which you raised questions concerning the right of a town supervisor to take action unilaterally and without the consent or approval of the town board, and concerning a right of due process that may inure to a member of the public.

I regret that I cannot address the issue involving due process; it is beyond the jurisdiction or expertise of this office.

With respect to the other questions, as a general matter, if only the town board has the authority to take certain action (i.e., to schedule a hearing), I believe that only the town board would have the authority to revoke that action. Further, §63 of the Town Law states in relevant part that: "Every act, motion or resolution shall require for its adoption the affirmative vote of a majority of all the members of the town board." In short, the supervisor is one of five, and unless the law provides the supervisor with the authority to act on his own initiative, I do not believe that he can do so unilaterally.

I hope that I have been of assistance.

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

OML-AO-3678

From: Robert Freeman
To: larry.helwig@niagaracounty.com
Date: 9/25/2003 11:52:20 AM
Subject: Dear Councilman Helwig:

Dear Councilman Helwig:

I have received your letter in which you referred to meeting of a citizens' committee with the Town Supervisor held at Town Hall and whether you, as a member of the Town Board, could have been "barred" from attending "by another board member or committee."

In this regard, I do not believe that the Open Meetings Law would have applied to the gathering in question. The committee, as you described it, is not a creation of or authorized to act on behalf of Town government and, therefore, would not constitute a "public body" subject to the Open Meetings Law. That being so, the public, in my view, would have had no right to attend.

Whether the Supervisor or other Board member can bar you from attending such a gathering is not addressed in the Open Meetings Law. Consequently, it involves a matter beyond the jurisdiction of this office.

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

Robert J. Freeman
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NYS Committee on Open Government
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3679

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September 25, 2003

E-Mail

TO:

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. Smith:

I have received your letter in which you sought advice concerning what "you believe was a violation of the Open Meetings Law...in the Town of Union Vale."

You wrote that it is your understanding that "certain members of the Town Board along with others (who serve on other town boards such as the planning board) formed a 'committee' to study and plan for the development of a 'Town Center' to be constructed on both town-owned and private lands." You referred to a recent gathering held at the Town Hall "without any public notice" during which a representative of the County Planning Department "presented a proposed plan for the development." Present at the gathering, according to your letter, were "at least 3 of the 5 Town Board members", members of other town boards and committees, and land developers.

From my perspective, there are several potential responses concerning the applicability of the Open Meetings Law. In this regard, I offer the following comments.

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

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

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.

There is no doubt that a town board, a planning board or a zoning board of appeals would constitute a "public body" required to comply with the Open Meetings Law. Further, 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.

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

The membership of the committee to which you referred is not clear. If three of the five members of the Town Board are members of the committee and participate because they are members of the Board, I believe their presence would effectively constitute a meeting of the Town Board. I point out that definition of "meeting" [§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)].

The decision rendered by the Court of Appeals was precipitated by contentions made by public bodies that so-called "work sessions" and similar gatherings held for the purpose of discussion, but without an intent to take action, fell outside the scope of the Open Meetings Law.

In discussing the issue, the Appellate Division, whose determination was unanimously affirmed by the Court of Appeals, stated that:

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

In short, based upon the direction given by the courts, if a majority of the public body, such as a town board, gathers to conduct the business of the body, in their capacities as board members, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law.

If the committee includes less than three members of the Town Board, it does not appear that the committee would constitute a public body or, therefore, that the Open Meetings Law would apply. At issue, however, in the situation that you described in that event would be the functions of those Board members who attended. As suggested earlier, if three of the five functioned as a body in their capacities as Board members, I believe that the gathering would have constituted a "meeting" subject to the Open Meetings Law. However, if those persons attended and did not function as a body, it is questionable whether their presence could be characterized as a convening of a public body or whether the Open Meetings Law would have applied.

If you can provide additional information or detail regarding the matter, perhaps I could offer more specific guidance. Nevertheless, I hope that I have been of assistance.

RJF:jm

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3680

Committee Members

Randy A. Daniels
Mary O. Donohue
Stewart F. Hancock III
Stephen W. Hendershott
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J. Michael O'Connell
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Carole E. Stone
Dominick Tocci

Executive Director

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September 30, 2003

Hon. April L. Scheffler
Town Clerk
Town of Groton
101 Conger Boulevard
Groton, NY 13073

The staff of the Committee on 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. Scheffler:

I have received your letter in which you described a dispute between yourself as Town Clerk of the Town of Groton and the Town Board. The Town Board appears to have taken action to place advertisements in a local newspaper endorsing the candidacy of your opponent in a primary. When the Board was asked about "political ads, sponsored by the Town Board [and the] Planning Board, and whether action to place those ads were taken at a meeting and who authorized their publication, the Supervisor responded by asserting that "we [the Town Board] all authorized it." When that answer was met with surprise, the Supervisor again said "We all authorized it as a group."

You have asked whether either the Town Board or the Planning Board could have authorized the publication of the ads without having done so at a meeting by means of a vote of their members.

From my perspective, a public body, such as the Town Board or Planning Board, may take action only during a meeting conducted in accordance with the Open Meetings Law. In this regard, I offer the following comments.

It is noted at the outset that there is nothing in the Open Meetings Law that would preclude members of a public body from conferring individually, by telephone, 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, or a meeting or vote held by means of a telephone conference, by mail or e-mail would in my opinion be inconsistent with law.

In my view, 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."

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 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 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.

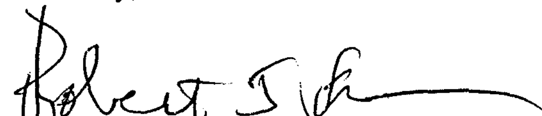
There is no authority to take action outside of a meeting, and in the only decision dealing with a vote taken by phone, the court found the vote to be a nullity. In Cheevers v. Town of Union (Supreme Court, Broome County, September 3, 1998), which cited and relied upon an opinion rendered by this office, 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..."

The Supervisor's admission that "we all authorized it as a group", that the Board, according to the minutes, placed ads in the local paper, indicates that the Board took action in private, and not during a meeting held in accordance with the Open Meetings Law. If that is so, I believe that the Board would have failed to have complied with law. In that circumstance, as in Cheevers, I believe that a court would find its action to be a nullity and determine that it failed to comply with law.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Planning Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO - 3681

Committee Members

Randy A. Daniels
Mary O. Donohue
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September 30, 2003

E-Mail

TO: Will Burbank <

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. Burbank:

As you are aware, I have received your letter concerning "party caucuses." Specifically, you asked:

> "Can such meeting be legally held in private if all (or most) members of a town or city council are members of the same party? Also, can independents or members of another party be allowed to attend?"

It is assumed that your questions involve members of political parties who serve on government bodies, such as city councils, town boards or county legislatures. Based on that assumption, 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 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 a public body is present to discuss public 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 one of the situations that you described, one in which members of more than one political party serving on a public body convene to discuss public business, 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, if a majority is present, 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 a gathering as described above is attended by legislators who are members of more than one political party, I do not believe that a minority member could be characterized as a "guest" or that the gathering can be described as a political caucus exempt from the Open Meetings Law. Again, it would appear to be a "meeting" that falls within the coverage of that statute.

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).

Buffalo News also dealt with the other situation to which you referred, where all of the members of a legislative body are of the same political party membership. The court concentrated on the expressed legislative intent regarding the exemption for political caucuses, as well as the statement of intent appearing in §100 of the Open Meetings Law, stating that:

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

To reiterate a statement in the Buffalo News decision: "any exemption must be narrowly construed so that it will not render Section 100 meaningless" (id., 278). When all the members of a legislative body are from a single political party, based on the decision cited above, I do not believe that a legislative body may validly conduct a closed political caucus to discuss matters of public business. However, when the members are discussing political party business (i.e., fund raising, party leadership, etc.), a closed political caucus may in my view be appropriately held.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3682

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October 1, 2003

Mr. Stan Evans
Deputy Managing Editor
The Buffalo News
P.O. Box 100
Buffalo, NY 14240

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

Dear Mr. Evans:

I have received your letter in which you requested an advisory opinion concerning the status of "working groups" established by the Buffalo Fiscal Stability Authority ("the Authority").

Section 3852 of the Public Authorities Law states that the Authority is "a corporate governmental agency...constituting a public benefit corporation", and §3853 provides that its governing body consists of nine directors. Its charge, in brief, involves monitoring and advising the City of Buffalo concerning the City's financial matters.

At a meeting held by its directors in August, the Chairman "announced the creation of seven committees", referred to those entities as committees, and "identified each member of every committee"; only directors were designated to serve on the committees. Although the *News* asked to be informed of the times and locations of committee meetings, it was learned later that month that two committee meetings had been held without notice. When questioned with respect to the status of the committees under the Open Meetings Law, the *News* was informed by a Board member that:

> "...it was the board's position that the committees are not subject to state open meetings laws. He said the panels should never have been called 'committees,' adding that they have been reclassified as 'working groups.' He said that the 'working groups' have no power. He said their purpose is to gather information. 'We don't think all information-gathering sessions can be public or should be public'."

In September, the Authority approved a resolution "Establishing and Reconstituting Working Groups." The resolution indicates that the Authority "did not officially act" to establish committees and chose to establish seven "working groups." The working groups are authorized to gather and

provide information to the Board of Directors and to make recommendations to the Board. The resolution also states that the Executive Director of the Authority is a member of each working group and may appoint staff to serve on each working group. Further, the Board's Chair and the leader of each working group may appoint others to a working group "for a limited period of time or indefinitely." In addition to the Executive Director, the resolution identified the other initial members of the seven work groups. In each instance, those other members are either three or four directors; no other persons are mentioned as participants in the working groups. Stated differently, the core members of each work group are directors (members of the governing body of the Authority), plus the Executive Director serving *ex officio*.

While there is no case law of which I am aware that deals with the kind of situation at hand, because the Open Meetings Law is intended to enable the public to observe the deliberative process, the working groups are, in my view, essentially committees of the Board and, therefore, constitute public bodies required to comply with that statute. In this regard, I offer the following comments.

First, judicial decisions indicate generally that advisory bodies having no authority to take binding action and which typically include persons other than members of a governing body 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 governing body or the staff of an agency participates.

Second, however, when a committee consists solely of members of a public body, such as the Board of Directors of the Authority, 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, a subcommittee or "similar body" consisting of members of the Board of the Authority, would fall within the requirements of the Open Meetings Law when such an entity discusses or conducts public business collectively as a body [see Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984 (1981)]. A quorum of a public body is a majority of its total membership (see General Construction Law, §41). Therefore, in a body consisting of nine, a quorum would be five. If that body designates a committee of three, a quorum of the committee would be two.

Second, with respect to the general intent of the Open Meetings Law, the first sentence of its legislative declaration, §100, 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 listing to the deliberations and decisions that go into the making of public policy."

In an early decision that focused largely on the intent of the Open Meetings Law that was unanimously affirmed by the Court of Appeals, it was asserted 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" [Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, 415; affirmed 45 NY2d 947 (1978)].

In my opinion, the committees originally designated, those consisting solely of Board members which, according to the resolution, the Board "did not officially act to establish", were "public bodies" required to comply with the Open Meetings Law. Again, the amendments to the definition of "public body" suggest a clear intention on the part of the State Legislature to ensure that entities consisting of two or more members of a governing body (committees, subcommittees or similar bodies) are themselves public bodies falling with the coverage of the Law.

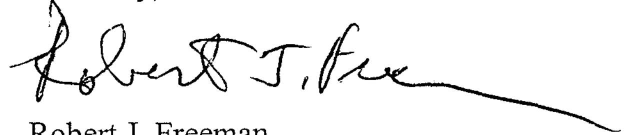
Does the applicability of the Open Meetings Law change if a committee consists of three members of a governing body, and in addition, a fourth person, not a member of the governing body, is designated to serve on the committee? What if each committee of the Board consisted solely of its own members, plus the Executive Director as an *ex officio* member? What if additions of that nature were made to evade the applicability and intent of the Open Meetings Law? From my perspective, when the core membership of an entity consists of members of a governing body, the kinds of additions or actions described in those questions would not change the essential character of the entity. In this instance, the core membership of the work groups includes either three or four directors, plus the Executive Director. The core members, having been designated by means of a resolution approved by the Board, presumably may be removed only by action taken by the Board. Their status on the work groups is permanent, unless and until the Board as a whole takes action to remove them or until they no longer serve on the Board.

In contrast, other persons "may be appointed for a limited period of time or indefinitely" by the Chair or the leader of a work group and may be removed "in the sole discretion" of either of those persons. Those other persons may come and go as members of a work group without any action taken by the Board as a whole. That being so, in my view, they are not in reality full members of a work group. I would conjecture that it is likely that those persons may be staff of the Authority or other agencies or perhaps consultants. In typical circumstances, when staff or consultants are called upon to offer expertise or guidance, they do so on an *ad hoc* basis and do not become members of the public body that has sought their assistance.

Based on the foregoing, it is my opinion that the work groups are essentially committees of the Board and, therefore, constitute public bodies required to comply with the Open Meetings Law when a majority of the core members of a work group gather for the purpose of discussing matters within the area of its activity.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Buffalo Fiscal Stability Authority

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO - 3683

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October 2, 2003

Captain Lisa A. Buchter
Engine Company One
Setauket Fire Department
190 Main Street
Setauket, NY 11733

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

Dear Ms. Buchter:

Your letter addressed to the State Ethics Commission has been forwarded to the Committee on Open Government. The Committee, a unit of the Department of State, is authorized by law to provide advice and opinions pertaining to the Open Meetings and Freedom of Information Laws.

In brief, you asked whether a board of fire commissioners is required to comply with the Open Meetings Law and whether minutes of a board's meetings must be made available to the public within two weeks, even if they have not been approved.

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

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

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

Second, §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:

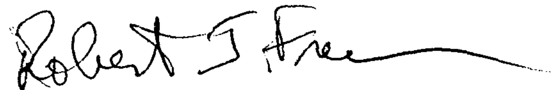
> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.
>
> 2. Minutes shall be taken at executive sessions of any action that is taken by formal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

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm
cc: Board of Commissioners

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3684

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October 9, 2003

Ms. Linda S. Lin
London Fischer LLP
59 Maiden Lane
New York, NY 10038

The staff of the Committee on 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. Lin:

I have received your letter in which you wrote that:

> "The Village Board of Trustees, in its capacity as the Board of Police Commissioners under N.Y. Unconsol. §5711-q, is holding a disciplinary hearing of a police officer. The Board has allowed the hearing to be broadcast and televised. After two witnesses testified, the Village Chief of Police filed an Article 78 petition seeking to enjoin the broadcasting and televising of the disciplinary hearing pursuant to Civil Rights Law §52."

You have sought an advisory opinion concerning "[w]hether the Open Meetings Law is applicable to the disciplinary hearing" and [w]hether the Open Meetings Law is consistent with Civil Rights Law 52."

Section 5711-q(9) of the Unconsolidated Laws provides in part that "[t]he board of trustees or municipal board shall have power and is authorized to adopt and make rules and regulations for the examination, hearing, investigation and determination of charges made or preferred against any member or members of [a] police force..." That statute also refers to a police officer's "right to a public hearing and trial" and to witnesses giving testimony "under oath." Section 52 of the Civil Rights Law states that no person or entity "shall televise, broadcast, take motion pictures of or arrange for" so doing in proceedings "in which the testimony of witnesses by subpoena or other compulsory process is or may be taken , conducted by a court, commission, committee, administrative agency or other tribunal in this state...."

A village board of trustees acting as such or in its capacity as a board of police commissioners in my view clearly constitutes a "public body" as that phrase is defined in §102(2) of the Open Meetings Law. Public bodies are generally required to conduct public business in public, and it has been held that open meetings of public bodies may be audio or video recorded, unless the use of the recording equipment is obtrusive or disruptive [see Mitchell v. Board of Education of the Garden City Union Free School District, 113 AD2d 924 (1985), Peloquin v. Arsenault, 616 NYS2d 716 (1994), and most recently, Csorny v. Shoreham-Wading River Central School District, Appellate Division, Second Department, NYLJ, May 20, 2003]. Nevertheless, I believe that the proceeding in question is exempt from the coverage of the Open Meetings Law.

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

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

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

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

Relevant to the matter is §108(1) of the Open Meetings Law, which exempts from the coverage of that statute "judicial or quasi-judicial proceedings..." From my perspective, it is often difficult to determine exactly when public bodies are involved in a quasi-judicial proceeding, or where a line of demarcation may be drawn between what may be characterized as quasi-judicial, quasi-legislative or administrative functions. Similarly, often provisions require that public hearings be held; others permit discretion to hold a public hearing. Further, the holding of public hearings and providing an opportunity to be heard does not in my opinion render a proceeding quasi-judicial in every instance. Those requirements may be present in a variety of contexts, many of which precede legislative action.

I believe that one of the elements of a quasi-judicial proceeding is the authority to take final action. While I am unaware of any judicial decision that specifically so states, there are various decisions that infer that a quasi-judicial proceeding must result in a final determination reviewable only by a court. For instance, in a decision rendered under the Open Meetings Law, it was found that:

> "The test may be stated to be that action is judicial or quasi-judicial, when and only when, the body or officer is authorized and required to take evidence and all the parties interested are entitled to notice and a hearing, and, thus, the act of an administrative or ministerial officer becomes judicial and subject to review by certiorari only when there is an opportunity to be heard, evidence presented, and a decision had thereon" [Johnson Newspaper Corporation v. Howland, Sup. Ct., Jefferson Cty., July 27, 1982; see also City of Albany v. McMorran, 34 Misc. 2d 316 (1962)].

Another decision that described a particular body indicated that "[T]he Board is a quasi-judicial agency with authority to make decisions reviewable only in the Courts" [New York State Labor Relations Board v. Holland Laundry, 42 NYS 2d 183, 188 (1943)]. Further, in a discussion of quasi-judicial bodies and decisions pertaining to them, it was found that "[A]lthough these cases deal with differing statutes and rules and varying fact patterns they clearly recognize the need for finality in determinations of quasi-judicial bodies..." [200 West 79th St. Co. v. Galvin, 335 NYS 2d 715, 718 (1970)].

It is my opinion that the final determination of a controversy is a condition precedent that must be present before one can reach a finding that a proceeding is quasi-judicial. Reliance upon this notion is based in part upon the definition of "quasi-judicial" appearing in Black's Law Dictionary (revised fourth edition). Black's defines "quasi-judicial" as:

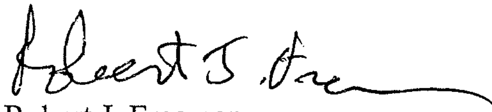
> "A term applied to the action, discretion, etc., of public administrative officials, who are required to investigate facts, or ascertain the existence of facts, and draw conclusions from them, as a basis for their official action, and to exercise discretion of a judicial nature."

In the situation that you described, I believe that the proceeding could be characterized as quasi-judicial and, therefore, would be exempt from the coverage of the Open Meetings Law.

With respect to your second question, whether the Open Meetings Law is inconsistent with §52 of the Civil Rights Law, I am not certain of the meaning of the question. In short, since §52 pertains to judicial or quasi-judicial proceedings, and since §108(1) of the Open Meetings Law exempts those proceeding from the coverage of that statute, the two statutes in my opinion ordinarily would not directly relate to or be construed in connection with one another.

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-3685

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October 9, 2003

Mr. Frank I. Ioli, Sr.

The staff of the Committee 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. Ioli:

I have received your letter concerning minutes of meetings of a village board of trustees. In brief, as I understand your comments, the minutes do not include reference to the remarks offered by you and others during meetings.

In this regard, there is no obligation that reference to those comments be included. The Open Meetings Law contains what might be characterized as minimum requirements concerning the contents of minutes. Specifically, subdivision (1) of §106 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 vote thereon."

Based on the foregoing, it is clear that minutes need not consist of a verbatim account of everything said during or meeting or that reference be made to comments offered by the public or even members of the board. So long as the minutes consist of a "record or summary" of the kinds of items described in subdivision (1), I believe that a public body would be acting in a manner consistent with law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees, Village of Mayville

OML-AO- 3686

From: Robert Freeman
To: [redacted]
Date: 10/15/2003 7:55:13 AM
Subject: Dear Ms. Sawyer:

Dear Ms. Sawyer:

I have received your inquiry concerning public participation at village board meetings. In this regard, although the Open Meetings Law gives the public the right to attend meetings of public bodies, listen and observe the deliberative process, the law is silent with respect to public participation or the ability of the public to speak. That being so, a board is not obliged to permit the public to speak or participate. However, it may choose to do so, and if it does, it has been advised that it should do so based on reasonable rules that treat members of the public equally.

