STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3736

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January 7, 2004

Mr. John D. Murphy
Deputy Director
Chautauqua Home Rehabilitation and
Improvement Corporation
2 Academy Street
Mayville, NY 14757

The staff of the Committee on 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. Murphy:

As you are aware, I have received your letter in which you asked whether a particular committee falls within the coverage of the Open Meetings Law.

By way of background, the organization that you serve, the Chautauqua Home Rehabilitation and Improvement Corporation (CHRIC) is a not-for-profit corporation that was awarded contracts by the U.S. Department of Housing and Urban Development (HUD) to assist the City of Dunkirk in managing its Community Development Block Grant program (CDBG). Part of CHRIC's duties involved the preparation of five year Consolidated Plan, which has been approved by the City Council and HUD. One portion of the Plan requires the designation of a selection committee "with roughly an equal number of elected officials, Council people and Mayor, and an equal number of low and moderate-income residents to go over applications from the City and community groups for the CDBG funds that will be available each fiscal year." You wrote that "No formal ratification takes place at this meeting" and that, following the meeting, a resolution is prepared "listing programs and projects to be submitted to HUD for approval, and the Common Council votes at its next public meeting to authorize the Mayor to submit the Annual Action Plan to HUD for approval." In addition, you indicated that "A required public hearing on the Action Plan is held at that Council meeting."

If my understanding of the matter is accurate, neither the meetings of the selection committee nor CHRIC fall within the coverage of the Open Meetings Law.

That statute is applicable to meetings of public bodies, and §102(2) defines the phrase "public body" to mean:

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

Based on 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) 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. In consideration of the definition of "public body", 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 basis for existence of the committee is federal law, it appears that the committee would not constitute a "public body" required to comply with the Open Meetings Law.

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

In the context of your inquiry, since the committee has no authority to take any final and binding action for or on behalf of a government agency, I do not believe that it constitutes a public body or, therefore, is obliged to comply with the Open Meetings Law.

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

Lastly, CHRIC is clearly not a governmental entity and, notwithstanding its relationships with government agencies, is not under governmental control. That being so, I do not believe that its board would constitute a public body required to give effect 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
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OML-AO-3737

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January 7, 2004

E-MAIL

TO: Tonya Taber <[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. Taber:

I have received your letters concerning a proposed retreat that might be held by the Jamestown City Council for a dual purpose. One would involve "training and 'team building' skills"; the other would involve an intent "to outline goals and objectives of the Strategic Planning and Partnerships Commission." You added that the cost of the event might be borne by a foundation.

In this regard, I do not believe that the source of funding of the event is pertinent. The issue in my view is whether or the extent to which the retreat would constitute a "meeting" that falls within the coverage of the Open Meetings Law.

Section 102(1) of that statute defines the term "meeting" to mean "the official convening of a public body for the purpose of conducting public business", and 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, insofar as the retreat involves consideration of the Strategic Planning and Partnerships Commission or any other matter concerning the functions, powers or duties of the Council, the retreat would constitute a "meeting" that must be held in accordance with the provisions of the Open Meetings Law.

On the other hand, insofar as the retreat involves no intent to conduct public business as a body, but rather is held for the purpose of gaining education, training or team building, I do not believe that the Open Meetings Law would apply.

In consideration of the foregoing, if the Council chooses to hold the retreat, it is suggested that it be conducted in two components, one of which would be held as a meeting subject to the Open Meetings Law, and the other in the manner of the Council's choosing.

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
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January 8, 2004

E-Mail

TO: Diana Calandro <[redacted]

FROM: Robert J. Freeman, Executive Director

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

Dear Ms. Calandro:

I have received your letter in which you raised a series of questions concerning actions taken by the Superintendent and Board of Education of the Eastchester Union Free School District No.1.

According to your letter, the public was misled concerning the nature and magnitude of an effort to "fill school fields", and the Superintendent made verbal and written agreements with contractors without approval by the Board until a year after the agreements were reached. Although you have been informed that many of the issues of your concern were discussed at open meetings, you wrote that no reference to them can be found in the minutes.