To obtain more detailed information on the subject, go to our website, which is identifed below, and then to advisory opinions rendered under the Open Meetings Law. From there, click on to "P" and scroll down to "public participation." The opinions prepared within the last ten years will be accessible in full text.

If you questions after reviewing the opinions, please feel free to contact me.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3687

Committee Members

Randy A. Daniels
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Stephen W. Hendershott
Gary Lewi
J. Michael O'Connell
Michelle K. Rea
Kenneth J. Ringler, Jr.
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October 16, 2003

Mr. Robert L. Leonard
Labor Relation Specialist
CSEA Rochester Satellite Office
332 Jefferson Road
Rochester, NY 14623

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

Dear Mr. Leonard:

I have received your letter in which you indicated that a subcommittee of the Ontario County Board of Supervisors entered into executive session during a meeting without providing a reason for so doing. You have questioned the propriety of its action.

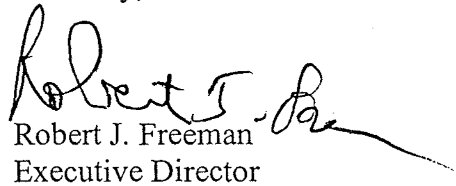
In this regard, §105(1) of the Open Meetings Law requires that a motion for entry into executive session must include reference to the subject or subjects to be discussed. The cited provision states in relevant part that:

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

Based on the foregoing, again, 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.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Solid Waste Committee
Board of Supervisors

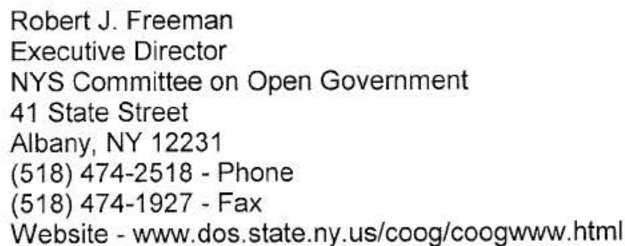
OML-AO-3688

From: Robert Freeman
To: Village of Schuylerville
Date: 10/20/2003 1:03:07 PM
Subject: Re: Strategic Planning Committee Meetings

If I understand the situation correctly, the Mayor has designated a committee, advisory in nature, that does not include a majority of the members of the Board of Trustees; rather, its membership largely includes persons other than Board members. If that is correct, a variety of judicial decisions indicate that the entity is not a public body and, therefore, is not subject to the Open Meetings Law. If that is so, I know of no provision that would require you, as clerk, to be present at its meetings.

If I have misconstrued the facts, please offer clarification.

I hope that this helps and that you are enjoying today's sunshine.



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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3689

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October 27, 2003

Mr. Gary Leland Rhodes

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

Dear Mr. Rhodes:

I have received your letter in which you questioned the propriety of an executive session held by the Henderson Town Board to discuss "potential litigation."

I note that you raised essentially the same issue in December of 1996 and that I responded on January 21, 1997. Nevertheless, I will reiterate the commentary offered in that opinion.

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

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

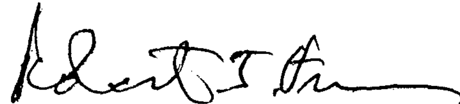
> "The purpose of paragraph d is 'to enable a public body to discuss pending litigation privately, without baring its strategy to its

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

Based upon the foregoing, I believe that the exception is intended to permit a public body to discuss its litigation strategy behind closed doors, rather than issues that might eventually result in litigation. Again, §105(1)(d) would not permit a public body to conduct an executive session due solely to a possibility or fear of litigation.

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-3690

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October 27, 2003

Hon. Arthur J. DeAngelis
Former Mayor Village of Elmsford

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

Dear Former Mayor DeAngelis:

I have received your letter in which you referred to a meeting held by the Village of Elmsford Board of Trustees on September 24 that "was a (reconvened) continuation of [a meeting] held...September 22."

You wrote that "[t]he meeting of the 24th was noted on a public notice dated the 24th of September, which [you] felt did not meet the 72-hour time constraints of the law. No notice was in the newspaper or posted in conspicuous places." You added that you learned of the meeting "by chance."

While there was no obligation to provide notice seventy-two hours prior the meeting, I believe that the Board was nonetheless required to provide notice of the meeting to the news media and to post notice.

In this regard, §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, conspicuous, public 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, a case decided in Supreme Court, Westchester County:

> "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.

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

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

However, the same provision states further that:

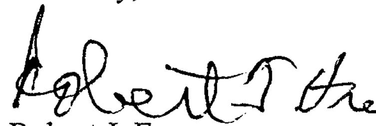
> "An unintentional failure to fully comply with the notice provisions required by this article shall not alone be grounds for invalidating any action taken at a meeting of a public body."

As such, when a legal challenge is initiated relating to a failure to provide notice, a key issue is whether a failure to comply with the notice requirements imposed by the Open Meetings Law was "unintentional".

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 Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3691

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October 27, 2003

Ms. Joyce Day

The staff of the Committee on 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. Day:

I have received your letter in which you asked whether it is "legal for a town board to pass an ordinance so a citizen cannot speak longer than 5 minutes at a public meeting."

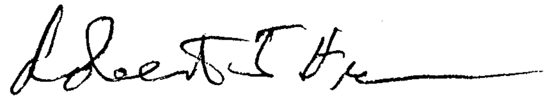
In short, I believe that such a provision would be valid and "legal." While the Open Meetings Law clearly provides the public with the right "to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy" (see Open Meetings 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.

You also asked whether it is "true that only the Town Board & Supervisor (5 people)" can decide "to have zoning in their community." Your question falls beyond the advisory jurisdiction of this office, which relates to the Freedom of Information and Open Meetings Laws. However, enclosed is a copy of §261 of the Town Law, which I believe includes direction responsive to your question.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3692

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October 27, 2003

Hon. Susan E. Wood
Town Board Member
Town of Greenville
1537 US Highway 6
Port Jervis, NY 12771

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

Dear Ms. Wood:

I have received your letter in which you raised a question concerning the location of meetings held by a board of fire commissioners.

According to your letter, the board conducts its meetings "in a small room above the fire house." Although that room has generally been adequate, you indicated that "the size and accessibility of the room has come into question." You added that the room "holds about 12-15 people and is not handicap accessible." The Fire District's bylaws state that meetings of its board "will be held in the aforementioned room." You have contended, however, that "so long as it is properly advertised, it can be moved to accommodate all who wish to hear and be heard."

You have sought my opinion on the matter, and in this regard, I offer the following comments.

First, the Open Meetings Law applies to meetings of public bodies. Since a board of commissioners is the governing body of a public corporation, I believe that it clearly constitutes a "public body" required to comply with the Open Meetings Law.

Second, §103(b) of the Open Meetings Law states that:

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

Based upon the foregoing, there is no obligation upon a public body to construct a new facility or to renovate an existing facility to permit barrier-free access to physically handicapped persons. However, I believe that the Law does impose a responsibility upon a public body to make "all reasonable efforts" to ensure that meetings are held in facilities that permit barrier-free access to physically handicapped persons. Therefore, if, for example, the Board has the capacity to hold its meetings at a location 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.

Third, 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.

In sum, if the board has the ability to conduct its meetings at a location that is accessible to physically handicapped persons and that can accommodate those likely interested in attending, it would be unreasonable, in my view, not to hold meetings at that location.

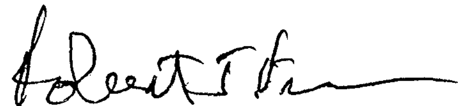
Lastly, with regard to the Board's by-law, §110(1) of the Open Meetings Law states that:

> "Any provision of a charter, administrative code, ordinance, or rule or regulation affecting a public body which is more restrictive with respect to public access than this article shall be deemed superseded hereby to the extent that such provision is more restrictive than this article."

In consideration of the foregoing, I believe that the by-law is invalid insofar as it is more restrictive with respect to public access than the Open Meetings Law. In this instance, the use of the meeting room used in the past would be more restrictive with respect to public access than a nearby location that would permit access to those interested in attending.

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-3693

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October 27, 2003

E-Mail

TO: Ralph Quinn

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. Quinn:

I have received your letter in which you asked whether a certain not-for-profit corporation is required to comply with the Open Meetings Law. You referred to the corporation's operations in relation to "the U.S. Dept. of Justice's Weed & Seed Program."

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

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

Based on the foregoing, a "public body" generally is an entity created by or performs a governmental function for the state or a municipality. Assuming that the Corporation in question is not an instrumentality of state or local government, I do not believe that it would fall within the coverage of the Open Meetings Law.

I note, too, that based on a decision rendered by the State's highest court, the Court of Appeals, an entity created pursuant to federal law would not be subject to the Open Meetings Law. The decision dealt with a "laboratory animal use committee" (LAUC) that was required to be established pursuant to federal law and was instituted at the State University at Stony Brook, and it was determined that the entity in question fell beyond the scope of the Open Meetings Law. Following its reference to the definition, the Court found that:

> "It is thus evident that the Open Meetings Law excludes Federal bodies from its ambit.
>
> "The LAUC's constituency, powers and functions derive solely from Federal law and regulations. Thus, even if it could be characterized as a governmental entity, it is at most a *Federal* body that is not covered under the Open Meetings Law" [ASPCA v. Board of Trustees of the State University of New York, 79 NY 2d 927, 929 (1992)].

The foregoing is not intended to suggest that the corporation cannot hold open meetings; rather, based on the language of the Open Meetings Law and the decision cited above, I do not believe that the state's Open Meetings Law would be applicable.

I hope that I have been of assistance.

RJF:jm

OML-AO - 3694

From: Robert Freeman
To: [redacted]
Date: 10/28/2003 4:31:37 PM
Subject: Dear Ms. Mickle:

Dear Ms. Mickle:

I have received your letter in which you sought an opinion concerning a situation in which a library Board of Trustees "will be preparing and presenting a performance evaluation on our Library Director." You have asked whether "any part of this process needs to be done during the public meeting or can this be done in Executive Session."

The only ground for entry into executive session relevant to the matter, §105(1)(f) of the Open Meetings Law, authorizes the Board to conduct an executive session to discuss: "the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline suspension, dismissal or removal of a particular person or corporation."

In view of the language quoted above, in short, discussion or consideration of the preparation of a document used to evaluate an employee should, in my opinion, transpire in public, for a discussion of that nature would deal with the criteria used to evaluate and likely the functions inherent in the position of library director, rather than the performance of the Director. The criteria would involve the position rather than the person who hold the position. However, when Board discusses the Director and how well or poorly that person has carried out his or her duties, the matter would involve "the employment history of a particular person" and, therefore, could be discussed in executive session.

I hope that I have been of assistance. If you would like to discuss the matter, 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-14329
OML-AO-3695

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October 30, 2003

Ms. Virginia Demjanenko

The staff of the Committee 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. Demjanenko:

As you are aware, I have received your letters and the materials attached to them. In short, you have raised issues concerning the implementation of the Freedom of Information and Open Meetings Laws by the Starpoint Central School District and its Board of Education.

The first letter related to a request for the "Starpoint High School Master Schedule showing all teachers' schedules and room assignments." Although certain records were disclosed, the District did not include records indicating "what courses each teacher is teaching." Nevertheless, you obtained a copy of a record from another source that contains the information that you requested. Consequently, it is your view that the District "violated FOIL" and you asked that this office initiate an investigation.

In this regard, the Committee on Open Government is authorized to offer advice and opinions concerning public access to government information, primarily in relation to the Freedom of Information and Open Meetings Laws. The Committee does not have the resources to conduct an investigation, nor is it empowered to compel an entity of government to comply with those statutes. It is our hope, however, that advisory opinions, such as this communication, serve to educate, persuade and encourage compliance with law. With those goals in mind, I offer the following comments.

First, when an agency discloses some of the records sought but withholds others, both §89(3) of the Freedom of Information Law and the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) require that a denial of access be given in writing. Further, the regulations specify that the person denied access be informed of the right to appeal pursuant to §89(4)(a). 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 of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Second, 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."

In a related vein, and I am not suggesting that they apply, §89(8) of the Freedom of Information Law and §240.65 of the Penal Law include essentially the same language, and the latter states that:

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

From my perspective, the preceding may be applicable in two circumstances: first, when an agency employee receives a request for a record and indicates that the agency does not maintain the record even though he or she knows that the agency does maintain the record; or second, when an agency employee destroys a record following a request for that record in order to prevent public disclosure of the record. I do not believe that §240.65 applies when an agency denies access to a record, even though the basis for the denial may be inappropriate or erroneous, or when an agency cannot locate a record after having made a diligent search.

And third, insofar as an agency, such as a school district, maintains 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. In my view, records indicating the courses taught by teachers and their schedules must be disclosed. In short, there is nothing secret about the contents of such records, and I do not believe that any of the grounds for denial of access could be asserted.

Your other letter referred to practices of the Board of Education in relation to its meetings, and during our conversation, you indicated that the Board routinely conducts executive sessions in advance of its meetings open to the public. In this regard, the phrase "executive session" is defined in §102(3) of the Open Meetings Law to mean a portion of an open meeting during which the public may be excluded. As such, an executive session is not separate and distinct from a meeting, but rather is a portion of an open meeting. Moreover, 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.

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 or conduct an executive session in advance of a meeting. In short, because a vote to enter into an executive session must be made and carried by a majority vote of the total membership during an open meeting, technically, it cannot be known in advance of that vote that the motion will indeed be approved. However, as an alternative method of achieving the desired result that would comply with the letter of the law, rather than scheduling an executive session, the Superintendent or the Board on its agenda or notice of a meeting could refer to or schedule a motion to enter into executive session to discuss certain subjects. 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.

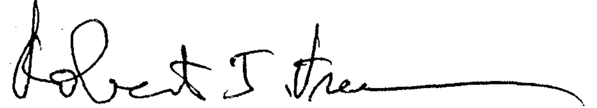
Lastly, although you did not refer to the subject matter of executive sessions, I point out that, like the Freedom of Information Law, the Open Meetings Law is based on a presumption of

openness. Paragraphs (a) through (h) of §105(1) specify and limit the subjects that may properly be considered during executive sessions.

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

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Steven Lunden, Records Access Officer
C. Douglas Whelan, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3696

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October 31, 2003

Mr. Richard Gardella
Village Attorney
Village of Scarsdale
1001 Post Road
Scarsdale, NY 10583

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

Dear Mr. Gardella:

I have received your letter and the materials attached to it. You have requested an advisory opinion concerning the obligation of the Board of Appeals of the Village of Scarsdale to tape record its deliberative discussions. You indicated that the Board audio tapes its "public hearing sessions", but not its deliberations, and that a member of the Board "has condemned the Board's failure to tape record its deliberative sessions as a violation of the Open Meetings Law."

I disagree with the Board member's contention. The only record keeping requirement found in or imposed by the Open Meetings Law pertains to minutes of meetings. Specifically, §106 contains what might be characterized 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."

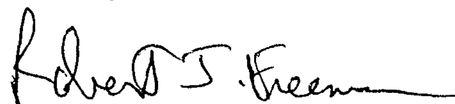
Based upon the foregoing, it is clear in my view that minutes need not consist of a verbatim account of what was said at a meeting; similarly, there is no requirement that minutes refer to every topic discussed or identify those who may have spoken. Although a public body may choose to prepare expansive minutes, at a minimum, so long as minutes of open meetings include reference to all motions, proposals, resolutions and any other matters upon which votes are taken, I believe that it would satisfy its legal obligation concerning the preparation of a record pertaining to a meeting.

As you are aware, public bodies frequently record their meetings. However, in my experience, they record the meetings not because of any legal requirement to do so, but rather as an aid in preparing accurate minutes or, in some instances, to have a detailed record of proceedings if an issue is complex or may become the subject of a legal proceeding. As you also indicated in your letter, members of the public who attend the deliberative sessions may record those sessions, and it has been held that those in attendance at open meetings may tape or video record the meetings, so long as the use of a recording device is not obtrusive or disruptive [see e.g., Mitchell v. Board of Education of the Garden City Union Free School District, 113 AD2d 924(1985), People v. Ystueta, 99 Misc.2d 1105, 418 NYS2d 508 (1979), Peloquin v. Arsenault, 616 NYS2d 716 (1994), Csorny v. Shoreham-Wading River Central School District, ___AD2d___, Appellate Division, Second Department, NYLJ, May 20, 2003].

In short, there is nothing in the Open Meetings Law that requires a public body, such as the Board of Appeals, to tape record any aspect of its meetings. Again, it may choose to do so, but I do not believe that it is required to do so.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3697

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October 30, 2003

E-Mail

TO: Dan

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 Dan:

As you are aware, I have received your letter in which you raised questions concerning the Open Meetings Law. In consideration of those questions, I offer the following comments.

First, this office, the Committee on Open Government, is authorized pursuant to §109 of the Open Meetings Law to provide advice and opinions concerning that statute. While the Committee cannot enforce the law, it is our hope that opinions rendered by this office serve to educate, persuade and enhance compliance. In short, if you have a complaint or question relative to that statute, you may direct it to the Committee. When an opinion is prepared, a copy is sent to the government entity involved when its identity is known.

Second, 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."

Based on the language quoted above, the Open Meetings Law applies equally to the governing bodies of counties, cities, towns, villages, school and special districts, as well as various commissions, boards, councils and similar bodies that conduct public business and perform a governmental function.

Third, the Open Meetings Law contains direction concerning minutes of meetings and provides what might be viewed as minimum requirements pertaining to their contents. 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."

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 generally 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.

Lastly, it is emphasized that minutes of executive sessions need not include information that may be withheld under the Freedom of Information Law. From my perspective, when a public body makes a final determination during an executive session, that determination will, in most instances, be public. For example, although a discussion to hire or fire a particular employee could clearly be discussed during an executive session [see Open Meetings Law, §105(1)(f), a determination to hire or fire that person would be recorded in minutes and would be available to the public under the Freedom of Information Law. 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, such as unsubstantiated allegations, to the extent that disclosure would result in an unwarranted personal privacy [see Freedom of Information Law, §87(2)(b)].

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3698

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November 3, 2003

E-Mail

TO: Pat Reynolds [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. Reynolds:

I have received your letter and appreciate your kind words. You referred to problems that have arisen in relation to a building project in your school district, and that the Board of Education will be "meeting with all the parties involved". You wrote that "[t]here may be litigation to follow and asked whether the session must be held open to the public, or whether this "is [a] matter for executive session."

From my perspective, which is based on judicial decisions, since "all the parties involved" will be present, there would be no basis for conducting an executive session.

In this regard, as a general matter, the Open Meetings Law is based on a presumption of openness. Stated differently, meetings of public bodies must be conducted open to the public, except to the extent that an executive session may properly be held . Further, that statute requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, §105(1) states in relevant part that:

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

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

It would appear that the only pertinent ground for entry in executive session would have been §105(1)(d), which permits a public body to enter into an executive session to discuss "proposed, pending or current litigation". Based on judicial decisions, the scope of the so-called litigation exception is narrow. As stated judicially:

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

In the context of the situation that you described, the presence of the parties would negate the Board's ability to conduct an executive session under the "litigation" exception. Insofar as the Board seeks to discuss its litigation strategy, without the presence of any adversary or potential adversary, I believe that it would have a basis for entry into executive session.

I hope that I have been of assistance.

RJF:jm

OML-AO-3699

From: Robert Freeman
To: michaelmills@elmsfordny.org
Date: 11/3/2003 4:14:06 PM
Subject: Dear Mr. Mills:

Dear Mr. Mills:

I have received the materials that you forwarded concerning the meeting held by the Village of Elmsford Board of Trustees on September 24.

As indicated in the opinion of September 27 addressed to Mr. DeAngelis, notice of the time and place of a meeting scheduled at least a week in advance must be given to the news media and by means of posting at least 72 hours prior to the meeting. However, when a meeting is scheduled less than a week in advance, which was so in this instance, §104(2) of the Open Meetings Law requires that notice of the time and place be given to the news and posted "to the extent practicable" at "a reasonable time" prior to the meeting.

Based on our conversation, it appears that there was an actual need to reconvene the meeting begun on September 22 quickly in order that the Board could take appropriate action. Further, you indicated that notice pertaining to the meeting of September 24, a copy of which you transmitted, was given to the news media and posted at a reasonable time prior to the meeting and that members of the public attended. If that is so, it appears that the Board complied with the Open Meetings Law.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
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FOIL-AO-14345
OML-AO-3700

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November 5, 2003

Mr. William A. Hurst
McNamee, Lochner, Titus
& Williams, P.C.
P.O. Box 459
Albany, NY 12201-0459

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

Dear Mr. Hurst:

I have received your letter and the materials attached to it. You indicated that Ms. Karen Deyo, a member of the Greene County Legislature, has asked the Association for Efficient Government (AEG), which appears to be your client, to seek an advisory opinion from this office concerning compliance with the Freedom of Information and Open Meetings Laws by the Greene County Industrial Development Agency (IDA).

The initial issue that you raised relates to Ms. Deyo's requests made under the Freedom of Information Law from March to June. Some of the records were made available promptly; others were missing from the category of those provided or simply not disclosed. I use the phrase "not disclosed" because the IDA has not suggested that the records would be withheld in accordance with any ground for denial of access appearing in §87(2) of the Freedom of Information Law. In most instances, the receipt of the requests was acknowledged and Ms. Deyo was informed by the records access officer for the IDA that he "expect[ed] to be able to respond to [her] request within ten (10) business days." When more than ten business days had passed, Ms. Deyo appealed, contending that her requests had been constructively denied. The attorney for the IDA wrote to her, indicating that due to the volume of the request and the small size of the IDA's staff, two persons, the records would be available within sixty to ninety days of the date of his responses. He added that he did not believe that the delays in disclosure constituted a constructive denial of access. As of the date of your letter to this office, more than ninety days had passed since the IDA attorney's response, and the IDA, in your words, "has still neither produced the requested records nor denied the FOIL requests."

You have questioned "the propriety of the...4-6 month delay." In consideration of the nature of the request, the expressed intent of the Freedom of Information Law, and judicial decisions, I believe that Ms. Deyo's requests that have not resulted in any determination to grant access to or withhold the records may be characterized as having been constructively denied.

In this regard, as you are aware, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

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)].

Further, the advice rendered by this office was confirmed in Linz v. The Police Department of the City of New York (Supreme Court, New York County, NYLJ, December 17, 2001), in which 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, if the acknowledgement of the receipt of a request fails to include an estimated date for granting or denying access, or if the estimated date is unreasonable, 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."

I point out, too, that 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)].

While I am not suggesting that such a step be taken, one court found in a similar circumstance that the person seeking the records could initiate an Article 78 proceeding. In a situation in which the applicant met with a series of delays and extensions, the court found that:

> "...respondent's actions and/or inactions placed petitioner in a 'Catch 22' position. The petitioner, relying on the respondent's representation, anticipated a determination to her request...this court finds that this petitioner should not be penalized for respondent's failure to comply with Public Officers Law §89 (3), especially when petitioner was advised by respondent that a decision concerning her application would be forthcoming.
>
> "It should also be noted that petitioner did not sit idle during this period but rather made numerous efforts to obtain a decision from

> respondent including the submission of a follow up letter to the Records Access Officer and submission of various requests for said records with the Department of Transportation" (Bernstein v. City of New York, Supreme Court, Supreme Court, New York County, November 7, 1990).

In Bernstein, the court determined that the agency "is estopped from asserting that this proceeding is improper due to petitioner's failure to appeal the denial of access to records within 30 days to the agency head, as provided in Public Officers Law, §89(4)(a)."

In the situation that you described, the applicant was initially informed that the request would be granted or denied within ten business days of the date of acknowledgment. Then, following a contact by the applicant contending that the request was constructively denied, the IDA's attorney disputed that claim and extended the time for response another sixty to ninety days. And again, even though that period has expired, the applicant still has neither been granted nor denied access to many of the records sought.

From my perspective, there is little about the items requested that could be characterized as complex. In a small agency, I would conjecture that locating and retrieving the records would not be an onerous task. I am mindful of the difficulties involved in having a small staff; this office has a staff of three, including myself. Nevertheless, we respond annually to approximately 7,000 telephone and hundreds of email inquiries, prepare more 800 written advisory opinions and provide dozens of presentations before organizations of all kinds. While I am somewhat sympathetic, I believe that the delays and extensions encountered by the applicant cannot be justified and that the outstanding requests may be considered to have been constructively denied.

Your remaining questions relate to the sufficiency of minutes of IDA meetings and the description and substance of executive sessions.

With respect to the detail reflected in the minutes, the Open Meetings Law provides what might be characterized as minimum requirements concerning the contents. Specifically, §106(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, at a minimum, minutes of open meetings must consist of a record or summary of motions, proposals, resolutions, action taken and the vote of each member. Having reviewed the minutes that you enclosed, it appears that their contents are consistent with the standard imposed by §106(1).

The motions for entry into executive session are, however, in my view, inadequate. Moreover, it is questionable whether or the extent to which the executive sessions were properly held.

Prior to entry into an executive session, the Open Meetings Law requires that a procedure be accomplished, during an open meeting. Section 105(1) states in relevant part that:

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

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

You referred to executive sessions held to discuss "personnel issues", "legal issues", and "contracts" or "contract negotiations."

I emphasize 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. 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 in a similar manner 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)]

With respect to "legal issues", nearly anything discussed by a public could involve a legal issue, and the exception most related to that kind of phrase is §105(1)(d), which 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 a public body 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

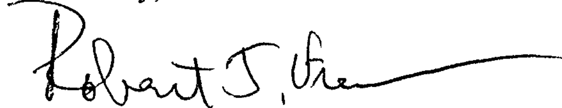
> boilerplate recitation does not comply with the intent of the statute. To validly convene an executive session for discussion of proposed, pending or current litigation, the public body must identify with particularity *the* pending, proposed or current litigation to be discussed during the executive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

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. I point out that the §105(1)(f), which was discussed in detail earlier, may be applicable in relation to matters involving the contracting or negotiation process, for it includes reference, for instance, to discussions involving the financial or credit history of a "particular person or corporation".

Lastly, in several requests, Ms. Deyo expressed the belief that "as a member of the Greene County Legislature, it is [her] right as an elected public official to receive this information without any fee." Unless there is some local enactment or rule that confers such a right upon her, I do not believe that she would be entitled to a waiver of fees for copies. It has been advised that when a member of a public body seeks records under the Freedom of Information Law unilaterally, absent direction or approval provided by a majority of that body, he or she is acting, in essence, as a member of the public. In that capacity, I believe that he or she may be treated in the same manner as a member of the public, and that an agency may assess the appropriate fees for copies of records.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Karen A. Deyo
Alexander Mathes, Jr.
Willis Vermilyea
Paul J. Goldman

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DEPARTMENT OF STATE
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OML-AO-3701

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November 5, 2003

Scott F. Chatfield, Esq.

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

Dear Mr. Chatfield:

I have received your letter in which you questioned the extent to which the attorney/client privilege may be asserted as a basis for excluding the public from meetings and withholding records of a town zoning board of appeals.

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

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

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed and the motion must be carried by majority vote of a public body's membership before such a session may validly be held. The ensuing provisions of §105(1) specify and limit the subjects that may appropriately be considered during an executive session. Therefore, a public body may not conduct an executive session to discuss the subject of its choice. In the context of the situation that you described, it does not appear that any basis for entry into executive session would be or have been pertinent or applicable.

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 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 instance, while the litigation exception for entry into executive session [see §105(1)(d)] 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.

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

The initial ground for denial, §87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute." For more than a century, the courts have found that legal advice given by a municipal attorney to his or her clients, municipal officials, is privileged when it is prepared in conjunction with an attorney-client relationship [see e.g., People ex rel. Updyke v. Gilon, 9 NYS 243, 244 (1889); Pennock v. Lane, 231 NYS 2d 897, 898, (1962); Bernkrant v. City Rent and Rehabilitation Administration, 242 NYS 2d 752 (1963), aff'd 17 App. Div. 2d 392]. As such, I believe that a municipal attorney may engage in a privileged relationship with his/her client and that records prepared in conjunction with an attorney-client relationship may be considered privileged under §4503 of the Civil Practice Law and Rules. Further, since the enactment of the Freedom of Information Law, it has been found that records may be withheld when the privilege can appropriately be asserted when the attorney-client privilege is read in conjunction with §87(2)(a) of the Law [see e.g., Mid-Boro Medical Group v. New York City Department of Finance, Sup. Ct., Bronx Cty., NYLJ, December 7, 1979; Steele v. NYS Department of Health, 464 NY 2d 925 (1983)]. Similarly, the work product of an attorney may be confidential under §3101 of the Civil Practice Law and Rules.

I believe that the same kinds of considerations are pertinent in relation to determining the application of the privilege in relation to the Freedom of Information Law as those discussed in relation to the Open Meetings Law. In short, the communication from the attorney must involve the rendition or use of legal expertise, a service that could be rendered only by an attorney, in order to assert the attorney/client privilege.

Even if the letters in question are not subject to the attorney/client privilege, a different exception would in my view be relevant. Section 87(2)(g) authorizes an agency to withhold records that:

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

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

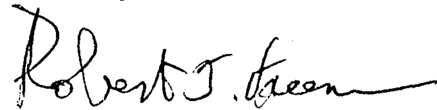
iii. final agency policy or determinations; or

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

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

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Zoning Board of Appeals

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-14347
OML-AO-3702

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November 6, 2003

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

Dear :

I have received several communications from you, as well as a variety of related materials.

By way of background, you wrote that you have been a substitute teacher in the Penn Yan Central School District for several years, but that your services were terminated one week after incurring a work related injury, apparently in May of 2002. This year you were elected to the Board of Education and took office in July. Since you filed your petition to seek to run for the Board, you indicated that the Superintendent and two board members "have made things difficult" for you and attempted "to discredit [you] and cast [you] in a negative light in the public eye." Further, your request made under the Freedom of Information Law was apparently denied, and you learned that the District does not have an appeals officer. According to your letter:

> "They held a Foil Hearing in reference to [your] request on September 15th in the School District Office. They made this meeting Public. This meeting should not have been made public. This was an illegal meeting. They divulged very private, personal, privileged and confidential information at this meeting. They released [your] medical information and work related injuries in this meeting. They gave out information about [your] work history with the school district, they supplied information about the complaints [you] filed against the school district. They gave FALSE, incorrect, inaccurate, and misleading information to the media. Two straight weeks, two local newspaper printed false information in news articles that was given to them by the Superintendent of the Penn Yan Central School District. This was done to force [you] to resign from [your] position on the BOE. This is libel, slander, invasion of [your] privacy,

> defamation of character. They have ruined [your] reputation, and future employability. The FOIL Hearing should have only had information related to the FOIL request."

In consideration of the foregoing, you have sought assistance, and in this regard, I offer the following comments.

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

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

In this instance, the governing body of a public corporation is the Board of Education. That being so, the Board is required to promulgate appropriate rules and regulations consistent with those adopted by the Committee on Open Government and with the Freedom of Information Law.

When a request is denied, it 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 of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Further, the regulations promulgated by the Committee state that:

> "(a) The governing body of a public corporation...shall hear appeals or shall designate a person...to hear appeals regarding denial of access to records under the Freedom of Information Law.

In consideration of the foregoing, I believe that a board of education has general responsibility concerning the implementation of the Freedom of Information Law in a school district and that the Board may determine appeals or designate a person to do so on its behalf.

Second, with respect to the disclosures of information pertaining to you, 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. 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, with or without identifying details, 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 characterized as "confidential", it is unlikely that there is a bar regarding disclosure. 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 Education, West Hempstead Union Free School District No. 27, Supreme Court, Nassau County, January 29, 1987).

In the context of the situation that you described, with one possible exception, I do not believe that the Board or the District would have been prohibited from disclosing information pertaining to you. If the information was false and you consider it to have been slanderous or libelous, there may be legal avenues available to you to seek redress. I cannot, however, offer advice in that realm. Otherwise, again, with the exception of the matter to be discussed in the ensuing

remarks, neither the Open Meetings Law nor the Freedom of Information Law would have forbidden disclosure.

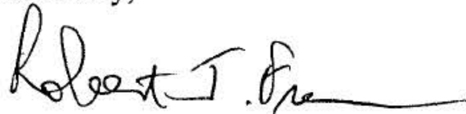
You referred to the disclosure of "medical information" by the District. While the meaning of the quoted phrase is unclear, I note that §18 of the Public Health Law pertains to patient information. In brief, that statute generally provides the subjects of patient information with rights of access to the information; concurrently, it authorizes disclosure in limited circumstances; disclosure to the public at large would not be among them, unless the subject of the information consents to disclosure. The phrase "patient information" is defined to include:

> "...any information concerning or relating to the examination, health assessment including, but not limited to, a health assessment for insurance and employment purposes or treatment of an identifiable subject maintained or possessed by a health care facility or health care practitioner who has provided or is providing services for assessment of a health condition including, but not limited to, a health assessment for insurance and employment purposes or has treated or is treating such subject..."

As I understand §18, if patient information falling within the coverage of that statute was disclosed without the consent of the patient, the person or entity that engaged in the disclosure would have failed to comply with law. To obtain additional information on the subject, it is suggested that you contact the Access to Patient Information Program, NYS Department of Health, Hedley Park Place, Suite 303, 433 River Street, Troy, NY 12180.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Gene Spanneut
Marc H. Reitz

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 3703

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November 7, 2003

Mr. Sam Fratto
IBEW Local 363
62 Commerce Drive South
Harriman, NY 10926

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

Dear Mr. Fratto:

I have received your memorandum of October 21 and the correspondence attached to it. You referred to a construction project undertaken by the Town of Esopus Library and a "directive" from the architect hired by the Library in which he indicated that the Board should no longer hold open meetings. In a letter of October 3 addressed to the Executive Director of the Library and the President of the Board of Trustees, a representative of the architectural firm, Mr. Michael Morkaut, wrote that he wanted to avoid "too much adverse publicity" and that:

> "For one thing no more open meetings should be held. It is counterproductive and does nothing to help the design process. All we have done is give the green people a forum to vent their personal agendas...From now on we will tell you when we need to meet and with whom and for what purpose. By doing this we will stream line the process and avoid a lot of undo hassles."

Notwithstanding Mr. Morkaut's desire to avoid adverse publicity and his instruction to the Board to end its practice of holding open meetings, meetings of the Board of Trustees are subject to the Open Meetings Law and are required to be conducted in accordance with the terms of that statute. In this regard, I offer the following comments.

First, the Open Meetings Law, Article 7 of the Public Officers Law, is applicable to meetings of public bodies, and §102(2) defines the phrase "public body" to mean:

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

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

Based on the foregoing, as a general matter, the Open Meetings Law pertains to governmental bodies, and as a town library, it is assumed that the Esopus Public Library is a government entity.

In addition, §260-a of the Education Law, which states that:

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

Again, since Article 7 of the Public Officers Law is the Open Meetings Law, meetings of boards of trustees of various libraries must be conducted in accordance with that statute. In short, the Board of Trustees of the Town of Esopus Library is clearly subject to and required to comply with the Open Meetings Law. In my view, Mr. Morkaut's directive or desire is irrelevant in consideration of the Board's obligation to comply with law.

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

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

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

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

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

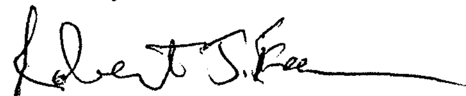
> "The word 'formal' is defined merely as 'following or according with established form, custom, or rule' (Webster's Third New Int. Dictionary). We believe that it was inserted to safeguard the rights of members of a public body to engage in ordinary social transactions, but not to permit the use of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

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

Lastly, every meeting 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. Further, the Open Meetings Law is based on a presumption of openness. Stated differently, public bodies, such as the Board of Trustees, must conduct their meetings in public, unless there is a basis for entry into an executive session. Section 102(3) defines the phrase “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 grounds for entry into 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:jm
cc: Hon. William Larkin
Roscoe Pecora
Linda Rolufs
Michael Morkaut

OML. AO-3704

From: Robert Freeman
To: [redacted]
Date: 11/14/2003 11:46:13 AM
Subject: o2803

http://www.dos.state.ny.us/coog/otext/o2803.txt

Dear Ms. Lemus:

I have received your inquiry concerning the ability to tape record an executive session.

In this regard, while judicial decisions indicate that open meetings may be recorded, so long as the use of a recording device is neither obtrusive nor disruptive, there is no decision or provision of law indicating that a member of the public or any other person has the right to tape record an executive session. From my perspective, recording an executive session would in many instances defeat the purpose of holding the executive session.

If the issue is whether a public body (i.e., a town board, a board of education, etc.) may tape record its executive sessions, I know of no law that would prohibit it from so doing. Again, however, doing so may defeat the purpose of holding the executive session. If the issue is whether an individual board member has the right to record, I do not believe that he or she would have the right to do so. Only with the approval of the board by means of a majority vote of its total membership would permission to do so be granted.

I hope that I have been of assistance.
Attached is a lengthy opinion concerning the issue that may be useful to you.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
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Albany, NY 12231
(518) 474-2518 - Phone
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OML-AO-3705

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November 18, 2003

Ms. Katherine Zalantis
Wilson, Elser, Moskowitz, Edelman
& Dicker LLP
3 Gannett Drive
White Plains, NY 10604

The staff of the Committee on 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. Zalantis:

I have received your letter and the materials attached to it. You have requested an advisory opinion "addressing the City of Mount Vernon's practice of not maintaining written minutes of its City Council meetings." You indicated that "the City claims that recordings on tape cassettes act as the City's 'official record.'" You added that, following the receipt of tape recordings of meetings, you found them to be "largely inaudible."

From my perspective, tape recordings of meetings do not serve as a valid substitute for written minutes. In this regard, I offer the following comments.

First, it does not appear that a tape recording of a meeting may be characterized as the "official record" of the meeting. In an opinion rendered by the State Comptroller, it was found that, although tape recordings may be used as an aid in compiling or preparing minutes, they do not constitute the "official record." (1978 Op.St. Compt. File #280).

Second, the Comptroller's opinion is consistent with the implementation of Article 57-A of the Arts and Cultural Affairs Law, which is also known as the "Local Government Records Law" and pertains to the management and preservation of municipalities' records. With respect to the retention and disposal of records, §57.25 of the Arts and Cultural Affairs Law states in relevant part that:

> "1. It shall be the responsibility of every local officer to maintain records to adequately document the transaction of public business and the services and programs for which such officer is responsible; to retain and have custody of such records for so long as the records are

needed for the conduct of the business of the office; to adequately protect such records; to cooperate with the local government's records management officer on programs for the orderly and efficient management of records including identification and management of inactive records and identification and preservation of records of enduring value; to dispose of records in accordance with legal requirements; and to pass on to his successor records needed for the continuing conduct of business of the office...

2. No local officer shall destroy, sell or otherwise dispose of any public record without the consent of the commissioner of education. The commissioner of education shall, after consultation with other state agencies and with local government officers, determine the minimum length of time that records need to be retained. *Such commissioner is authorized to develop, adopt by regulation, issue and distribute to local governments retention and disposal schedules establishing minimum retention periods...*" (emphasis added).

In view of the foregoing, records cannot be destroyed without the consent of the Commissioner of Education, and local officials cannot destroy or dispose of records until the minimum period for the retention of the records has been reached. The provisions relating to the retention and disposal of records are carried out by the State Archives, which is a unit of the State Education Department, through promulgation of Schedule MU-1.

Section 1.[1] of Schedule MU-1 requires that "[o]fficial minutes and hearing proceedings of governing body or board, commission or committee thereof" must be maintained permanently. In contrast, §2.[2] provides as follows:

"**Recording of voice conversations**, including audio tape, videotape, stenotype or stenographer's notebook and also including verbatim minutes used to produce official minutes and hearing proceedings, report or other record

a. Recording of public meeting of governing body or board, commission thereof:
Retention: 4 months after transcription and/or approval of minutes or proceedings..."