You asked who oversees school boards and superintendents and how the District can operate in this fashion and added that the fields "are now possibly contaminated..."

In this regard, I note that the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information and Open Meetings Laws, and consequently, the following comments will focus on matters that you raised that may relate to those statutes.

First, I am not an expert with respect to the powers and duties of superintendents or boards of education. However, if the ability to engage in contractual agreements concerning the project to which you referred lies only within the authority of the Board, I do not believe that the Superintendent could validly, on his or her own, have engaged in such agreements. Further, if the authority to contract is solely with the Board, it could only have taken action to do so during open meetings, and any such action would have to have been memorialized in minutes of a meeting.

Second, the Open Meetings Law contains what might be characterized as minimum requirements concerning the contents of minutes. Subdivision (1) of §106 of that statute provides that:

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

Based on the foregoing, it is clear that minutes need not consist of a verbatim account of everything said at a meeting or even that reference be made to each topic discussed. However, if any motion was made or action taken, the law requires that the minutes reflect that to have been so.

Third, it is emphasized that the Freedom of Information Law, which deals with public access to records, is expansive in its scope, for it applies to all records of an agency, such as a school district. Section 86(4) of that statute defines the term "record" to mean:

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

Whether documents are characterized as official or otherwise, irrespective of their origin, authorship or function, if they are maintained by or for the District, they would constitute "records" that fall within the coverage of the Freedom of Information Law.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, any contract or communication between the District and a contractor pertaining to the contract would be accessible. In short, I do not believe that any of the grounds for denial of access would be pertinent or applicable in that context.

When seeking records, a request should be made to the District's "records access officer." The records access officer has the duty of coordinating an agency's response to requests. Additionally, §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records the records sought. Therefore, although a person seeking records need not identify the record or records of his or her interest, a request should include sufficient detail to enable agency staff to locate the records.

As in many other instances, if a member of the public believes that a government agency or official has acted unreasonably or has failed to carry out a duty required by law to be performed, that person may initiate a judicial proceeding to attempt to compel compliance with law pursuant to Article 78 of the Civil Practice Law and Rules. I note that a court in such proceeding brought under

the Open Meetings Law may award attorney's fees to the successful party; in a suit brought under the Freedom of Information Law, a court may award attorney's fees when the person denied access has substantially prevailed, there was no reasonable basis for the denial, and when the records are of clearly significant interest to the general public.

Lastly, if you believe that action has resulted in contamination, it is suggested that you contact the County Health Department and the regional office of the Department of Environmental Conservation.

Attached is a copy of "Your Right to Know", which serves as a guide to the Freedom of Information and Open Meetings Laws.

I hope that I have been of assistance.

RJF:jm

Enc.

cc: Board of Education

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January 9, 2004

E-Mail

TO: Commissioner Davenport <[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 Commissioner Davenport:

As you are aware, I have received your letter of December 15. As a member of the Mechanicville Housing Authority and [redacted] you questioned whether you may have the right to tape record executive sessions held by its Board. You indicated that you would use your own tape recorder and that you would pay for tapes at your own expense.

From my perspective, it is unlikely that you have the right or perhaps privilege to tape record the executive sessions, unless the Board authorizes you to do so. Further, even if you use your own property to record those sessions, I believe that recordings of executive sessions would be subject to the Freedom of Information Law. In this regard, I offer the following comments.

First, there is no statute that deals directly with the taping of executive sessions. Several judicial decisions have dealt with the ability to use recording devices at open meetings, and although those decisions do not refer to the taping of executive sessions, their thrust is pertinent to the matter. Perhaps the leading decision concerning the use of tape recorders at meetings, a unanimous decision of the Appellate Division, involved the invalidation of a resolution adopted by a board of education prohibiting the use of tape recorders at its meetings [Mitchell v. Board of Education of Garden City School District, 113 AD 2d 924 (1985)]. In so holding, the Court stated that:

> "While Education Law sec. 1709(1) authorizes a board of education to adopt by-laws and rules for its government and operations, this authority is not unbridled. Irrational and unreasonable rules will not be sanctioned. Moreover, Public Officers Law sec. 107(1) specifically provides that 'the court shall have the power, in its discretion, upon good cause shown, to declare any action *** taken

> in violation of [the Open Meetings Law], void in whole or in part.' Because we find that a prohibition against the use of unobtrusive recording goal of a fully informed citizenry, we accordingly affirm the judgement annulling the resolution of the respondent board of education" (id. at 925).