The foregoing provisions clearly distinguish between "official minutes", which must be retained permanently, and the audio recording of a meeting, in which case tapes or other recording storage devices must be retained for only four months, for they are "used to produce official minutes."

In a related vein and in consideration of the utility of the tape recordings, the "official minutes" of meetings clearly, in the words of §57.25(1) of the Arts and Cultural Affairs Law, have enduring value; again, they must be kept permanently. While a written record can be read and easily

reproduced, a tape recording, particularly a recording that is inaudible in part, would not have the attributes needed to preserve valuable information. That being so, it does not appear that substitution of tape recordings for written minutes would reflect compliance with that statute.

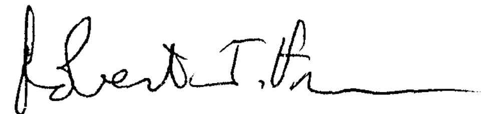
Lastly, §106 of the Open Meetings Law deals directly with minutes of meetings and states that:

> "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, minutes of meetings must be prepared and made available within two weeks. I note, too, that if the Council or others have a need years from now to determine the nature of action taken by the Council, the task of wading through hours of recordings in an effort to find the crucial portions will be unnecessarily frustrating and time consuming and perhaps impossible to understand.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: City Council
Lisa Copeland, City Clerk

STATE OF NEW YORK
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OML-AO-3706

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November 19, 2003

Dr. Kathy Dimitrievski
President
The Founders of the Global Concepts Charter School
145 Highview Circle
Blasdell, NY 14219

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

Dear Dr. Dimitrievski:

I have received your letter in which you raised a variety of issues in relation to the Open Meetings Law and its implementation by the Global Concepts Charter School and its Board of Trustees.

In consideration of your contentions, it is noted that the Open Meetings Law does not include provisions, guidance or direction concerning attendance at meetings or the preparation of financial reports. Similarly, there is nothing in the Open Meetings Law or any other statue of which I am aware that pertains to or requires the preparation of an agenda prior to a meeting. As your contentions involve that statute, however, I offer the following comments.

First, as you may be aware, the Education Law, §2854(1)(e), specifies that the governing body of a charter school is required to comply with the Open Meetings Law.

Second, §106 of the Open Meetings Law provides direction concerning the contents of minutes and the time within which they must be prepared and disclosed. That provision states that:

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

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

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

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

Third, with respect to notice of meetings, §104 of the Open Meetings Law provides that:

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

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

can generally be met by telephoning or faxing notice of the time and place of a meeting to the local news media and by posting notice in one or more designated locations.

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

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

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

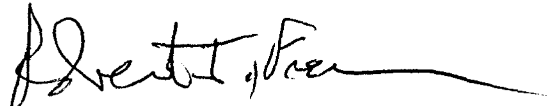
Lastly, the reason for conducting an executive session must be expressed in a motion made during an open meeting, and as indicated earlier, reference to all motions must be included in minutes. More specifically, §105(1) states in relevant part that:

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

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

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14356
OML-AO-3707

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November 19, 2003

Ms. Tamara O'Bradovich

The staff of the Committee 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. O'Bradovich:

I have received your correspondence of October 10. In the first, you sought an opinion concerning compliance with the Open Meetings Law by the Village of Tuckahoe Board of Trustees and whether "it is incumbent on the Village Attorney to advise the mayor and the board when and if they are in violation of the Open Meetings Law."

With respect to the duties of the Village Attorney, your question is beyond the authority or jurisdiction of the Committee on Open Government. In short, although this office is permitted to offer advice and opinions pertaining to the Open Meetings and Freedom of Information Laws, it has no authority to do so in relation to the conduct of a municipal attorney.

As your remarks pertain to the Board of Trustees and its meetings, you wrote that:

> "By local law, this meeting is held on the first Tuesday of the month at 8:00 PM. For the last few months, on the night of this monthly meeting the mayor and the full board have met in the mayor's office to conduct Village business before convening the televised meeting at 8:00 PM. There are usually members of Village staff in attendance as well...
>
> "The last time this occurred was Tuesday, October 7. Some residents who arrived early came upon this 'pre-meeting' while it was in progress. One resident inquired if it was open to the public. The mayor and one trustee said no, another trustee said yes, the Village Attorney and the rest of the trustees did not respond. The resident was permitted to observe the end portion of the meeting, noting that the discussion covered agenda items for the 8:00 televised meeting. Later

> that evening the resident questioned a Village staff member about this 'pre-meeting' practice and was told that 'they always do it'."

In an effort to learn more of the matter, I contacted the Village Attorney, who described the situation somewhat differently. He wrote as follows:

> "By Village Code & resolution the Tuckahoe Village Board meets on the second MONDAY of the month not Tuesday as noted in the O'Bradovich note. The meetings are noticed for 8 PM & as you know people don't just materialize & start a meeting at 8 PM. Normally, the Mayor, Trustees & staff gather in the Mayor's office while waiting for all Board members to arrive. While waiting they sometimes go through the agenda or discuss who will introduce items on the agenda or may add items to the agenda. They have occasionally stayed in the office until after 8 PM while waiting for a quorum to arrive. The door to the office is left open & members of the public have walked in & sat down on chairs around the room.
>
> "If they do plan to really 'meet' before an 8 PM scheduled Board meeting, proper notices are posted. They have done this a few times at 7 PM or 7:30 PM as those times are convenient for Westchester County Planning Dept. representatives and the Village's labor counsel.
>
> "Please note that both the Mayor & I believe that Ms. O'Bradovich's characterizations of the conversations are inaccurate and that no mention of excluding the public prior to 8 PM was made on October 7, 2003."

In consideration of the foregoing, the pertinent provision, in my view, is §102(1) of the Open Meetings Law, the definition of the term "meeting." A meeting is a gathering of a majority of a public body for the purpose of conducting public business, collectively, as a body. Unless and until a quorum is present, a gathering does not constitute a "meeting" and the Open Meetings Law would not apply. If there is an intent to convene and conduct public business as a body, and if a quorum is present, any such gathering in my opinion would constitute a meeting, and I believe that notice of the time and place would be required to be given in accordance with §104 of the Open Meetings Law. The Village Attorney indicated that when there is an intent on the part of the Board to convene, as a body, to conduct public business prior to 8 p.m., i.e., "if they do plan to really 'meet' before an 8 PM scheduled meeting", notice is given.

Assuming that the Village Attorney's description of events and actions is accurate, it does not appear that the Open Meetings Law was contravened.

Your second letter pertains to the implementation of the Freedom of Information Law by the Village, whether records must be "FOILed" in every instance, and whether the Village may treat its residents differently when responding to requests for records.

In this regard, as a general matter, the Freedom of Information Law does not distinguish among applicants for records. The courts have held, in short, that records accessible under the Freedom of Information Law should be made equally available to any person without regard to one's status or interest [see Burke v. Yudelson, 368 NYS2d 779, aff'd 51 AD2d 673, 378 NYS2d 165 (1976); see also M. Farbman & Sons v. New York City Health and Hosps. Corp., 62 NY2d 75 (1984)].

Second, although the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) authorize agency staff to accept oral requests, there is no statutory requirement that they do so. Section 89(3) of the Freedom of Information Law provides in part that an agency may require that a request be made in writing. Further, since the Freedom of Information Law pertains to all agency records [see definition of "record', §86(4)", an agency may require written requests in relation to any or all agency records.

I note too, that an agency may but need not accept requests transmitted via fax machine or email. Specifically, §5(1) of the State Technology Law provides that:

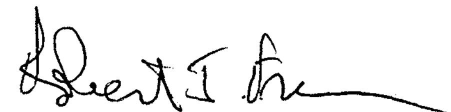
> "In accordance with rules and regulations promulgated by the electronic facilitator, government entities are authorized and empowered, *but not required*, to produce, receive, accept, acquire, record, file, transmit, forward, and store information by use of electronic means" (emphasis added).

Based on the foregoing, an agency may choose to accept a request under the Freedom of Information Law made by means of fax or email, but as indicated above, it is "not required" to do so. Similarly, §105(1) specifies that an agency would not be required to "transmit" records via fax or email sought under the Freedom of Information Law.

Lastly, as inferred earlier, the Committee on Open Government has promulgated regulations that govern the procedural aspects of the Freedom of Information Law pursuant to §89(1). In turn, §87(1) requires the governing body of a public corporation, such as a village, to promulgate similar rules and regulations consisting with those adopted by the Committee and consistent with the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees
Les Maron, Village Attorney

OML-AO - 3708

From: Robert Freeman
To: pamela@brooklyn.cuny.edu
Date: 11/20/2003 9:47:40 AM
Subject: Dear Ms. Pollack:

Dear Ms. Pollack:

I have received your note in which you asked whether a public body subject to the Open Meetings Law may "prohibit the taking of photographs during a public meeting."

In this regard, there is nothing in the Open Meetings Law or any other statute that addresses the issue. There are, however, Appellate Division, Second Department, decisions indicating, in brief, that any person may audio or video record open meetings, so long as the use of the recording devices is not disruptive or obtrusive.

While there are no decisions dealing with still photography, I believe that the same principle would apply. If the use of a camera is neither disruptive nor obtrusive, a public body could not, in my view, prohibit its use. If a person seeks to use a flash, which may be temporarily blinding to those photographed and perhaps others, I would conjecture that a court would find that it would be reasonable for a public body to prohibit the use of a device of that nature.

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

Robert J. Freeman
Executive Director
NYS Committee on Open Government
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Albany, NY 12231
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STATE OF NEW YORK
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OML-AO-3709

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November 20, 2003

Mr. James W. Leahy

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

Dear Mr. Leahy:

I have received your letter and the materials attached to it. You indicated that you serve as a member of the Kingston City School District Board of Education, and you have sought my views concerning a "retreat" conducted in private by the Board.

According to your letter, you "thought [the retreat] was to be informational and descriptive in nature", and not "a decision making-meeting." Although no action was taken at the retreat, the discussion involved "the rules we [Board members] operate under before, during and after meetings." Further, one of the attachments that you included is a memorandum that referred to the gathering as "a workshop retreat for the Superintendent's Goals and District Goals." Another attachment that was apparently reviewed and discussed during the retreat is entitled "Ground Rules", and it includes a reference to a series of policies and procedures under which the Board and members operate.

In my view, which is based on the judicial interpretation and language of the Open Meetings Law, the "retreat" was a "meeting" that should have been held open to the public. In this regard, I offer the following comments.

As you are likely aware, the Open Meetings Law applies to meetings of public bodies, and a board of education clearly constitutes a public body required to comply with that statute. Section 102(1) of the Open Meetings Law defines the term "meeting" to mean "the official convening of a public body for the purpose of conducting public business". It is emphasized that the definition of "meeting" has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be convened open to the public, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

Inherent in the definition and its judicial interpretation is the notion of intent. If there is an intent that a majority of a public body will convene for the purpose of conducting public business, such a gathering would, in my opinion, constitute a meeting subject to the requirements of the Open Meetings Law.

I point out that the decision rendered by the Court of Appeals was precipitated by contentions made by public bodies that so-called "work sessions" and similar gatherings held for the purpose of discussion, but without an intent to take action, fell outside the scope of the Open Meetings Law. In discussing the issue, the Appellate Division, whose determination was unanimously affirmed by the Court of Appeals, stated that:

> "We believe that the Legislature intended to include more than the mere formal act of voting or the formal execution of an official document. Every step of the decision-making process, including the decision itself, is a necessary preliminary to formal action. Formal acts have always been matters of public record and the public has always been made aware of how its officials have voted on an issue. There would be no need for this law if this was all the Legislature intended. Obviously, every thought, as well as every affirmative act of a public official as it relates to and is within the scope of one's official duties is a matter of public concern. It is the entire decision-making process that the Legislature intended to affect by the enactment of this statute" (60 AD 2d 409, 415).

The court also dealt with the characterization of meetings as "informal," stating that:

> "The word 'formal' is defined merely as 'following or according with established form, custom, or rule' (Webster's Third New Int. Dictionary). We believe that it was inserted to safeguard the rights of members of a public body to engage in ordinary social transactions, but not to permit the use of this safeguard as a vehicle by which it precludes the application of the law to gatherings which have as their true purpose the discussion of the business of a public body" (id.).

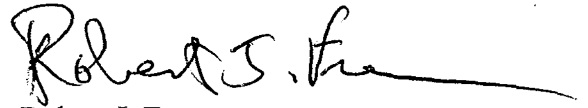
Based upon the direction given by the courts, when a majority of a public body gathers to discuss public business, in their capacities as members of the body, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law.

On the other hand, 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, and not to conduct or discuss matters of 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.

In this instance, if indeed the retreat involved "District goals" and consideration of the policies and procedures referenced earlier, I believe that it constituted a "meeting" that fell within the requirements of 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-3710

From: Robert Freeman
To: Carole Nasra
Date: 11/20/2003 10:14:51 AM
Subject: Re: question

Good morning:

I trust that you and yours are happy and well.

With respect to your question, if a majority of the Board has gathered for the kind of event that you described, I believe that it would constitute a "meeting" that falls within the coverage of the Open Meetings Law. As you may be aware, judicial decisions indicate that "workshops", "work sessions" and other "informal" gatherings held for the purpose of "conducting public business" are "meetings" subject to the requirements of the Open Meetings Law, even if there is no intent to take action or vote.

With respect to the presence of the district clerk and the preparation of minutes, §106 of the Open Meetings Law contains what might be considered as minimum requirements concerning the contents of minutes. At a minimum, minutes must consist of a record or summary of motions, proposals, resolutions, action taken and the vote of each member. If it is clear that none of those activities will occur (which would appear to be so in this instance), there would be no obligation to prepare minutes. It has been suggested in similar circumstances that it may be appropriate to prepare some sort of a record, perhaps characterized as minutes, that merely indicates that the Board met with concerned citizens to a engage in discussion and to attempt to respond to questions at a certain time and place.

I hope that this helps.

All the best.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
Albany, NY 12231
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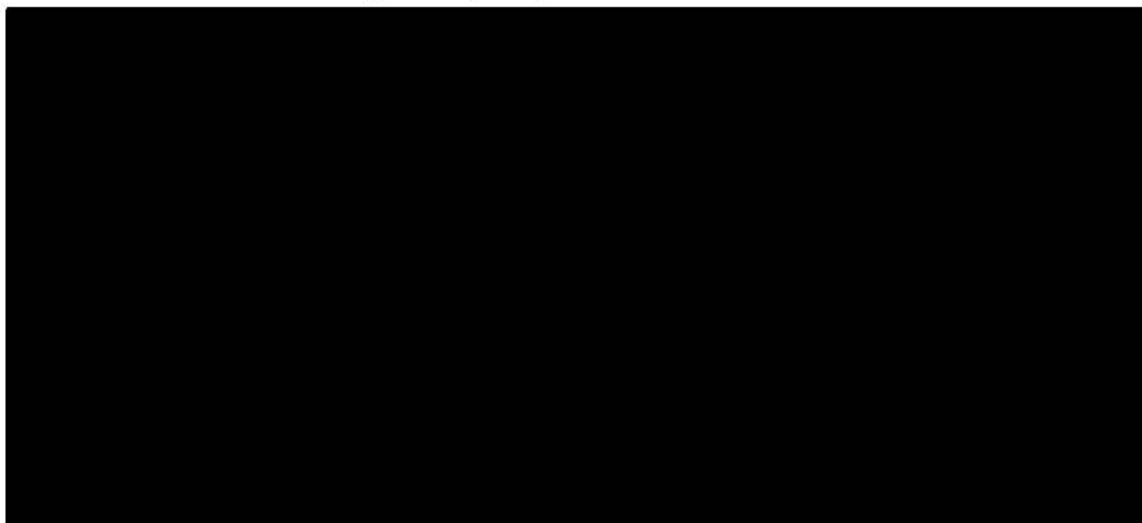
(518) 474-1927 - Fax
Website - www.dos.state.ny.us/coog/coogwww.html



STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-14368

OML-AO-3711

Committee Members

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November 26, 2003

Hon. Judith M. Cornick
Clerk-Treasurer
Village of Clayton
P.O. Box 250
Clayton, NY 13624

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Cornick:

I have received your letter of October 30 and the attached proposed "Policies and Procedures" relating to requests made under the Freedom of Information Law, as well as the Open Meetings Law. You indicated the Village of Clayton Board of Trustees favors their adoption, but prior to taking action, you asked that I review them.

In this regard, first, your interest in compliance with open government laws is gratifying and appreciated.

Second, it is suggested that some aspects of the draft be eliminated or modified. It is suggested generally that portions of the proposal that reiterate or seek to reiterate provisions within the Open Meetings and Freedom of Information Laws are unnecessary. Moreover, should amendments to those statutes be enacted, the Village's policy and procedure would become outdated and perhaps inconsistent with law. With those considerations in mind, I offer the following comments and suggest that my intent is not be overtechnical.

Section I would define "meetings", "public body" and "executive session." Since those terms are defined in the Open Meetings Law itself, there is no need to include them in a statement of policy. Further, some elements of the definition are inconsistent with the language of the Open Meetings Law.

In Section II concerning notice, subdivision (1) indicates that notice will be "advertised" in the official newspaper. Here I point out that §104 of the Open Meetings Law requires that notice be "given" to the news media and posted. A public body is not required to pay to advertise or place a legal notice to comply with the Open Meetings Law.

Subdivision (1) of Section III is unnecessary. Again, the law itself deals with the matters expressed in that provision. Further, it might be interpreted as suggesting that "proceedings of the courts" may be closed. That is not so, even though those proceedings fall beyond the coverage of the Open Meetings Law.

In subdivision (5), there is a requirement that a person willing to address the Board must give his or her name and address. I do not believe that the privilege of speaking can validly be conditioned on providing one's name and address. Situations have arisen in which doing so (i.e., in the case of a battered spouse) might jeopardize a person's safety. To be sure, I believe that the Board may *ask* for a person's name and address; I do not believe, however, that it can *require* that information to be given.

Other than subdivision (4), it is suggested that the entirety of Section IV entitled "Executive Sessions" be eliminated, for it merely reiterates the language of the Open Meetings Law. Section VI concerning "Enforcement" should in my opinion be eliminated for the same reason.

With respect to the draft policy concerning the Freedom of Information Law, Section I should in my view be removed.

In Section II, subdivision (4) should be removed because it does not, in my opinion, clearly reflect judicial interpretations of the Freedom of Information Law.

Section III, subdivision (1) requires that "All FOIL requests must be submitted in writing." While the Village may clearly impose that requirement, it diminishes the flexibility of Village officials. I would conjecture that many requests are made verbally and honored quickly and informally, i.e., when a resident enters your office and asks to review minutes of a recent meeting. It is suggested that the policy might indicate that the Village may require that requests be made in writing, but that Village officials may in appropriate circumstances accept oral requests.

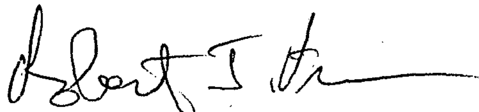
In subdivision (2) reference is made to the "Records Management Officer." That title is used in the Arts and Cultural Affairs Law. The term "records access officer" is used in the regulations promulgated by the Committee on Open Government to identify a person designated to coordinate an agency's response to requests (see 21 NYCRR Part 1401).

Section V concerning "Records Exempt from FOIL" should be eliminated. Only the State Legislature through the enactment of a statute can determine the extent to which records are exempt from disclosure.

Enclosed are copies of the regulations promulgated by the Committee on Open Government, as well as model regulations. By filling in the blanks as appropriate in the model, the Village Board can readily adopt procedures consistent with the Freedom of Information Law.

Again, I hope that you do not consider the preceding remarks to be unnecessarily critical or technical; my only goal is to offer guidance and assistance. If you would like to discuss any matter relating to the Freedom of Information Law or the Open Meetings Law, please feel free to contact me.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-14371
OML-AO-3712

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December 1, 2003

Hon. Elizabeth A. Neville
Town Clerk
Town of Southold
53095 Main Road
Southold, NY 11971

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence, unless otherwise indicated.