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

Again, while there are no decisions that deal with the use of tape recorders during executive sessions, I believe that the principle in determining that issue is the same as that stated above, i.e., that the Board may establish reasonable rules governing the use of tape recorders at executive sessions.

Unlike an open meeting, when comments are conveyed with the public present, an executive session is generally held in order that the public cannot be aware of the details of the deliberative process. When an issue focuses upon a particular individual, the rationale for permitting the holding of an executive session generally involves an intent to protect personal privacy, coupled with an intent to enable the members of a public body to express their opinions freely. Viewing the matter from a different vantage point, when representatives of public bodies have asked whether they should tape record executive sessions, I have suggested that doing so may result in unforeseen and potentially damaging consequences. For reasons to be discussed later in detail, I believe that a tape recording is a "record" as that term is defined in section 86(4) of the Freedom of Information Law and, therefore, would be subject to rights conferred by that statute. Further, a tape recording of an executive session may be subject to subpoena or discovery in the context of litigation. Disclosure in that kind of situation may place a public body at a disadvantage should litigation arise relative to a topic that has been appropriately discussed behind closed doors.

In short, I am suggesting that tape recording an executive session could potentially defeat the purpose of holding an executive session, and that, in my opinion, the Board could, by rule, prohibit a member from using a tape recorder at an executive session absent the consent of a majority of the board. If other members of the Board had the right or privilege to tape record executive sessions, I believe that you would have the same right or privilege. However, for the reasons expressed, I do not believe that they do, or that you would have a greater right or privilege in consideration of your condition.

Second, from my perspective, a tape recording of an executive session prepared by a Board member would fall within the coverage of the Freedom of Information Law. That statute pertains to all agency records and defines the term "record" expansively to include:

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

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

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

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

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

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

Perhaps closest to your situation is 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. The court cited the definition of "record" and determined that the notes did not consist of personal property but rather were records subject to rights conferred by the Freedom of Information Law [Warder v. Board of Regents, 410 NYS 2d 742, 743 (1978)].

Based upon the foregoing, assuming that you record an executive session in furtherance of the performance of your duties as a member of the Board, I believe that the tape recording would

constitute a "record" that falls within the coverage of the Freedom of Information Law. That being so, aside from the possibility that portions might be available to the public under that law, perhaps more important, and potentially more damaging to the Authority, would be disclosure in a litigation context.

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

RJF:jm

STATE OF NEW YORK
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January 12, 2004

E-Mail

TO: [redacted]

FROM: Robert J. Freeman, Executive Director

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

Dear Ms. Schoettle:

As you are aware, I have received your letter of December 19. You indicated that your local library is a "special district" library with the authority to levy taxes, and you asked whether it is "legal for a Board appointed Committee to have 5 Board Members on it if the Board numbers nine Trustees total." You also questioned "what kind of notice should one look for concerning the posting of notice of such meetings."

In this regard, first, 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 your comments, it appears that the library functions as a district corporation, which, according to §66 of the General Construction Law, is a kind of public corporation. If that is so, its governing body, the Board of Trustees, in my view clearly constitutes a public body required to comply with the Open Meetings Law.

Second, when the Open Meetings Law went into effect in 1977, questions consistently arose with respect to the status of committees, subcommittees and similar bodies that had no capacity to take final action, but rather merely the authority to advise. Those questions arose due to the definition of "public body" as it appeared in the Open Meetings Law as it was originally enacted.