Dear Ms. Neville:

I have received your note and a variety of material relating to it. You have sought my opinion concerning requests made under the Freedom of Information Law relating to an issue that has been considered by the both the Town of Southold Ethics Board and the Town Board.

One request, which was submitted by Ms. Melanie Norden, involved the original complaint filed by a named individual relative to a Town Board member, tapes of all meetings during which the complaint was discussed, and "all written decisions by any/all members" of the Ethics Board. A second request involved similar materials. You received a letter from the Secretary to the Ethics Board in which she wrote that a member of the Board advised that the persons seeking the records "may not have what is so broadly requested on their forms", and Ms. Norden has questioned the propriety of that response.

Based on a review of the materials that you submitted and discussions with Patricia Finnegan, Assistant Town Attorney, and in consideration of the unusual facts relating to the matter, I offer the following comments, some of which are intended to offer clarification and general guidance.

First, it is likely that you, not the Secretary to the Ethics Board or a member of the Board, have the authority to determine rights of access in response to a request made under the Freedom of Information Law.

By way of background, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural aspects of the Law (see 21 NYCRR Part 1401). In turn, §87(1)(a) of the Law states that:

> "the governing body of each public corporation shall promulgate uniform rules and regulations for all agencies in such public corporation pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the administration of this article."

In this instance, the governing body of a public corporation, the Town Board, is required to promulgate appropriate rules and regulations consistent with those adopted by the Committee on Open Government and with the Freedom of Information Law.

The initial responsibility to deal with requests is borne by an agency's records access officer, and the Committee's regulations provide direction concerning the designation and duties of a records access officer. Specifically, §1401.2 of the regulations provides in relevant part that:

> "(a) The governing body of a public corporation and the head of an executive agency or governing body of other agencies shall be responsible for insuring compliance with the regulations herein, and shall designate one or more persons as records access officer by name or by specific job title and business address, who shall have the duty of coordinating agency response to public requests for access to records. The designation of one or more records access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public from continuing to do so."

As such, the Town Board has the ability to designate "one or more persons as records access officer". Further, §1401.2(b) of the regulations describes the duties of a records access officer, including the duty to coordinate the agency's response to requests. If you, as the Town Clerk, have been designated records access officer, I believe that you have the authority to make initial determinations to grant or deny access to records in response to requests made under the Freedom of Information. In addition, as you are aware, §30(1) of the Town Law indicates that the town clerk is the legal custodian of all town records. Therefore, even if records are in the physical possession of the Ethics Board or a member of the Board, I believe that you have legal custody of those records.

Second, Ms. Norden indicated in testimony that the Town Ethics Code makes no reference to the ability of the Ethics Board to conduct executive sessions, and she questioned whether the Board has the authority to do so. I do not believe that the authority to conduct executive sessions need be mentioned in the Town Code, for it exists in the Open Meetings Law. That point was, in fact, offered to the other person who requested records, Ms. Jody Adams, in an advisory opinion addressed to her in 1996, copies of which were sent to the Town Board and the former Town Attorney. To reiterate, 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."

An ethics board or committee is a creation of law, and it clearly conducts public business and performs a governmental function for a public corporation, a town. That being so, I believe that it has the same obligations as a governing body, such as the Town Board, regarding openness and the provision of notice of meetings, for example, as the Town Board, as well as the same authority to conduct executive sessions when it is appropriate to do so. Section105(1) of the Open Meetings Law specifies and limits the grounds for entry for entry into executive session.

Relevant to the duties of a board of ethics is §105(1)(f) of the 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..."

If the issue before a board of ethics involves a particular person in conjunction with one or more of the subjects listed in §105(1)(f), I believe that an executive session could appropriately be held. For instance, if the issue deals with the "financial history" of a particular person or perhaps matters leading to the discipline of a particular person, §105(1)(f) could in my opinion be cited for the purpose of entering into an executive session.

Third, for purposes of general guidance, I note that both the Open Meetings Law and its companion statute, the Freedom of Information Law, are permissive. Under the former, a public body, such as the Town Board or the Ethics Board, *may* conduct executive sessions in accordance with §105(1) of the Open Meetings Law, but it is not *required* to do so. Similarly, the Freedom of Information Law provides that an agency, such as the Town, *may* withhold records in circumstances specified in that statute, but it is not *required* to do. Whether it is wise, ethical or in the public interest to discuss matters in public that may be considered in executive session or to disclose records that may be withheld under the Freedom of Information Law is, in my view, largely irrelevant to the authority to do so.

While I believe that the Ethics Board and the Town Board clearly have the ability to enter into executive under §105(1)(f) to discuss certain matters relating to a "particular person", again, in my view, there is no obligation to do so. In like manner, while certain records pertinent to the matter may in my opinion have been withheld under the Freedom of Information Law, I do not believe that there would have been any obligation to do so.

If my understanding of the Town Code is accurate, the Ethics Board does not have the authority to decide or make binding or final determinations. Section 10-20 of the Code entitled "Powers of Ethics Board" states that Board is authorized "to render advisory opinions on any matter

of ethical conduct of town officials and employees..." Relevant to that provision is §87(2)(g) of the Freedom of Information Law, which authorizes an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

Applying the foregoing to the matters at issue, an advisory opinion prepared by the Ethics Board could in my view be withheld, except in two circumstances. If an opinion was rejected or modified, I believe that it would be deniable under both §87(2)(b) as an unwarranted invasion of personal privacy and under §87(2)(g), for it consists of a recommendation to the Town Board that is not final or binding. One situation in which the opinion of the Ethics Board would be public would involve the case in which the Town Board clearly adopts the opinion as its own, thereby making the opinion a final determination, and finds that an officer or employee engaged in misconduct (see e.g., Miller v. Hewlett-Woodmere Union Free School District, Supreme Court, Nassau County, NYLJ, May 16, 1990, in which recommendations were uniformly adopted as the agency's final determination). The other would involve a situation in which a local law requires disclosure. Having reviewed the Town Code as it relates to the matter, the extent to which the Code may require disclosure is, in my view, unclear and subject to a variety of possible interpretations.

Also relevant, as inferred above,is §87(2)(b), which authorizes an agency to deny access to records insofar as disclosure would constitute "an unwarranted invasion of personal privacy."

With respect to disclosure of the identity of a person who made a complaint to the Ethics Board, it has generally been advised that those portions of a complaint which identify complainants may be deleted on the ground that disclosure would result in an unwarranted invasion of personal privacy. I point out that §89(2)(b) states that an "agency may delete identifying details when it makes records available." Further, the same provision contains five examples of unwarranted invasions of personal privacy, the last two of which include:

> "iv. disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject party

> and such information is not relevant to the work of the agency requesting or maintaining it; or
>
> v. disclosure of information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency."

In my view, what is relevant to the work of the agency is the substance of the complaint, i.e., whether or not the complaint has merit. The identity of a member of the person who made the complaint is often irrelevant to the work of the agency, and in such circumstances, I believe that identifying details may be deleted.

In this instance, however, it is my understanding that the name of the complainant has been disclosed by himself and others. If that is so, there would appear to be no basis for withholding those portions of the complaint that indicate his identity.

As records pertain to public officers or employees, the courts have provided substantial direction. 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 persons 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 a public official's 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 final determinations indicating the imposition of some sort of disciplinary action pertaining to particular public officials were found to be available. However, when allegations or charges of misconduct have not yet been determined or did not result in disciplinary action, the records relating to such allegations may, in my view, be withheld, for disclosure would result in an unwarranted invasion of personal privacy [see e.g., Herald Company v. School District of City of Syracuse, 430 NYS 2d 460 (1980)]. Further, to the extent that charges are dismissed or allegations are found to be without merit, I believe that they may be withheld.

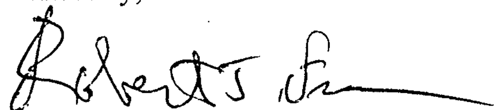
In consideration of the preceding commentary, in the typical situation in which the Freedom of Information Law determines rights of access, opinions offered by the Ethics Board or its members may be withheld, unless and until an opinion is adopted by the Town Board or a local enactment requires disclosure. Similarly, if the Open Meetings Law was followed, discussions following a

complaint concerning the conduct of a Town Board member could, in my opinion, have occurred during executive sessions.

What in fact occurred is unclear, but whether meetings and discussions of the matter were conducted in public or in executive session would affect rights of access to the tape recordings that were requested. Insofar as a tape recording captured commentary made during a public proceeding, I do not believe that there would be any basis for a denial of access, and it was held years ago tape recordings of open meetings are accessible under the Freedom of Information Law (see Zaleski v. Hicksville Union Free School District, Supreme Court, Nassau County, NYLJ, December 27, 1978). On the other hand, the contents of tape recordings of executive sessions reflecting the deliberative process of either the Town Board or the Ethics Board would consist of "intra-agency material" falling within the scope of §87(2)(g). Moreover, since there appears to have been no final determination by the Town Board indicating misconduct or imposing a penalty regarding the subject of the complaint, it appears that any such tapes could be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Ethics Board
Patricia Finnegan

OML-AO-3713

From: Robert Freeman
To: mvaughn@longwoodcsd.com
Date: 12/3/2003 10:23:22 AM
Subject: Dear Ms. Vaughn:

Dear Ms. Vaughn:

I have received your letter, and it appears that your Board or the Superintendent misunderstand the Open Meetings Law. I can offer a lengthy and detailed opinion with a month if you feel that would be educational and beneficial.

For the moment, however, I note first that an executive session is defined to mean a portion of an open meeting during which the public may be excluded. That being so, an executive session cannot validly be held prior to or after a meeting.

Second, that an issue is characterized as a "personnel" or "contractual" matter is not determinative of whether it may properly be discussed during an executive session. The term "personnel" does not appear in the law and the language of the so-called personnel exception is limited, stating that a board may conduct an executive session to discuss "the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation." Matters involving the budget and the allocation of public moneys often relate to personnel, but if they do not focus on a "particular person", it is unlikely that there would be a basis for entry into executive session.
Similarly, it does not appear that the subjects to which you referred would fall within the language of the exception.

Third, the phrase "contractual matters" does not appear in the law. One of the grounds for entry into executive session pertains to collective bargaining negotiations involving a public employee union. Not all contractual matters involve public employee unions.

Again, if you would like a more detailed response, please so inform me. Also, numerous advisory opinions are accessible via our website.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
Albany, NY 12231
(518) 474-2518 - Phone
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3714

Committee Members

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December 8, 2003

Mr. Steven J. Getman
County Attorney
Seneca County Department of Law
County Office Building
One DiPronio Drive
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 Mr. Getman:

I have received your letter in which you raised a question on behalf of County Supervisor C. Frederick Trickler concerning the status of a certain policy in relation to the Open Meetings Law. Your interest in compliance with the law is much appreciated.

According to your letter, the Seneca County Board of Supervisors has established a number of committees consisting of various supervisors, and the committees generally review matters prior to consideration by the full board. You wrote that "[a] policy has been enacted under which the approval of position refills by the committee(s) could be approved by telephone calls (essentially polling the committee members by telephone), instead of by vote/passage at a committee meeting." You added that the policy requires that "the County Manager, with a witness, makes the calls and the time, date and vote are supposed to be recorded." The question "is whether such a policy runs afoul of the New York State Open Meetings Law."

From my perspective, based on the judicial interpretation of the Open Meetings Law and relatively recent amendments to that statute and §41 of the General Construction Law, a public body cannot take action by means of a conference call or a series of telephone calls. In this regard, I offer the following comments.

As you are aware, 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.

In my view, 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."

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, if, for example, the Board consists of nineteen, its quorum would be ten; 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); County of Lewis v. O'Connor, Supreme Court, Lewis County, January 21, 1997].

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 Board or a committee of the 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."

As suggested earlier, the provisions in the Open Meetings Law concerning videoconferencing are newly enacted (Chapter 289 of the Laws of 2000), and in my opinion, 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.

Again, 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..."

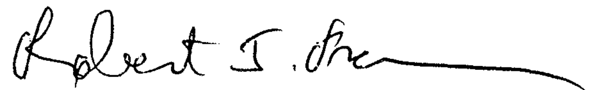
Lastly, I direct your attention to the legislative declaration of the Open Meetings Law, §100, which states in part that:

> "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.

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-3715

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December 8, 2003

Ms. Sandra R. Halberstam
Editor-In-Chief
Eliot Camaren
Contributing Editor
The Clinton Chronicle
444 West 50th Street
New York, NY 10019

The staff of the Committee on 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. Halberstam and Mr. Camaren:

I have received your letter of November 7 in which you sought guidance concerning the status of certain gatherings in relation to the Open Meetings Law and the ability of the public to speak at those gatherings.

You referred to a provision in the New York City Charter concerning community boards that states that "At each public meeting, the board shall set aside time to hear from the public." To give effect to that provision, the by-laws of Community Board No. 4 state that "[T]here shall be a public session at the beginning of each regular monthly board meeting, of sufficient length to afford all members of the public present to present their concerns to the Board." You then referred to another section of the Board's by-laws that provides that "[c]ommittee meetings shall be conducted under the same procedures as board meetings..."

In consideration of those provisions, you offered the following contention:

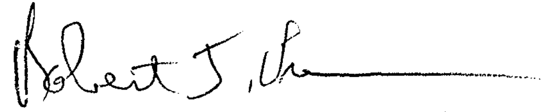
> "....when a committee gathers without a quorum, even though the Open Meetings Law does not apply, City Regulations still do apply. Thus any committee which hears from the public in the absence of a quorum is violating mandated procedure."

In short, I disagree with your point of view.

The City Charter refers to "public meetings." From my perspective, since the Open Meetings Law pertains to meetings of public bodies, and since a gathering is not a "meeting" unless and until a quorum has convened for the purpose of conducting public business, the Open Meetings Law does not apply in the situation that you described. If the Open Meetings Law does not apply, the public, in my view, has no right to attend or, therefore, speak or otherwise participate.

I hope that the foregoing serves to clarify your understanding of the law.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Michelle Solomon, Community Board No. 4

OML-AO - 3716

From: Robert Freeman
To: MULLEN, VICTORIA
Date: 12/9/2003 3:23:49 PM
Subject: Re:

Yes, you are correct.

A town board may vote during an executive session, so long as the vote is not taken to appropriate public money. Assuming that the vote did not involve an appropriation, section 106 of the Open Meetings Law requires that minutes indicating the nature of the action taken and the vote of the members must be prepared and made available within one week to the extent required by the Freedom of Information Law.

For additional detail, take a look at our index to advisory opinions rendered under the Open Meetings Law, click on to "M", and scroll down to "minutes of executive session."

I hope that this helps.

All the best,
Bob

Robert J. Freeman
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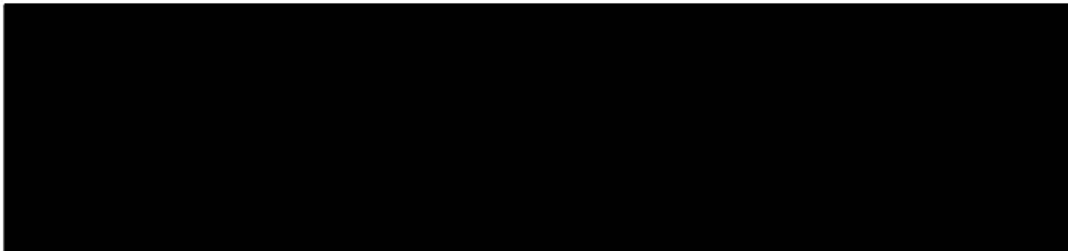

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3717

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December 12, 2003

Ms. Peg Churchill
Senior Planner
Wayne County Planning Board
9 Pearl Street
Lyons, NY 14489

The staff of the Committee on 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. Churchill:

As you are aware, I have received your letter in which you sought "a written clarification of proxy use and meeting notification in regards to the Western Erie Canal Heritage Corridor Planning Commission" (hereafter "the Commission").

According to your letter:

> "Immediately preceding Labor Day Weekend, the Commission Chair and Program Coordinator spoke with selected members of the commission and then, without calling a meeting, setting an agenda, a motion, second or discussion, sent out a proxy form asking for a yes/no/abstain for each commissioner, and giving the Chair their proxy to vote to approve the entire management plan as an editor's copy. Although the first eight chapters had gone through the management plan committee and the content been approved, noting that graphics, layout and final editing were to come, the last three chapters had not gone through any committee. Indeed, it had been agreed by both the executive committee and the management plan committee that the implementing entity to be included in the last three chapters, had to be determined through discussion and presentations by experts on various entity forms."

You also wrote that the Commission's by-laws state in relevant part that:

> "At all meetings, a quorum shall consist of a majority of the appointed Planning Commissioners. No official business may be transacted without a quorum. A majority vote is required to pass a resolution. A commissioner may vote by written proxy on matters duly noted in the meeting agenda. 'Written proxy' shall include original correspondence, fax, or e-mail. The Secretary or other designated person shall confirm receipt by reply by original correspondence, fax or e-mail."

In my opinion, the members of the Commission cannot vote by proxy. Moreover, certain aspects of the by-laws are, in my view, inconsistent with law. In this regard, I offer the following remarks.

First, the Open Meetings Law applies to public bodies, and §102(2) defines the phrase "public body" to mean:

> "...any entity for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body."

The Commission was created by the enactment of Chapter 352 of the Laws of 1999 and amended earlier this year (Chapter 120, Laws of 2003). Its functions involve the preparation of a "management plan" for the Western Canal area in accordance with §35.05 of the Parks, Recreation and Historic Preservation Law and the obligation to "definitively specify and map out the physical boundaries of the heritage corridor within [certain] geographical borders..." Chapter 352 specifies that the Commission "shall have eighteen members" and describes their qualifications and the means by which they are appointed.

In my view, the Commission, in consideration of the means by which it was created and its statutory duties, clearly constitutes a "public body" required to comply with the Open Meetings Law.

Second, although Chapter 120 indicates that the Commission may adopt by-laws, I do not believe that the by-laws are valid insofar as they may be inconsistent with statutes. In this instance, I believe that the by-laws are inconsistent with two statutes, §41 of the General Construction Law and the Open Meetings Law. Based on relatively recently enacted amendments to those statutes, from my perspective, it is clear 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.

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, 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 consideration 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 virtual 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 were enacted three years ago (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 during which the members may vote. Any other means of conducting a meeting, i.e., by proxy, by telephone conference, by mail, or by e-mail, would be inconsistent with law.

Third, 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." Although the by-laws state that a majority of those appointed constitutes a quorum, §41 indicates that a quorum is a majority of the total membership, notwithstanding the fact that there may be vacancies. 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 nor can its members vote by proxy.

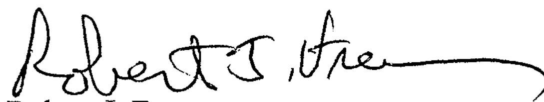
Lastly, I direct your attention to the legislative declaration of the Open Meetings Law, §100, which states in part that:

> "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 collectively, as a body, by proxy, phone, mail, or e-mail.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

OML-AO - 3718

From: Robert Freeman
To: [redacted]
Date: 12/12/2003 12:08:14 PM
Subject: Dear Ms. Cashen:

Dear Ms. Cashen:

I have received your inquiry and believe that your reading of the Open Meetings Law is accurate.

In short, there is no reference to agendas in that law or any other of which I am aware, and consequently, there is no statutory obligation that a public body, such as a town board, prepare or follow an agenda. The only instance, and in my experience it would be rare, in which an agenda is required would involve the situation in which a public body has, on its own initiative, established a requirement by rule or policy that an agenda be prepared. Again, absent such an action, there need not be an agenda.

I hope that the foregoing serves to clarify your understanding of the matter and that I have been of assistance.

Robert J. Freeman
Executive Director
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STATE OF NEW YORK
DEPARTMENT OF STATE
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OML-AO - 3719

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December 16, 2003

Mr. Patrick Dedman

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. Dedman:

I have received your letter of November 19 in which you raised a series of questions concerning activities of the Board of Trustees of the Village of Afton.

In this regard, it is noted at the outset that the Committee on Open Government is authorized to advise and offer opinions concerning the Open Meetings and Freedom of Information Laws. Consequently, in the following remarks, I will seek to address your questions as they relate to those statutes.