Perhaps the leading case on the subject involved a situation in which a governing body, a school board, designated committees consisting of less than a majority of the total membership of the board. In Daily Gazette Co., Inc. v. North Colonie Board of Education [67 AD 2d 803 (1978)], it was held that those advisory committees, which had no capacity to take final action, fell outside the scope of the definition of "public body".

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

Due to the determination rendered in Daily Gazette, supra, which was in apparent conflict with the stated intent of the sponsor of the legislation, a series of amendments to the Open Meetings Law was enacted in 1979 and became effective on October 1 of that year. Among the changes was a redefinition of the term "public body". Although the original definition made reference to entities that "transact" public business, the amended 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 library 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 nine, its quorum would be five; 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)].

With respect to your question, I know of no provision that pertains to the "legality" of designating a committee consisting of five of nine members of a governing body. However, for the reasons discussed in the preceding remarks, I believe that such a committee constitutes a public body required to comply with the Open Meetings Law.

With regard to notice, §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."

In consideration of the foregoing, §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 board will be held.

I note that 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, if you, for example, have had difficulty gaining entry to a meeting of a committee consisting of Board members, it is suggested that you duplicate and share copies of this opinion with the members. While opinions rendered by this office are advisory, it is my hope that they are educational and persuasive, and that they serve to enhance compliance with and understanding of the Open Meetings Law.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
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January 13, 2004

Dr. Lucille C. Thomas
President
Board of Trustees
Brooklyn Public Library
Grand Army Plaza
Brooklyn, NY 11238

The staff of the Committee on 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. Thomas:

I have received your letter of December 16 in which you sought an advisory opinion concerning the applicability of the Open Meetings Law to meetings of the Brooklyn Public Library (BPL) Board of Trustees. You wrote that the BPL was incorporated in 1902 and is a not-for-profit corporation, and that "by law its Board of Trustees consists entirely of government appointees."

From my perspective, the Board of Trustees, irrespective of its corporate status, is required to comply with the Open Meetings Law.

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

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

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

Second, that statute, which is codified as Article 7 of the Public Officers Law, is applicable to boards of trustees of all 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."

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, such as the BPL, must be conducted in accordance with that statute.

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

FOIL-AO - 14464
OML-AO - 3742

From: Robert Freeman
To: jpalm@stny.rr.com
Date: 1/16/2004 8:31:30 AM
Subject: Dear Ms. Palmer:

Dear Ms. Palmer:

I have received your letter in which you indicated that a request has been made for minutes of all Town Board and Planning Board minutes from 1999 to the present. You wrote that the materials are voluminous, for they include site plans and maps that are oversized. Since you do not have the capacity to copy them, you asked whether you can offer that the requester "look at these" in your office. You also questioned whether there is "a limit on how much a person can request."

In this regard, I offer the following comments.

First, it is suggested that you contact the applicant to discuss the request. From my perspective, minutes of meetings do not include site and plans and maps; rather they typically consist of a record or summary of a board's motions, proposals, resolutions, action taken and the vote of the members; those are the items that the law requires to be included in minutes [see Open Meetings Law, §106(1)]. That being so, you might attempt to learn whether only the minutes have been requested, or whether the applicant also is seeking the other materials to which you referred.

Second, under the Freedom of Information Law, records are available for inspection and copying. Inspection is free, and certainly you can offer that the applicant inspect the records. If a person wants copies, the fee is a maximum of twenty-five cents per photocopy up to nine by fourteen inches; the fee for larger copies would be based on the actual cost of reproduction. In situations in which an agency does not have the capability to photocopy large documents, it has been suggested that the applicant may photograph the document; often that is the cheapest and easiest method. I note, too, that if a person seeks copies, you can require that the fees be paid in advance.

Third, so long as the applicant reasonably describes the records, there is no real limit on how much can be requested. The Court of Appeals has held that if an agency can locate and identify the records sought, the applicant has reasonably described the records, irrespective of the volume of material. On the other hand, even if a request is specific but you could not locate the items requested without going through a haystack in an effort to find the needle, the request would not reasonably describe the records sought.

Lastly, the Freedom of Information Law requires that an agency respond to a request within five business days of its receipt. Within that time, the agency may grant access to the records, deny access in writing and inform the applicant of the right to appeal, or if more time is needed, acknowledge the receipt of the request in writing. Any such acknowledgement must include an approximate date indicating when the agency believes it will be able to grant or deny access. So long as the approximate date is reasonable (based, for example, on the volume of the request, the need to search or retrieve, the need to review the records, etc.), the agency would be complying with law.

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

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STATE OF NEW YORK
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January 21, 2004

Mr. Michael Kless
[redacted]

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 absence of minutes of a meeting of a "management team" at the Department of Transportation indicates that there may be a "violation of the rules relating to open meetings."

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 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 consisting of at least two members who have been elected or appointed pursuant to law to conduct public business and perform a governmental function collectively, as a body. The designation of staff to comprise a management team or its equivalent would not constitute the creation of a public body, and the Open Meetings Law would not apply in that kind of situation.

Further, assuming that the management team is not a public body, it would not be obliged to prepare minutes of its meetings.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt
cc: Mary Saviola
John Dearstyne

From: Robert Freeman
To: JohnHelfer@monroecounty.gov
Date: 1/22/2004 8:47:12 AM
Subject: Dear Deputy Helfer:

Dear Deputy Helfer:

I have received your inquiry and appreciate your kind words.

You questioned whether meetings of your "Police Bureau" must be held open to the public. If my understanding of the nature of that entity is accurate, it would not be subject to the Open Meetings Law.

That statute pertains to public bodies, and §102(2) defines the phrase "public body" to include entities consisting of two or more members that conduct public business and perform a governmental function collectively, as a body. Typically, a public body consists of elected officials or persons appointed by law to carry out some sort of governmental function as a group. Examples include a county legislature, city council, town board, school board, zoning board of appeals, etc. An entity consisting of staff or that performs purely advisory functions would not ordinarily constitute a public body and would fall beyond the coverage of the Open Meetings Law.

I would conjecture that the Police Bureau consists of staff or perhaps representatives of various agencies. If that is so, it would not be subject to the Open Meetings Law.

If my understanding of the matter is inaccurate, please feel free to contact me.

I hope that I have been of assistance.

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January 26, 2004

E-MAIL

TO: Steve Pierce <pierce@rpi.edu

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Mr. Pierce:

I have received your inquiry concerning the ability of the public to attend meetings of the Town of Nassau Mining Committee, which was appointed by the Town Board.

Although you did not describe the Committee in detail, I offer the following comments.

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

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

Based on the foregoing, a public body is, in my view, an entity required to conduct public business by means of a quorum that performs a governmental function and carries out its duties collectively, as a body. In order to constitute a meeting subject to the Open Meetings Law, a majority of the total membership of a public body, a quorum, must be present for the purpose of conducting public business. I note, too, that the definition refers to committees, subcommittees and similar bodies of a public body. Based on judicial interpretations, if a committee, for example, consists solely of members of a particular public body (i.e., a town board), 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.

It is noted 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.).

In the context of your inquiry, if the Committee has no authority to take any final and binding action for or on behalf of the Town, in my view, it would not constitute a public body and, therefore, would not be obliged to comply with the Open Meetings Law. This is not to suggest that the Committee could not hold open meetings, but rather that it is not obliged to do so or to give effect to the requirements of the Open Meetings Law.

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

RJF:tt

STATE OF NEW YORK
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January 26, 2004

E-MAIL

TO: Pete Ludden <pludden@nysutmail.org>

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Mr. Ludden:

I have received your letter concerning the status of a sports booster club under the Open Meetings Law.

In this regard, that statute pertains to public bodies, and §102(2) defines the phrase "public body" to include entities consisting of two or more members that conduct public business and perform a governmental function collectively, as a body. Typically, a public body consists of elected officials or persons appointed by law to carry out some sort of governmental function as a group. Examples include a county legislature, city council, town board, school board, zoning board of appeals, etc. Even an entity consisting of staff of a government agency or that performs purely advisory functions would not ordinarily constitute a public body and would fall beyond the coverage of the Open Meetings Law. A booster club is separate from government and in my opinion clearly is outside the scope of the Open Meetings Law. That being so, in accordance with its own rules or by-laws, a booster club could choose to discuss its concerns in public or private.