First, I note that minutes of meetings need not be expansive, for the Open Meetings Law prescribes what may be characterized as minimum requirements concerning the contents of minutes. Specifically, §106 provides that:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.
>
> 2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.
>
> 3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of

> information law within two weeks from the date of such meetings except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

While the minutes of the meeting of June 9 to which you referred could have included more information, there was no obligation, in my view, to include additional information. Further, if a public body merely discusses an issue during an executive session but takes no action, there is no requirement that minutes of the executive session be prepared. If action is taken in executive session, although minutes must be prepared, they need not include information that may be withheld under the Freedom of Information Law. If, for example, the Board received an appraisal regarding the property it sought to purchase, the minutes in my opinion would not have been required to include the appraiser's figure regarding the value of the property. Premature disclosure in that instance might preclude the Village from reaching an optimal price or agreement reached on behalf of the taxpayer, and that figure or related information might justifiably be withheld under §87(2)(c) of the Freedom of Information Law. That provision authorizes an agency, such as a village, to deny access to records insofar as disclosure "would impair present or imminent contract awards...." I note that that provision has been cited to uphold a denial of access to appraisals in a situation in which premature disclosure would have indicated the price that an agency might accept, thereby potentially placing a ceiling on the offering prices that might be made [see Murray v. Troy Urban Renewal Agency, 56 NY2d 888 (1982)].

Second, you asked in several contexts whether the Board of Trustees was required to vote on certain issues. I do not have the expertise to respond, and it is suggested that you might raise that question by contacting the Office of the State Comptroller. However, in those instances in which action could only have been taken by the Board, I believe that motions would have been required and memorialized in minutes of meetings. If, for example, the appraiser could only have been retained pursuant to action taken by the Board, a motion so indicating would have to have been made and referenced in minutes of a meeting.

Third, with respect to the Board's ability to conduct an executive session, as a general matter, the Open Meetings Law is based on a presumption of openness. Meetings of public bodies must be conducted open to the public, except to the extent that the subject matter may properly be considered during executive sessions. 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 be made in public and include reference to the subject or subjects to be discussed and the motion must be carried by majority vote of a public body's total membership before such a session may validly be held. The ensuing provisions of

§105(1) specify and limit the subjects that may appropriately be considered during an executive session. Therefore, a public body may not conduct an executive session to discuss the subject of its choice.

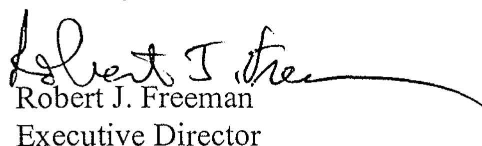
Section 105(1)(h) appears to have been relevant to the matter, for it permits a public body to enter into an executive session to discuss:

> "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."

Based on the foregoing, a public body may discuss the proposed purchase of real property behind closed doors, "but only when publicity would substantially affect the value" of the property. Conversely, when publicity would not have any "substantial effect" upon the value of real property, §105(1)(h) could not in my opinion be properly asserted to enter into an executive session. As suggested above, if disclosure of the appraised value of the parcel during an open meeting could have substantially affected the ability of the Village to reach an optimal agreement on behalf of the taxpayers, an executive session, to that extent, would appear to have been justifiable. On the other hand, if public discussion would have had little or no impact on the value of the property, there would likely have been no basis for entry into executive session.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Trustees, Village of Afton

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14415
OML-AO-3720

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December 17, 2003

Mr. George Yourke

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Yourke:

I have received your letter of November 18 and the materials attached to it.

As you surmised, the advisory jurisdiction of the Committee on Open Government is limited to matters relating to the Freedom of Information and Open Meetings Laws. That being so, I cannot offer guidance concerning SEQRA or other matters that do not involve the application of those statutes. Insofar as the issues raised pertain to the Freedom of Information and Open Meetings Laws, I offer the following comments.

First, the Open Meetings Law requires that notice be posted and given to the news media prior to every meeting of a public body, such as a town board or planning 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 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.

Second, although the notice required by §104 must include the time and place of a meeting, there is nothing in the Open Meetings Law or any other law of which I am aware that deals specifically with agendas. While many public bodies prepare agendas, the Open Meetings Law does not require that they do so. Similarly, the Open Meetings Law does not require that a prepared agenda be followed. However, a public body on its own initiative may adopt rules or procedures concerning the preparation and use of agendas.

Third, §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.

And lastly, you referred to a situation in which an applicant in a proceeding "hired a stenographer to transcribe [a] hearing", and that a copy of the transcript was forwarded to a regional office of the Department of Environmental Conservation. Here I point out that the Freedom of Information Law pertains to all agency records, and that §86(4) of that statute defines the term "record" to include:

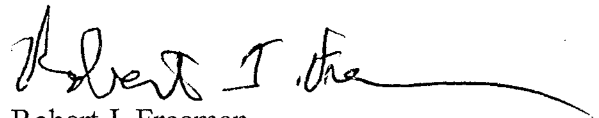
> "...any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based on the provision quoted above, once the transcript came into the possession of the Department, I believe that it constituted an agency 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. Since the transcript reflects comments offered during a public hearing, none of the grounds for denial of access would, in my view, be applicable or pertinent.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Planning Board
Hon. Ruth Mazzei, Town Clerk
Michael Merriman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3721

Committee Members

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December 18, 2003

E-Mail

TO: Mary Ann Cascarino <macascarino@stny.rr.com>

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Cascarino:

As you are aware, I have received your letter of November 24 in which you asked whether "a commissioner [may] vote by telephone during the regular monthly meeting of the Board of Fire District Commissioners."

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 phone, by mail or e-mail would in my opinion be inconsistent with law.

From my perspective, voting and action by members of 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 Fire Commissioners, 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 or during which its members may vote. 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 nor may its members vote through the use of a telephone 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.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14418
OML-AO-3722

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December 19, 2003

Mrs. Patricia Rozwood

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mrs. Rozwood:

I have received your letter in which you asked a variety of questions relating to the Open Meetings and Freedom of Information Laws. In consideration of the previous correspondence, it is assumed that your questions related to the Global Concepts Charter School and its Board of Trustees. Because charter schools and their boards are subject to the Freedom of Information and Open Meetings Laws, in the following remarks, the school and its board will be treated as an "agency" for purposes of the Freedom of Information Law and a "public body" for purposes of the Open Meetings Law.

First, with respect to the legality of a meeting held on a Sunday, a holiday or when school is closed, again, the Open Meetings Law is silent on the matter. Although §24 of the General Construction Law enumerates certain days as "public holidays", I an unaware of any statute or judicial decisions that deal specifically with the issue of a public body's authority to conduct a meeting on a holiday or a weekend day. I have found a summary of an opinion rendered by the State Comptroller in which it was advised that a town is not legally obligated to close its offices on the holidays designated in §24 of the General Construction Law, and that a town board has discretionary authority to close town offices in observation of those holidays (see 1985 Opinion of the State Comptroller, 85-33). In my view, due to the absence of specific statutory guidance, it appears that a public body may in its discretion conduct meetings on public holidays or weekends, so long as it complies with the applicable provisions of law, such as the Open Meetings Law. I point out, too, that many public bodies conduct organizational meetings on January 1, which is a public holiday.

Second, every meeting must be preceded by notice indicating the time and place, and §104 of the Open Meetings Law states that:

> "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and

> shall be conspicuously posted in one or more designated public locations at least seventy-two hours before 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."

Based on the foregoing, the Open Meetings Law 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 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.

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.

Third, §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."

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.

When a government officer or body fails to carry out a duty required to be performed, or in this instance, a charter school, a member of the public may initiate a judicial proceeding under Article 78 of the Civil Practice Law and Rules in Supreme Court in the proper county. In such a proceeding, the court may compel the officer or body to perform its duty and comply with law. Nevertheless, it is my hope that the preparation of an advisory opinion such as this, which can be shared with an entity, will encourage compliance and obviate the need to commence litigation.

Next, with respect to the procedural implementation of the Freedom of Information Law, I note by way of background that §89(1) 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, i.e., a board of trustees, to adopt rules and regulations consistent those promulgated by the Committee and with the Freedom of Information Law. Further, §1401.2 of the regulations provides in relevant part that:

> "(a) The governing body of a public corporation and the head of an executive agency or governing body of other agencies shall be responsible for insuring compliance with the regulations herein, and shall designate one or more persons as records access officer by name or by specific job title and business address, who shall have the duty of coordinating agency response to public requests for access to records. The designation of one or more records access officers shall not be construed to prohibit officials who have in the past been

> authorized to make records or information available to the public from continuing to do so."

In short, I believe that a board of education has the overall responsibility of ensuring compliance with the Freedom of Information Law and that the records access officer has the duty of coordinating responses to requests.

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, again, the records access officer must "coordinate" an agency's response to requests. If a different official receives a request, he or she, in accordance with the direction provided by the records access officer, must respond in a manner consistent with the Freedom of Information Law or forward the request to the records access officer.

Again, if an agency fails to implement the law or regulations, an Article 78 proceeding may be initiated.

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

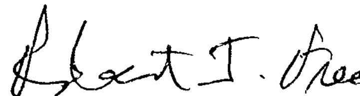
circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...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)].

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

OML-AO-3723

Committee Members

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December 19, 2003

Ms. Donna Suhor
Chairperson
Coalition for Accessible Transportation
P.O. Box 685
Troy, NY 12181

The staff of the Committee on 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. Suhor:

As you are aware, I have received you letter of December 1. You described difficulty in obtaining minutes of meetings of the Board of Directors of CDTA in a timely manner.

In this regard, §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."

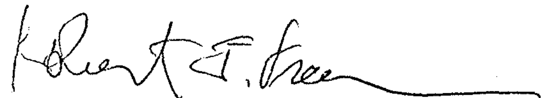
Based upon the foregoing, minutes must be prepared and made available within two weeks of meetings.

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 compliance with and understanding of the Open Meetings Law, copies of this opinion will be forwarded to the CDTA.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Directors
Carm Basile

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3724

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December 19, 2003

Mr. Gary S. Howell

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Howell:

I have received your inquiry of November 24. You wrote that the Board of Trustees in the Village of Depew recently began to ask the following questions before its meetings: "Is anyone tape recording the meeting?" and "What is your purpose for tape recording the meeting?" You asked whether the Board has the "right to ask these questions" and whether "what is said by a public office [sic] during a meeting is part of the public record."

In my view, the Board has the right to ask the question, but a person who seeks to record is not obliged to answer. In short, judicial decisions indicate that anyone can record an open meeting of a public body, so long as use of the recording device is neither obtrusive nor disruptive [see e.g., Csorny v. Shoreham-Wading River Central School District, 305 AD2d 83 (2003); Mitchell v. Board of Education, 113 AD2d 924 (985); Peloquin v. Arsenault, 616 NYS2d 716 (1994)]. I do not believe that permission is needed for a person to record a meeting, nor do I believe that a public body, such as a board trustees, has the authority to prohibit a person from recording a meeting if that person refuses to offer a purpose for wanting to do so.

As for the second question, I do not understand the meaning of the phrase "part of the public record." If you are referring to minutes of a meeting, most of what is said at meetings would not be required to be included in the minutes. Section 106 of the Open Meetings Law provides what might be viewed as minimum requirements concerning the contents of minutes. Specifically, subdivision (1) of that provision states that:

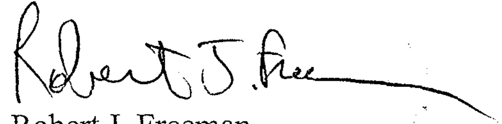
> "Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon."

Based on the foregoing, minutes need not consist of a verbatim account of what is said at a meeting.

If your question involves a recording of an open meeting, any person, according to Mitchell, supra, may do with such a recording as he or she sees fit. Stated differently, once comments are made at an open meeting and recorded, there is no restriction on its use.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14420
OML-AO-3725

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December 19, 2003

Mr. Clifford E. Wexler
Board of Directors
Valatie Volunteer Rescue
P.O. Box 242
Valatie, NY 12184

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Wexler:

As you are aware, I have received your letter of November 27 in which you questioned the status of the Valatie Volunteer Rescue Squad, a not-for-profit corporation, in relation to the Freedom of Information and Open Meetings Laws. You wrote that the Rescue Squad "provide[s] emergency medical services in an ambulance district" in certain towns pursuant to agreements with those municipalities.

Based on judicial decisions, it appears that the Rescue Squad is subject to both of those statutes. In this regard, I offer the following comments.

First, by way of background, 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 <u>wherever and whenever</u> 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" (<u>id.</u> 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)].

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 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. Since the situation of the Rescue Squad appears to be similar, it appears that it would fall within the coverage of the Freedom of Information Law.

Next, the Open Meetings Law pertains to meetings of public bodies, and §102(2) of that statute defines the phrase "public body" to mean:

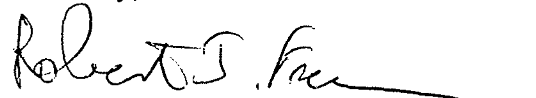
> "...any entity for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction 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 the Rescue Squad performs its functions exclusively for municipalities, I believe that it would be found that it conducts public business and performs a governmental function for those municipalities and that, therefore, the meetings of its governing body would be subject to the Open Meetings Law.

If I have misconstrued the facts, please so inform me.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

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OML-AO - 3726

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December 22, 2003

Mr. Christopher Venator
Law Offices Ingerman Smith, L.L.P.
167 North Main Street
Northport, NY 11768

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Mr. Venator:

I have received your letter in which you sought an opinion concerning the status of the Long Beach School District's "Health and Safety Team" under the Open Meetings Law.

You referred to our conversations on the matter and indicated that you learned that the information you then provided was "somewhat inaccurate" and that "the Health and Safety Team is not the same entity as either the district-wide safety team or building level safety team [created] pursuant to the mandates of §2801-a of the New York State Education Law." You added that the entity in question is "separate and apart from the §2801-a teams" and that it is not "statutorily required."

Your remarks do not describe the functions of the Health and Safety Team, other than suggesting that it is not the same entity that we discussed and that is not a creation of a statute. That being so, I cannot offer a definitive response. However, I offer the following remarks concerning the scope of the Open Meetings Law and judicial interpretations that might be pertinent.

As you are likely aware, 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."

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.

I note that several judicial decisions indicate generally that advisory bodies, other than those consisting of members of a governing body, that have no power to take final action fall outside the scope of the Open Meetings Law. As stated in those decisions: "it has long been held that the mere giving of advice, even about governmental matters is not itself a governmental function" [Goodson-Todman Enterprises, Ltd. v. Town Board of Milan, 542 NYS 2d 373, 374, 151 AD 2d 642 (1989); Poughkeepsie Newspaper v. Mayor's Intergovernmental Task Force, 145 AD 2d 65, 67 (1989); see also New York Public Interest Research Group v. Governor's Advisory Commission, 507 NYS 2d 798, aff'd with no opinion, 135 AD 2d 1149, motion for leave to appeal denied, 71 NY 2d 964 (1988)]. In one of the decisions, Poughkeepsie Newspaper, supra, a task force was designated by then Mayor Koch consisting of representatives of New York City agencies, as well as federal and state agencies and the Westchester County Executive, to review plans and make recommendations concerning the City's long range water supply needs. The Court specified that the Mayor was "free to accept or reject the recommendations" of the Task Force and that "[i]t is clear that the Task Force, which was created by invitation rather than by statute or executive order, has no power, on its own, to implement any of its recommendations" (id., 67). Referring to the other cases cited above, the Court found that "[t]he unifying principle running through these decisions is that groups or entities that do not, in fact, exercise the power of the sovereign are not performing a governmental function, hence they are not 'public bod[ies] subject to the Open Meetings Law..."(id.).

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 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 that 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)].

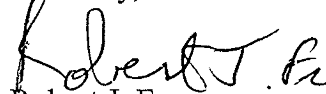
It has also been advised that an advisory body that performs a necessary step in the process of decision making constitutes a public body subject to the Open Meetings Law. For example, the entities created by the regulations promulgated by the Commissioner of Education, §100.11, "shared decision making" committees, may not have the authority to take final and binding action;

nevertheless, before a board of education may take action, it must first seek the views of a shared decision making committee in some circumstances. Because the board cannot act until it completes that process with that committee, I believe that the committee is a public body.

Again, without additional detail concerning the functions of the Health and Safety Team, I cannot offer unequivocal guidance. If you send additional information, I would be pleased to review it and provide a more pointed opinion.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Frank Fiumano

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OML-AO-3727

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December 29, 2003

Mr. Michael Veitch

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. Veitch:

As you are aware, I have received your letter of December 4. You have sought an opinion concerning "a private citizen's 'duties' when participating in a Town Board executive session..." and added that "[w]hat is at issue is whether or not a private citizen is bound by the rules that apply to public officials in and out of executive session."

While I am not certain of the nature of your question, it is assumed that you are asking whether a private citizen is forbidden from divulging information pertaining to what is said or heard during an executive session. Based on that assumption, I offer the following comments.

First, there are no general "rules" in the Open Meetings Law that prohibit a member of a public body, such as a town board, or any other person present during an executive session from divulging what transpired during the executive session.

By way of background, the Open Meetings Law is based upon a presumption of openness. Stated differently, meetings of public bodies must be conducted open to the public, unless there is a basis for entry into executive session. Moreover, the Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, §105(1) states in relevant part that:

> "Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed, and the motion must be carried by majority vote of a public body's total membership before such a session may validly be held. The ensuing provisions of §105(1) specify and limit the subjects that may appropriately be considered during an executive session.

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 generally prohibit a board member or other person from disclosing information heard or acquired during an executive session. 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 matter described in your correspondence, a discussion concerning an appointment to a "volunteer position."

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

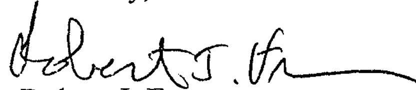
provision that describes the matter dealt with at such a session as confidential or which in any way restricts the participants from disclosing what took place" (Runyon v. Board of Education, West Hempstead Union Free School District No. 27, Supreme Court, Nassau County, January 29, 1987).

Lastly, 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 or other person might serve to defeat or circumvent the principles under which those bodies are intended to operate.

If I have not addressed the issue that you have sought to raise, please contact me.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board, Town of Woodstock

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OML-AO-3728

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December 29, 2003

Mr. Melvyn Meer

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Meer:

As you are aware, I have received your letter of November 20 and materials related to it. You have asked whether meetings of a "school leadership team" ("SLT") in the New York City school system is subject to the Open Meetings Law, and if so, whether it is proper for an entity falling within the coverage of that statute to meet at 7:20 a.m.

The materials to which you referred in my view indicate that an SLT is known in other contexts as a "shared decision-making committee." If that is so, I believe that it is required to comply with the Open Meetings Law. In this regard, I offer the following comments.

First, you indicated that SLT's are required to be created pursuant to §2590-h(15) of the Education Law. That provision states in part that "all necessary steps" must be taken by the City District and all community districts to comply with "state and federal law and regulations concerning school-based management and shared decision-making, including section 100.11 of the Commissioner's regulations". The Commissioner in this context is the State Commissioner of Education.

Second, §100.11(b) of the regulations promulgated by the Commissioner states in relevant part that:

> "By February 1, 1994, each public school district board of education and each board of cooperative educational services (BOCES) shall develop and adopt a district plan for the participation by teachers and parents with administrators and school board members in school-based planning and shared decisionmaking. Such district plan shall be developed in collaboration with a committee composed of the superintendent of schools, administrators selected by the district's

> administrative bargaining organization(s), teachers selected by the teachers' collective bargaining organization(s), and parents (not employed by the district or a collective bargaining organization representing teachers or administrators in the district) selected by their peers in the manner prescribed by the board of education or BOCES, provided that those portions of the district plan that provide for participation of teachers or administrators in school-based planning and shared decisionmaking may be developed through collective negotiations between the board of education or BOCES and local collective bargaining organizations representing administrators and teachers."

The committee to which reference is made in the provision quoted above is characterized frequently as the "shared decision-making committee", a district-wide committee, or apparently, as in your letter, an SLT.

Section 100.11(d) provides in part that:

> "The district's plan shall be adopted by the board of education or BOCES at a public meeting after consultation with and full participation by the designated representatives of the administrators, teachers, and parents, and after seeking endorsement of the plan by such designated representatives."
>
> "Each board of education or BOCES shall submit its district plan to the commissioner for approval within 30 days of adoption of the plan. The commissioner shall approve such district plan upon a finding that it complies with the requirements of this section..."

Additionally, §100.11(e)(1) states that:

> "In the event that the board of education or BOCES fails to provide for consultation with, and full participation of, all parties in the development of the plan as required by subdivisions (b) and (d) of this section, the aggrieved party or parties may commence an appeal to the commissioner pursuant to section 310 of the Education Law. Such an appeal may be instituted prior to final adoption of the district plan and shall be instituted no later that 30 days after final adoption of the district plan by the board of education or BOCES."

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."

Judicial decisions indicate generally that advisory bodies having no power to take final action, other than committees consisting solely of members of public bodies, fall outside the scope of the Open Meetings Law. As stated in those decisions: "it has long been held that the mere giving of advice, even about governmental matters is not itself a governmental function" [Goodson-Todman Enterprises, Ltd. v. Town Board of Milan, 542 NYS 2d 373, 374, 151 AD 2d 642 (1989); Poughkeepsie Newspapers v. Mayor's Intergovernmental Task Force, 145 AD 2d 65, 67 (1989); see also New York Public Interest Research Group v. Governor's Advisory Commission, 507 NYS 2d 798, aff'd with no opinion, 135 AD 2d 1149, motion for leave to appeal denied, 71 NY 2d 964 (1988)].

In this instance, however, although the SLT may or may not have the ability to make determinations, according to the Commissioner's regulations, it performs a necessary and integral function in the development of shared decision making plans. As stated earlier, the regulations specify that a district plan "shall be developed in collaboration with a committee." As such, a committee must, by law, be involved in the development of a plan. The regulations also indicate that a plan may be adopted only "after consultation with and full participation by" a committee, and that the Commissioner may approve a plan only after having found that it "complies with the requirements of this section", i.e., when it is found that a committee was involved in the development of a plan. Further, an appeal may be made to the Commissioner if a board has failed to permit "full participation" of a committee.

In the decisions cited earlier, none of the entities were designated by law to carry out a particular duty and all had purely advisory functions. More analogous to the status of shared decision-making committees in my view is the decision rendered in MFY Legal Services v. Toia [402 NYS 2d 510 (1977)]. That case involved an advisory body created by statute to advise the Commissioner of the State Department of Social Services. In MFY, it was found that "[a]lthough the duty of the committee is only to give advice which may be disregarded by the Commissioner, the Commissioner may, in some instances, be prohibited from acting before he receives that advice" (id. 511) and that, "[t]herefore, the giving of advice by the Committee either on their own volition or at the request of the Commissioner is a necessary governmental function for the proper actions of the Social Services Department" (id. 511-512).

Again, according to the Commissioner's regulations, which have the force and effect of law, a plan cannot be adopted absent "collaboration" and participation by a district-wide committee. If the SLT is the entity to which the regulations refer and carries out necessary functions in the development of shared decision making plans, I believe that it performs a governmental function and, therefore, is a public body subject to the Open Meetings Law.

While the Commissioner's regulations make reference to "school-based" committees, there is no statement concerning their specific role, function or authority. It is my understanding, based upon a discussion with a representative of the State Education Department, that school-based committees carry out their duties in accordance with the plans adopted individually by boards of

education in each school district, and that those plans are intended to provide the committees in question varied roles in the decision-making process.

When, for example, a plan provides decision making authority to school-based committees within a district, those committees, in my opinion, would clearly constitute public bodies required to comply with the Open Meetings Law. Similarly, when a school-based committee performs a function analogous to that of the shared decision-making committee, i.e., where the school-based committee has the authority to recommend, and the decision maker or decision making body must consider its recommendations as a condition precedent to taking action, I believe that the committee would be a public body subject to the Open Meetings Law, even when the recommendations need not be followed.

Lastly, with respect to the time of the meetings, §103(a) of the Law states in part that "Every meeting of a public body shall be open to the general public..." Further, the intent of the Open Meetings Law is clearly stated in §100 as follows:

> "It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of an able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy. The people must be able to remain informed if they are to retain control over those who are their public servants. It is the only climate under which the commonweal will prosper and enable the governmental process to operate for the benefit of those who created it."

As such, the Open Meetings Law confers a right upon the public to attend and listen to the deliberations of public bodies and to observe the performance of public officials who serve on such bodies.

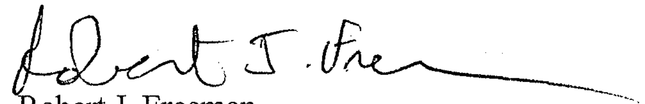
In consideration of its intent, it has been found that it is unreasonable to schedule meetings as early as 7:20 a.m. In a decision that dealt in part with meetings of a board of education held at 7:30 a.m., it was stated that:

> "It is...apparent to this Court that the scheduling of a board meeting at 7:30 a.m. -- even assuming arguendo that such meetings were properly noticed and promptly conducted -- does not facilitate attendance by members of the public, whether employed within or without the home, particularly those with school age or younger children, and all but insures that teachers and teacher associates at the school are unable to both attend and still comply with the requirement that they be in their classrooms by 8:40 a.m." (Matter of Goetchius v. Board of Education, Supreme Court, Westchester County, New York Law Journal, August 8, 1996).

Many may be unable to attend because they have small children, because of work schedules, commuting, and other matters that might effectively preclude them from attending meetings held so early in the morning.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Gwen Hopkins
Shelli Sklar

STATE OF NEW YORK
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OML-AO-3729

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December 29, 2003

E-Mail

TO: Laurie Spagnola

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. Spagnola:

As you are aware, I have received your letter of December 2 in which you raised a series of issues relating to the Open Meetings Law and its implementation by a village board of trustees.

First, there is nothing in the Open Meetings Law or the Village Law that pertains to or addresses what might be characterized as "special meetings." That being so, I know of no requirement that notice of a special meeting must include reference to the subject or subjects to be considered or that discussion by a public body, such as a village board of trustees, must be limited to certain topics.

Second, however, the Open Meetings Law specifies that notice of the time and place must be given prior to every meeting of a public body. Section 104 of that statute provides that:

> "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before each meeting.
>
> 2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.
>
> 3. The public notice provided for by this section shall not be construed to require publication as a legal notice."

Stated differently, if a meeting is scheduled at least a week in advance, notice of the time and place must be given to the news media and to the public by means of posting in one or more designated public locations, not less than seventy-two hours prior to the meeting. If a meeting is scheduled less than a week an advance, again, notice of the time and place must be given to the news media and posted in the same manner as described above, "to the extent practicable", at a reasonable time prior to the meeting. Although the Open Meetings Law does not make specific reference to special or emergency meetings, if, for example, there is a need to convene quickly, the notice requirements can generally be met by telephoning the local news media and by posting notice in one or more designated locations.

It is emphasized that notice must be "conspicuously posted in one or more designated public locations." Consequently, I believe that a public body must designate, presumably by resolution, the location or locations where it will routinely post notice of meetings. To meet the requirement that notice be "conspicuously posted", notice must in my view be placed at a location that is visible to the public.

Moreover, the judicial interpretation of the Open Meetings Law suggests that the propriety of scheduling a meeting less than a week in advance is dependent upon the actual need to do so. As stated in Previdi v. Hirsch:

> "Whether abbreviated notice is 'practicable' or 'reasonable' in a given case depends on the necessity for same. Here, respondents virtually concede a lack of urgency: They deny petitioner's characterization of the session as an 'emergency' and maintain nothing of substance was transacted at the meeting except to discuss the status of litigation and to authorize, pro forma, their insurance carrier's involvement in negotiations. It is manifest then that the executive session could easily have been scheduled for another date with only minimum delay. In that event respondents could even have provided the more extensive notice required by POL §104(1). Only respondent's choice in scheduling prevented this result.
>
> "Moreover, given the short notice provided by respondents, it should have been apparent that the posting of a single notice in the School District offices would hardly serve to apprise the public that an executive session was being called...
>
> "In White v. Battaglia, 79 A.D. 2d 880, 881, 434 N.Y.S.ed 637, lv. to app. den. 53 N.Y.2d 603, 439 N.Y.S.2d 1027, 421 N.E.2d 854, the Court condemned an almost identical method of notice as one at bar:
>
> "Fay Powell, then president of the board, began contacting board members at 4:00 p.m. on June 27 to ask them to attend a meeting at 7:30 that evening at the central office, which was not the usual meeting date or place. The only notice given to the public was one typewritten announcement posted on the central office bulletin

> board...Special Term could find on this record that appellants violated the...Public Officers Law...in that notice was not given 'to the extent practicable, to the news media' nor was it 'conspicuously posted in one or more designated public locations' at a reasonable time 'prior thereto' (emphasis added)" [524 NYS 2d 643, 645 (1988)].

Based upon the foregoing, absent an emergency or urgency, the Court in Previdi suggested that it would be unreasonable to conduct meetings on short notice, unless there is some necessity to do so.

Third, 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, 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.

In the context of your remarks, it appears that consideration of "options with an attorney" may have been validly discussed in private based on the assertion of attorney-client privilege. In this regard, 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 a 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 I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3730

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December 29, 2003

Ms. Kathleen Taylor

The staff of the Committee on 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. Taylor:

I have received your letter and thank you for your kind words.

You have requested an advisory opinion concerning "the propriety of [y]our school board's holding a discussion about the appointment of a particular person to the unexpired vacant seat in executive session. There is but one judicial decision of which I am aware that considered that issue, and the court determined that there is no basis for entry into executive session. In this regard, I offer the following remarks.

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 in the context of the issue is §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 that dealt directly with

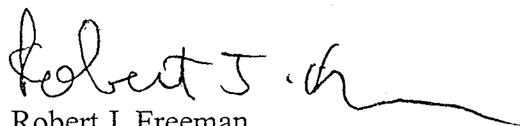
the propriety of holding an executive to discuss filling a vacancy in an elective office, the court found that there was no basis for entry into executive session. In determining that an executive session could not properly have been held, the court stated that:

> "...respondents' reliance on the portion of Section 105(1)(f) which states that a Board in executive session may discuss the 'appointment...of a particular person...' is misplaced. In this Court's opinion, given the liberality with which the law's requirements of openness are to be interpreted (Holden v. Board of Trustees of Cornell Univ., 80 AD2d 378) and given the obvious importance of protecting the voter's franchise this section should be interpreted as applying only to employees of the municipality and not to appointments to fill the unexpired terms of elected officials. Certainly, the matter of replacing elected officials, should be subject to public input and scrutiny" (Gordon v. Village of Monticello, Supreme Court, Sullivan County, January 7, 1994), modified on other grounds, 207 AD 2d 55 (1994)].

Based on the foregoing, notwithstanding its language, the Court in Gordon held that §105(1)(f) could not be asserted to conduct an executive session. I point out that the Appellate Division affirmed the substance of the lower court decision but did not refer to the passage quoted above. Whether other courts would uniformly concur with the finding enunciated in that passage is conjectural. Nevertheless, since it is the only decision that has dealt squarely with the issue at hand, I believe that it is appropriate to consider Gordon as an influential precedent.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

STATE OF NEW YORK
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OML-AO-3731

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December 29, 2003

Mr. Chris Garifo
Watertown Daily Times
260 Washington Street
Watertown, NY 13601

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Garifo:

I have received your letter of December 3 in which you requested an advisory opinion concerning the propriety of executive sessions held by the Board of Directors of the Ogdensburg Bridge and Port Authority.

You referred, for example, to an executive session that began at 5 p.m. to discuss "security issues and personnel" and was later followed by a "regular monthly meeting" at 6 p.m. Although the meeting was adjourned at 7 p.m., you wrote that the members "stayed until the media left, then went back into executive session, and that you were informed that "the decision to go into the second executive session was made during the first one."

In this regard, I offer the following comments.

First, it is emphasized that the phrase "executive session" is defined in §102(3) of the Open Meetings Law to mean a portion of an open meeting during which the public may be excluded. As such, an executive session is not separate and distinct from a meeting, but rather is a portion of an open meeting. The Law also contains a procedure that must be accomplished during an open meeting before an executive session may be held. Specifically, §105(1) states in relevant part that:

> "Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

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. Similarly, an executive session cannot be held following the adjournment of a meeting. 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.

Second, as you are likely aware, a public body may not conduct an executive session to discuss the subject of its choice; on the contrary, paragraphs (a) through (h) of §105(1) specify and limit the grounds for entry into executive session. And as indicated in the provision quoted earlier, a motion to enter into executive session must include refer to the subject or subjects to be discussed. In my view, the purpose of that requirement is to enable the public to have the ability to ascertain with reasonable certainty that those subjects may properly 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.

In my view, a discussion held to discuss policy or budgetary matters, for example, would not fall within the scope of §105(1)(f). In short, consideration of an issue of that nature would not focus on a "particular person" in relation to the topics listed in §105(1)(f).

When §105(1)(f) may be validly asserted, it has been advised that a motion describing the subject to be discussed as "personnel" or "specific personnel matters" is inadequate, and that the motion should be based upon the specific language of §105(1)(f). For instance, a proper motion might be: "I move to enter into an executive session to discuss the employment history of a particular person (or persons)". Such a motion would not in my opinion have to identify the person or persons who may be the subject of a discussion. By means of the kind of motion suggested above, members of a public body and others in attendance would have the ability to know that there is a proper basis for entry into an executive session. Absent such detail, neither the members nor others may be able to determine whether the subject may properly be considered behind closed doors.

It is noted that the Appellate Division has confirmed the advice rendered by this office. In discussing §105(1)(f) in relation to a matter involving the establishment and functions of a position, the Court stated that:

> "...the public body must identify the subject matter to be discussed (See, Public Officers Law § 105 [1]), and it is apparent that this must be accomplished with some degree of particularity, i.e., merely reciting the statutory language is insufficient (see, Daily Gazette Co. v Town Bd., Town of Cobleskill, 111 Misc 2d 303, 304-305). Additionally, the topics discussed during the executive session must remain within the exceptions enumerated in the statute (see generally, Matter of Plattsburgh Publ. Co., Div. of Ottaway Newspapers v City of Plattsburgh, 185 AD2d §18), and these exceptions, in turn, 'must be narrowly scrutinized, lest the article's clear mandate be thwarted

> by thinly veiled references to the areas delineated thereunder' (Weatherwax v Town of Stony Point, 97 AD2d 840, 841, quoting Daily Gazette Co. v Town Bd., Town of Cobleskill, supra, at 304; see, Matter of Orange County Publs., Div. of Ottaway Newspapers v County of Orange, 120 AD2d 596, lv dismissed 68 NY 2d 807).
>
> "Applying these principles to the matter before us, it is apparent that the Board's stated purpose for entering into executive session, to wit, the discussion of a 'personnel issue', does not satisfy the requirements of Public Officers Law § 105 (1) (f). The statute itself requires, with respect to personnel matters, that the discussion involve the 'employment history of a particular person" (id. [emphasis supplied]). Although this does not mandate that the individual in question be identified by name, it does require that any motion to enter into executive session describe with some detail the nature of the proposed discussion (see, State Comm on Open Govt Adv Opn dated Apr. 6, 1993), and we reject respondents' assertion that the Board's reference to a 'personnel issue' is the functional equivalent of identifying 'a particular person'" [Gordon v. Village of Monticello, 620 NY 2d 573, 575; 209 AD 2d 55, 58 (1994)].

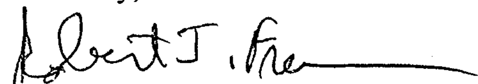
In short, the characterization of an issue as a "personnel" matter is inadequate, for it fails to enable the public to know whether subject at hand may properly be considered during an executive session.

There are no judicial decisions of which I am aware that deal with discussions concerning "security." However, it appears that the provision most likely associated with that issue is §105(1)(a), which authorizes a public body to conduct an executive session to discuss "matters which will imperil the public safety if disclosed." If indeed that is the subject under consideration, I believe that a motion to hold an executive session should so indicate. Describing the issue as one involving security, without more, would not provide the public with sufficient information to reasonably ascertain whether there is a proper basis for entry into 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 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
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OML-AO-3732

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December 29, 2003

Ms. Suzanne Barclay

<u>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.</u>

Dear Ms. Barclay:

I have received your letter in which you questioned the "process" by which the Orangetown Planning Board, upon which you serve, has apparently taken certain action.

According to your letter, you learned that four of the seven members of the Board "signed and sent a letter to a private attorney stating that they disagreed with a legal position taken by the Town Attorney", who petitioned a court to authorize the consolidation of several lawsuits relating to two projects. You wrote that the issue of consolidating the lawsuits was never discussed at a meeting of the Board, and that it was considered by means of a "series of phone calls." You added that you were never asked to sign the letter and learned of it only after it was sent, that the letter "appears to take a legal position on a lawsuit", that those who signed the letter identified themselves as chair, vice chair and members, and that another member of the Board "was likewise kept in the dark."

From my perspective, a public body, such as a planning board, may validly conduct a meeting or carry out its authority only at a meeting during which a majority of its members has physically convened or during which a majority has convened by means of videoconferencing, and even then, only when reasonable notice is given to all of the members. In this regard, I offer the following comments.

First, by way of background, it is emphasized 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 <u>Orange County Publications v. Council of the City of Newburgh</u>, 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 Board 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 series of telephone calls, or a vote taken by mail or e-mail would in my opinion be inconsistent with law.

Based on relatively recent legislation and as suggested earlier, 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 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 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, by mail, or by e-mail, would be inconsistent with law.

As indicated above, 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." 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. Moreover, §41 requires that reasonable notice be given to all the members. If that does not occur, even if a majority is present, I do not believe that a valid meeting could be held or that action could validly be taken.

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:

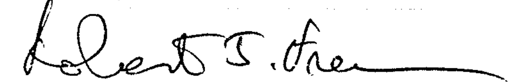
> "It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that 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.

In sum, I agree with your inference that the "process" by which the four members of the Board constructively took action appears to have been inconsistent with law.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OMC-AO - 3733

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December 29, 2003

Hon. Doug Malone
Oswego County Legislator
District 20

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 Legislator Malone:

I have received your letter and the materials attached to it. You have requested an opinion concerning the status of a special committee known as the "workforce redesign committee" (hereafter "the committee"), which was designated by the Chairman of the Oswego County Legislature. According to a news article, the committee includes three members of the Legislature's majority and three from the minority, and its function is "to explore staffing arrangements in departments and recommend proposed staff changes." You also referred to the Legislature's Rule No. 11, which authorizes the Chairman to create the entity in question.

Based on the language of the Open Meetings Law, its history and judicial decisions, I believe that the committee is required to comply with that statute. 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 consists solely of members of a public body, such as the Agency, I believe that the Open Meetings Law is applicable.

By way of background, when the Open Meetings Law went into effect in 1977, questions consistently arose with respect to the status of committees, subcommittees and similar bodies that had no capacity to take final action, but rather merely the authority to advise. Those questions arose due to the definition of "public body" as it appeared in the Open Meetings Law as it was originally enacted. Perhaps the leading case on the subject also involved a situation in which a governing body, a school board, designated committees consisting of less than a majority of the total membership of the board. In Daily Gazette Co., Inc. v. North Colonie Board of Education [67 AD 2d 803 (1978)], it was held that those advisory committees, which had no capacity to take final action, fell outside the scope of the definition of "public body".

Nevertheless, prior to its passage, the bill that became the Open Meetings Law was debated on the floor of the Assembly. During that debate, questions were raised regarding the status of "committees, subcommittees and other subgroups." In response to those questions, the sponsor stated that it was his intent that such entities be included within the scope of the definition of "public body" (see Transcript of Assembly proceedings, May 20, 1976, pp. 6268-6270).

Due to the determination rendered in Daily Gazette, supra, which was in apparent conflict with the stated intent of the sponsor of the legislation, a series of amendments to the Open Meetings Law was enacted in 1979 and became effective on October 1 of that year. Among the changes was a redefinition of the term "public body". "Public body" is now defined in §102(2) to include:

> "...any entity for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body."