I hope that I have been of assistance.

STATE OF NEW YORK
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January 26, 2004

E-MAIL

TO: Tanya Moyer <[redacted]

FROM: David Treacy, Assistant Director

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

Dear Ms. Moyer:

I have received your letter in which you raised issues concerning "requirements for posting under the New York State Open Meetings Law"

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

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

In consideration of the foregoing, first, I point out that §104 imposes a dual requirement, for notice must be posted in one or more conspicuous, public locations, and in addition, notice must be given to the news media. That notice of a meeting was given to a local newspaper does not necessarily suggest or indicate that a public body has complied with law. Again, the law requires that notice of a meeting be "posted"in one or more "designated" locations. The term "designated" in my opinion involves a requirement that a public body, by resolution or through the adoption of policy or a directive, must select one or more specific locations where notice of meetings will consistently and regularly be posted. If, for instance, a bulletin board located at the entrance of a town hall 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 town 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.

DT:tt

STATE OF NEW YORK
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OML-AO-3048

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January 27, 2004

Ronald B. McGuire, Esq.
30 Newport Parkway, Suite 2608
Jersey City, NJ 07310

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

Dear Mr. McGuire:

I have received your letter of January 2 and the materials attached to it. You have requested an advisory opinion concerning the status of "chartered student organizations at colleges operated by the City University of New York (CUNY)" under the Open Meetings and Freedom of Information Laws.

You referred to §15.2 of the CUNY by-laws indicating that students may charter "organizations, associations, clubs or chapters" and wrote that "chartered organizations at the various CUNY schools include groups engaged in political, social, cultural, recreational, educational and athletic activities as well as student publications." Those groups are eligible to receive funding derived from mandatory student activity fees. Section 16.5 of the by-laws requires each college to establish a "college association" which is responsible for approving the budgets of student organizations that receive student activity fees.

As you indicated, this office has advised student governments at public colleges fall with the coverage of both the Open Meetings and Freedom of Information Laws, and it has been so held by the courts. In Schuldiner v. The City University of New York (Supreme Court, Richmond County, September 13, 1999), petitioner sought and was granted an order declaring that the College of Staten Island Association is a "public body" subject to the Open Meetings Law and an "agency" falling within the coverage of the Freedom of Information Law. The same conclusion was reached in substance in (Wallace v. City University of New York, Supreme Court, New York County, NYLJ, July 7,2000) and in relation to the applicability of the Freedom of Information Law concerning an equivalent entity operating at a branch of the State University (Stony Brook Statesman v. Associate Vice Chancellor for University Relations, Supreme Court, Ulster County, January 22, 1996).

I concur with your finding, however, that there are no decisions pertaining to the applicability of open government statutes to "chartered organizations that spend, but do not allocate, public funds

such as student activity fees." As the attorney for editors of several student newspapers, you indicated that they have expressed concern that the application of those statutes "would inhibit their activities."

In this regard, I offer the following comments.

First, as you are aware, the Open Meetings Law pertains 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."

In its consideration of the language quoted above, the Court of Appeals has stated that:

> "In determining whether an entity is a public body, various criteria or benchmarks are material. They include the authority under which the entity was created, the power distribution or sharing model under which it exists, the nature of its role, the power it possesses and under which it purports to act, and a realistic appraisal of its functional relationship to affected parties and constituencies...
>
> It may be that an entity exercising only an advisory function would not qualify as a public body within the purview of the Open Meetings Law... More pertinently here, however, a formally chartered entity with officially delegated duties and organizational attributes of a substantive nature, as this Association, Inc. enjoys, should be deemed a public body that is performing a governmental function (compare, [*Matter of Syracuse United Neighbors v. City of Syracuse*, 80 AD2d 984, 985 appeal dismissed 55 NY2d 995).] It is invested with decision-making authority to implement its own initiatives and, as a practical matter, operates under protocols and practices where its recommendations and actions are executed unilaterally and finally, or received merely perfunctory review or approval. This Association, Inc. therefore, is manifestly not just a club or extracurricular activity." [Matter of Smith v. CUNY, 92 NY2d 707, 713-714 (1999)].