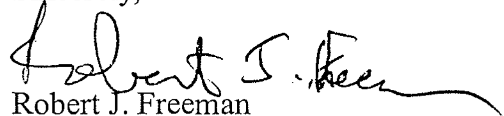
Although the original definition made reference to entities that "transact" public business, the current definition makes reference to entities that "conduct" public business. Moreover, the definition makes specific reference to "committees, subcommittees and similar bodies" of a public body.

In view of the amendments to the definition of "public body", I believe that any entity consisting of two or more members of a public body, such as a committee or subcommittee consisting of members of the Agency, would fall within the requirements of the Open Meetings Law, assuming that a committee discusses or conducts public business collectively as a body [see Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984 (1981)]. Further, as a general matter, I believe that a quorum consists of a majority of the total membership of a body (see e.g., General Construction Law, §41). Therefore, if, for example, the 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3734

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December 30, 2003

Mr. Thomas J. Cusker
Town of Mendon Attorney
Cusker & Cusker
2121 North Clinton Avenue
P.O. Box 17406
Rochester, NY 14617-0406

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. Cusker:

I have received your letter of December 11. In the past, our correspondence has related to meetings of the Mendon Town Board. In this instance, however, you referred to a meeting of the Library Board of Trustees and questioned whether it complied with the Open Meetings Law. Specifically, you wrote that:

> "According to the President of the Board of Trustees, notice of the meeting was e-mailed to the members of the Board of Trustees (although one of the absent members indicated that she had not received the e-mail). The only posted notice was affixed to the outside of the library. According to the publisher of the official Town newspaper; notice of the meeting was not communicated to the newspaper. It is unclear when the e-mail notification was given, but the President indicated that it may have been the day before the meeting."

In this regard, §104 of the Open Meetings Law states that:

> "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before each meeting.
>
> 2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.

3. The public notice provided for by this section shall not be construed to require publication as a legal notice."

Stated differently, if a meeting is scheduled at least a week in advance, notice of the time and place must be given to the news media and to the public by means of posting in one or more designated public locations, not less than seventy-two hours prior to the meeting. If a meeting is scheduled less than a week an advance, again, notice of the time and place must be given to the news media and posted in the same manner as described above, "to the extent practicable", at a reasonable time prior to the meeting. Although the Open Meetings Law does not make specific reference to special or emergency meetings, if, for example, there is a need to convene quickly, the notice requirements can generally be met by telephoning the local news media and by posting notice in one or more designated locations.

It is stressed that §104 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 library 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 Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-14441
OML-AO-3735

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December 30, 2003

Ms. Megan O'Neil-Haight
School Board Member
Corning-Painted Post School District

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. O'Neil-Haight:

I have received your letters of December 10 and 16. In your capacity as a member of the Corning Painted-Post School District Board of Education, you raised a variety of issues relating to the implementation of the Open Meetings and Freedom of Information Laws. The focus of your correspondence relates to an executive session held "for the purpose of chastising two board members for their minority held views on a facilities renovation plan..."

You wrote that the reason expressed for entry into executive session was "to discuss a specific personnel matter." You have questioned whether, under the circumstances, there would have been a basis for conducting an executive session. Additionally, you referred to motions often made to discuss "a matter in litigation" as the basis for entry into executive session.

In this regard, as a general matter, the Open Meetings Law is based upon a presumption of openness. Stated differently, 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. Moreover, the Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, §105(1) states in relevant part that:

> "Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed, and the motion must be carried by majority vote of a public body's total membership

before such a session may validly be held. The ensuing provisions of §105(1) specify and limit the subjects that may appropriately be considered during an executive session.

Although it is used frequently, the term "personnel" appears nowhere in the Open Meetings Law. Although one of the grounds for entry into executive session often relates to personnel matters, from my perspective, the term is overused and is frequently cited in a manner that is inappropriate, misleading or that 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 terms of the so-called "personnel" exception, §105(1)(f) of the Open Meetings Law, are limited and precise. As originally enacted, the provision in question permitted a public body to enter into an executive session to discuss:

> "...the medical, financial, credit or employment history of any person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of any person or corporation..."

Under the language quoted above, public bodies often convened executive sessions to discuss matters that dealt with "personnel" generally, tangentially, or in relation to policy concerns. However, the Committee consistently advised that the provision was intended largely to protect privacy and not to shield matters of policy under the guise of privacy.

In my view, the discussion to which you referred involving the stance taken by two members concerning a facilities renovation plan could not validly have been considered during an executive session. Very simply, the subject matter would not have fallen within the scope of §105(1)(f) or any other ground for entry into executive session.

With respect to the motion to discuss "a specific personnel matter", I agree with your inference, as have the courts, that it was inadequate. A specific personnel matter might involve the elimination of a teaching position due to budgetary constraints or program changes. In neither of those instances would there be a basis for conducting an executive session, for neither would focus on a particular person. I believe that a motion to conduct an executive session should include sufficient information to enable the public, as well as the members of a public body, to know with reasonable certainty that the subject to be discussed may properly be considered in executive session.

Even when §105(1)(f) may be validly asserted, it has been advised that a motion describing the subject to be discussed as "personnel" or "specific personnel matters" is inadequate, and that the motion should be based upon the specific language of §105(1)(f). For instance, a proper motion might be: "I move to enter into an executive session to discuss the employment history of a particular person (or persons)". Such a motion would not in my opinion have to identify the person or persons who may be the subject of a discussion. By means of the kind of motion suggested above, members of a public body and others in attendance would have the ability to know that there is a proper basis for entry into an executive session. Absent such detail, neither the members nor

others may be able to determine whether the subject may properly be considered behind closed doors.

It is noted that the Appellate Division has confirmed the advice rendered by this office. In discussing §105(1)(f) in relation to a matter involving the establishment and functions of a position, the Court stated that:

> "...the public body must identify the subject matter to be discussed (See, Public Officers Law § 105 [1]), and it is apparent that this must be accomplished with some degree of particularity, i.e., merely reciting the statutory language is insufficient (see, Daily Gazette Co. v Town Bd., Town of Cobleskill, 111 Misc 2d 303, 304-305). Additionally, the topics discussed during the executive session must remain within the exceptions enumerated in the statute (see generally, Matter of Plattsburgh Publ. Co., Div. of Ottaway Newspapers v City of Plattsburgh, 185 AD2d §18), and these exceptions, in turn, 'must be narrowly scrutinized, lest the article's clear mandate be thwarted by thinly veiled references to the areas delineated thereunder' (Weatherwax v Town of Stony Point, 97 AD2d 840, 841, quoting Daily Gazette Co. v Town Bd., Town of Cobleskill, supra, at 304; see, Matter of Orange County Publs., Div. of Ottaway Newspapers v County of Orange, 120 AD2d 596, lv dismissed 68 NY 2d 807).
>
> "Applying these principles to the matter before us, it is apparent that the Board's stated purpose for entering into executive session, to wit, the discussion of a 'personnel issue', does not satisfy the requirements of Public Officers Law § 105 (1) (f). The statute itself requires, with respect to personnel matters, that the discussion involve the 'employment history of a particular person" (id. [emphasis supplied]). Although this does not mandate that the individual in question be identified by name, it does require that any motion to enter into executive session describe with some detail the nature of the proposed discussion (see, State Comm on Open Govt Adv Opn dated Apr. 6, 1993), and we reject respondents' assertion that the Board's reference to a 'personnel issue' is the functional equivalent of identifying 'a particular person'" [Gordon v. Village of Monticello, 620 NY 2d 573, 575; 209 AD 2d 55, 58 (1994)].

In short, the characterization of an issue as "a specific personnel matter" fails to enable the public or members of the Board to know whether the subject at hand may properly be considered during an executive session.

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 general intent of the grounds for entry into executive session, 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; §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 short, 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].

A proper motion might be: "I move to enter into executive session to discuss litigation strategy in relation to the case of the XYZ Company v. the District" or something analogous.

Next, you raised issues concerning determinations made by "consensus" and asked when minutes of executive sessions must be prepared. The Open Meetings Law offers guidance

concerning minutes and their contents, and the courts have provided direction regarding the ability of boards of education to take action in executive session, as well as action reached by consensus.

By way of background, §106 of the Open Meetings Law pertains to minutes and states that:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.
>
> 2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.
>
> 3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meetings except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

As a general rule, a public body may take action during a properly convened executive session [see Open Meetings Law, §105(1)]. In the case of most public bodies, if action is taken during an executive session, minutes reflective of the action, the date and the vote must be recorded in minutes pursuant to §106(2) of the Law. 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.

Before addressing the matter of action taken by consensus, I point out that a provision of the Freedom of Information Law relates to the issue. Section 87(3)(a) of that statute requires that:

> "Each agency shall maintain:
>
> (a) a record of the final vote of each member in every agency proceeding in which the member votes..."

Based upon the foregoing, when a final vote is taken by an "agency", which is defined to include a state or municipal board [see §86(3)], such as a school board, a record must be prepared that indicates the manner in which each member who voted cast his or her vote. Ordinarily, records of votes will appear in minutes.

In terms of the rationale of §87(3)(a), I believe that the State Legislature 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, 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 which states that:

> "it is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of 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."

With respect to the notion of a "consensus", 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).

When the Board reaches a "consensus" that is reflective of final action, 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 must reflect the actual votes of the members.

In another decision that dealt with action taken by consensus, it was found that:

> "A consensus is 'judgment arrived at by most of those concerned' (Webster's New Collegiate Dictionary, 150th Anniversary Edition at 238). It can only be arrived by some type of allocution by each member. Whether by formal written ballot or informal oral expression, it is a vote, with...approval or denial dependent upon the outcome of that vote. Thus according to P.O.L. § 87(3) each member's final vote must be recorded" [ASPCA v. State University of New York at Stony Brook, 556 NYS2d 447, 453 (1990); reversed on other grounds, 79 NY2d 927 (1992)].

Other issues were also raised in relation to the Freedom of Information Law. You referred, for example, to a demand by the Board President that certain documents be returned to her, in your words, "so there would be no record of these items having been produced nor considered in executive session." You asked whether records must be returned or may be "recovered" because an official "did not want any of this to get out."

First, the records, in my view, are the property of the District, not a particular Board member. The documentation to which reference was made would fall within the coverage of the Freedom of Information Law, for that statute is applicable to all records of an agency. Section 86(4) defines the term "record" expansively to mean:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

In a case in which an agency contended, in essence, that it could choose which documents it considered to be "records" for purposes of the Freedom of Information Law, the state's highest court rejected that claim. As stated by the Court of Appeals:

> "...respondents' construction -- permitting an agency to engage in a unilateral prescreening of those documents which it deems to be outside the scope of FOIL -- would be inconsistent with the process set forth in the statute. In enacting FOIL, the Legislature devised a detailed system to insure that although FOIL's scope is broadly defined to include all governmental records, there is a means by which an agency may properly withhold from disclosure records found to be exempt (see, Public Officers Law §87[2]; §89[2],[3]. Thus, FOIL provides that a request for access may be denied by an agency in writing pursuant to Public Officers Law §89(3) to prevent an unwarranted invasion of privacy (see, Public Officers Law §89[2]) or for one of the other enumerated reasons for exemption (see, Public

> Officers Law §87[2]). A party seeking disclosure may challenge the agency's assertion of an exemption by appealing within the agency pursuant to Public Officers Law §89(4)(a). In the event that the denial of access is upheld on the internal appeal, the statute specifically authorizes a proceeding to obtain judicial review pursuant to CPLR article 78 (see, Public Officers Law §89[4][b]). Respondents' construction, if followed, would allow an agency to bypass this statutory process. An agency could simply remove documents which, in its opinion, were not within the scope of the FOIL, thereby obviating the need to articulate a specific exemption and avoiding review of its action. Thus, respondents' construction would render much of the statutory exemption and review procedure ineffective; to adopt this construction would be contrary to the accepted principle that a statute should be interpreted so as to give effect to all of its provisions...
>
> "...as a practical matter, the procedure permitting an unreviewable prescreening of documents -- which respondents urge us to engraft on the statute -- could be used by an uncooperative and obdurate public official or agency to block an entirely legitimate FOIL request. There would be no way to prevent a custodian of records from removing a public record from FOIL's reach by simply labeling it 'purely private'. Such a construction, which could thwart the entire objective of FOIL by creating an easy means of avoiding compliance, should be rejected" [Capital Newspapers v. Whalen, 69 NY 2d 246, 253-254 (1987)].

In short, irrespective of the function or origin of the document to which you referred or the desire of an official to avoid its "getting out", it would constitute a "record" that falls within the coverage of the Freedom of Information Law.

In a related vein, the "Local Government Records Law", Article 57-A of the Arts and Cultural Affairs Law, deals with the management, custody, retention and disposal of records by local governments. For purposes of those provisions, §57.17(4) of the Arts and Cultural Affairs Law defines "record" to mean:

> "...any book, paper, map, photograph, or other information-recording device, regardless of physical form or characteristic, that is made, produced, executed, or received by any local government or officer thereof pursuant to law or in connection with the transaction of public business. Record as used herein shall not be deemed to include library materials, extra copies of documents created only for convenience of reference, and stocks of publications."

Further, §57.25 of the Arts and Cultural Affairs Law states in relevant part that:

> "1. It shall be the responsibility of every local officer to maintain records to adequately document the transaction of public business and the services and programs for which such officer is responsible; to retain and have custody of such records for so long as the records are needed for the conduct of the business of the office; to adequately protect such records; to cooperate with the local government's records management officer on programs for the orderly and efficient management of records including identification and management of inactive records and identification and preservation of records of enduring value; to dispose of records in accordance with legal requirements; and to pass on to his successor records needed for the continuing conduct of business of the office..."

Next, you referred to "information packets" prepared and distributed to Board members on the Friday before a Wednesday meeting and "press leaks" of the content of the packets. You asked whether those preparatory materials are "considered confidential."

Again, the Freedom of Information Law pertains to all District records, and as a general matter, is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, the contents of the records in question serve as the factors relevant to an analysis of the extent to which they may be withheld or must be disclosed. In my view, several of the grounds for denial may be relevant to such an analysis.

Records prepared by District staff and forwarded to members of the Board would constitute intra-agency materials that fall within the coverage of §87(2)(g) of the Freedom of Information Law. That provision states that an agency may withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could

appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

It is emphasized that the Court of Appeals has specified that the contents of intra-agency materials determine the extent to which they may be available or withheld, for it was held that:

> "While the reports in principle may be exempt from disclosure, on this record - which contains only the barest description of them - we cannot determine whether the documents in fact fall wholly within the scope of FOIL's exemption for 'intra-agency materials,' as claimed by respondents. To the extent the reports contain 'statistical or factual tabulations or data' (Public Officers Law section 87[2][g][i], or other material subject to production, they should be redacted and made available to the appellant" [Xerox Corp. v. Town of Webster, 65 NY 2d 131, 133 (1985)].

Therefore, as indicated earlier, intra-agency materials may be accessible or deniable in whole or in part, depending upon their specific contents.

Also relevant may be §87(2)(b), which enables an agency to withhold records or portions thereof which if disclosed would result in an unwarranted invasion of privacy. That provision might be applied with respect to a variety of matters relating to hiring, evaluation or discipline of teachers or other staff, for example.

Section 87(2)(c) of the Freedom of Information Law permits an agency to withhold records to the extent that disclosure "would impair present or imminent contract awards or collective bargaining negotiations". Items within an agenda packet might in some instances fall within that exception.

Section 87(2)(a) pertains to records that "are specifically exempted from disclosure by state or federal statute". One such statute is the Family Educational Rights and Privacy Act (20 U.S.C. §1232g). In brief, that statute generally forbids a school district from disclosing personally identifiable information concerning students, unless the parents of students consent to disclosure.

In short, a blanket denial of access to an agenda package may be inconsistent with the Freedom of Information Law. However, there would likely be one or more grounds for denial that could appropriately be cited withhold portions of those records.

I point out that although records or perhaps portions of records may be withheld, there is no requirement that they must be withheld. The Court of Appeals has confirmed that the exceptions to rights of access are permissive, rather than mandatory, stating that:

> "while an agency is permitted to restrict access to those records falling within the statutory exemptions, the language of the exemption provision contains permissible rather than mandatory language, and it is within the agency's discretion to disclose such

> records, with or without identifying details, if it so chooses" [Capital Newspapers v. Burns, 67 NY 2d 562, 567 (1986)].

Consequently, even if it is determined that a record may be withheld under §87(2)(g), for example, an agency would have the authority to disclose the record.

It is also emphasized that the grounds for withholding records under the Freedom of Information Law and the grounds for entry into executive session are separate and distinct, and that they are not necessarily consistent. In some instances, although a record might be withheld under the Freedom of Information Law, a discussion of that record might be required to be conducted in public under the Open Meetings Law, and *vice versa*. For instance, if an administrator transmits a memorandum to the Board suggesting a change in the curriculum, that record could be withheld. It would consist of intra-agency material reflective of an opinion or recommendation. Nevertheless, when the Board discusses the recommendation at a meeting, there would be no basis for conducting an executive session. Consequently, there may be no reason for withholding the record even though the Freedom of Information Law would so permit. Further, in a decision in which the issue was whether discussions occurring during an executive session 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).

Lastly, with regard to claims concerning confidentiality, I point out that, like the Freedom of Information Law, the Open Meetings Law is 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.

I am unaware of any statute that would generally prohibit a Board member from disclosing the kinds of information referenced in your letters. 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

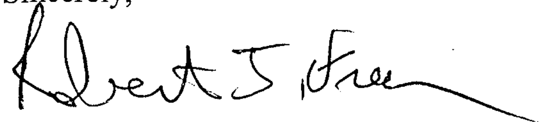
identifiable to a student, unless the parents of the student consent to disclosure. In the context of the Open Meetings Law, a discussion concerning a student would constitute a matter made confidential by federal law and would be exempted from the coverage of that statute [see Open Meetings Law, §108(3)]. 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.

While there may be no prohibition against disclosure of the information acquired during executive sessions or records that may 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. Nevertheless, historically, I believe that public bodies were created to bring together representatives of the public who may disagree. Through the process of discussion, deliberation and compromise, the goal involves the ability 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, I believe they should represent disparate points of view which, when conveyed as part of a deliberative process, lead to fair and representative decision making.

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 sent to members of the Board and District officials.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

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COMMITTEE ON OPEN GOVERNMENT

OML-AO-3735A

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December 30, 2003

E-MAIL

TO: Jacqueline Meola jmeola@co.montgomery.ny.us

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Meola:

I have received your letter of December 12 addressed to David Treacy of this office. You have requested a written confirmation of a discussion in which it was advised that the Montgomery County Board of Supervisors is in compliance with the provisions in the Open Meetings Law pertaining to notice of meetings.

By way of background, you indicated that you prepared a memorandum to one of the Supervisors in which you referred to provisions in the Open Meetings Law and §152 of the County Law and advised that the notice of a special meeting of the Board transmitted to its members must include the purpose of the meeting pursuant to the latter, but that notice given pursuant to the former need not include reference to the purpose. You also offered guidance concerning the specificity of the statement indicating the purpose of the meeting.

In this regard, I note that the advisory jurisdiction of the Committee on Open Government relates to the Open Meetings Law. Consequently, although general reference will be made to the County Law, detailed commentary will not be offered concerning those provisions.

First, the Open Meetings Law includes direction concerning the obligation of a public body, such as a county board of supervisors, to provide notice prior to its meetings. 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 point out that the provisions quoted above impose an obligation to provide notice of the time and place of a meeting; they do not include any reference to inclusion of the purpose of a meeting or the subject or subjects to be considered. Similarly, there is nothing in the Open Meetings Law that refers to or requires the preparation of an agenda.

Second, separate and distinct from the requirements imposed by the Open Meetings Law is, as you suggested, §152(2) of the County Law, which pertains to special meetings of a board of supervisors and states in relevant part that:

> "Notice in writing stating the time, place and purpose of special meeting shall be served personally or by mail upon each member....at least forty-eight hours before the date fixed for holding the meeting...."

Based on the foregoing, the notice requirements imposed §152(2) involve notice to the members and, again, are separate from the provisions in the Open Meetings Law, which involve notice of the time and place of a meeting that must be given to the public and the news media.

I hope that I have been of assistance.

RJF:tt