The organizations that are subjects of your inquiry are clubs or entities involved in extracurricular activities. Unlike a college association that has the authority to take final and binding action and to govern within certain limits, the organizations in question appear to lack authority of that nature. If that is so, I do not believe that they would constitute public bodies or, therefore, that they are subject to the Open Meetings Law.

Second, the scope of the Freedom of Information Law is, in my view, more expansive than the Open Meetings Law, for it pertains to all agency records. Section 86(3) defines "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."

Whether the organizations at issue constitute agencies is unclear. However, I do not believe that the status of such entities as agencies is determinative in relation to your inquiry.

Most significant in my view is the definition of "record." That term is defined in §86(4) to include:

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

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

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

In this instance, the by-laws of the CUNY Board of Trustees suggest that student organizations comprise an integral aspect of the activities at CUNY institutions. Further, according to §15.2, to exist, those organizations must file a document indicating their purposes and the identities of their officers, and in addition, the same provision states that extra-curricular activities carried out by those organizations "shall be regulated" by the student government organization. It

also includes language concerning the filing of charges against a student publication in cases in which there are allegations of misconduct in a variety of contexts.

Assuming that chartered organizations operate within the campuses or buildings of a CUNY institution, their documentation would, in my opinion, constitute CUNY records. In a decision rendered by the Court of Appeals, it was found that materials maintained by a corporation providing services pursuant to a contract for a branch of the State University that were kept on behalf of the University constituted "records" falling with the coverage of the Freedom of Information Law. I point out that the Court rejected "SUNY's contention that disclosure turns on whether the requested information is in the physical possession of the agency", for such a view "ignores the plain language of the FOIL definition of 'records' as information kept or held 'by, with or for an agency'" [see Encore College Bookstores, Inc. v. Auxiliary Services Corporation of the State University of New York at Farmingdale, 87 NY 2d 410. 417 (1995)].

Insofar as records are kept, held, produced or reproduced by a chartered club or extra-curricular organization, because such organizations would not exist but for their relationship with a CUNY institution, I believe that the records would fall within the coverage of the Freedom of Information Law. This is not to suggest that all such records would be accessible to the public, for exceptions to rights of access appear in §87(2) of that statute. In addition, I believe that access to records identifiable to a particular student or students would likely be restricted in accordance with the provisions of the Family Educational Rights and Privacy Act (20 USC §1232g).

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
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January 27, 2004

E-MAIL

TO: Mr. E. <[redacted]

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Mr. E:

I have received your note and the article indicating that the Town of Hyde Park Supervisor, in the words of the article, "wants to pull the plug on television broadcasts of town board workshops - - as well as the first two voting meetings of 2004." The article indicates that the Supervisor "said the informality of the twice-monthly workshops, which are conducive for discussing various issues and proposals, is lost when the camera is running."

From my perspective, which is based on the holdings in judicial determinations, any person may audio or video record an open meeting of a public body, such as a town board, so long as the use of the recording device is not disruptive or obtrusive. In this regard, I offer the following comments.

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

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

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

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

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

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

Second, there is nothing in the Open Meetings Law that pertains to the ability to record meetings, and until 1978, there had been but one judicial determination regarding the use of the recording devices at meetings of public bodies. The only case on the subject was Davidson v. Common Council of the City of White Plains, 244 NYS 2d 385, which was decided in 1963. In short, the court in Davidson found that the presence of a tape recorder, which at that time was a large, conspicuous machine, might detract from the deliberative process. Therefore, it was held that a public body could adopt rules generally prohibiting the use of tape recorders at open meetings.

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

This contention was initially confirmed in a decision rendered in 1979. That case arose when two individuals sought to bring their tape recorders at a meeting of a school board in Suffolk County. The school board refused permission and in fact complained to local law enforcement authorities

who arrested the two individuals. In determining the issues, the court in People v. Ystueta, 418 NYS 2d 508, cited the Davidson decision, but found that the Davidson case:

> "was decided in 1963, some fifteen (15) years before the legislative passage of the 'Open Meetings Law', and before the *widespread use of hand held cassette recorders which can be operated by individuals without interference with public proceedings or the legislative process.* While this court has had the advantage of hindsight, it would have required great foresight on the part of the court in Davidson to foresee the opening of many legislative halls and courtrooms to television cameras and the news media, in general. Much has happened over the past two decades to alter the manner in which governments and their agencies conduct their public business. The need today appears to be truth in government and the restoration of public confidence and not 'to prevent star chamber proceedings'...In the wake of Watergate and its aftermath, the prevention of star chamber proceedings does not appear to be lofty enough an ideal for a legislative body; and the legislature seems to have recognized as much when it passed the Open Meetings Law, embodying principles which in 1963 was the dream of a few, and unthinkable by the majority"(id., 509-510; emphasis mine).

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

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

In consideration of the "obtrusiveness" or distraction caused by the presence of a tape recorder, it was determined by the Court that " the unsupervised recording of public comment by portable , hand-held tape recorders is not obtrusive, and will not distract from the true deliberative process" (id., 925). Further, the Court found that the comments of members of the public, as well as public officials, may be recorded. As stated in Mitchell:

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

In short, the nature and use of the equipment were the factors considered by the Court in determining whether its presence affected the deliberative process, not the privacy or sensibilities of those who chose to speak.

In view of the judicial determination rendered by the Appellate Division, a member of the public may tape record open meetings of public bodies, so long as tape recording is carried out unobtrusively and in a manner that does not detract from the deliberative process. While Mitchell pertained to the use of audio tape recorders, I believe that the same points as those offered by the Court would be applicable in the context of the use of video recorders. Just as the words of members of the public can be heard at open meetings, those persons can also been seen by anyone who attends.

In Peloquin v. Arsenault, 616 NYS 2d 716 (1994), the court focused primarily on the manner in which camera equipment is physically used and found that the unobtrusive use of cameras at open meetings could not be prohibited by means of a "blanket ban." The Court expansively discussed the notion of what may be "obtrusive" and referred to the Mitchell holding and quoted from an opinion rendered by this office as follows:

> "On August 26, 1986 the Executive Director of the Committee on Open Government opined (OML-AO-1317, p.3) with respect to *video* recording as follows:
>
> > 'If the equipment is large, if special *lighting* is needed, and if it is obtrusive and distracting, I believe that a rule prohibiting its use under those circumstances would be reasonable. However, if advances in technology permit video equipment to be used without special lighting, in a stationary location and in an unobtrusive manner, it is questionable in my view whether a prohibition under those circumstances would be reasonable.'
>
> On April 1, 1994, Mr. Freeman further opined (OML-AO-2324) that a county legislature's resolution limiting hand held camcorders to the spectator area in the rear of the legislative chamber was not per se unreasonable but rather, as challenged, it depended for its legitimacy on whether or not the camcorders could actually record the proceedings from that location.
>
> Blanket prohibition of audio recording is not permissible, and it is likely that the appellate courts would find that also to be the case with blanket prohibitions of video recording. However, what might be reasonable in one physical setting - a village board restricting camcording to the rear area of *its* meeting room - might not be in another - the larger chambers of a county legislature (OML-AO-1317, supra). It

might well be reasonable in a village or other space-restricted setting to restrict the number of camcorders to one, as the court system may with its pooling requirement for video coverage of trials (22 NYCRR Parts 22 and 131). Such a requirement might be viewed as unreasonable in a large county legislative chamber or where a local board of education is conducting a meeting in a school auditorium.

As Mr. Freeman observed with respect to video recording (OML-AO-1317, supra), if it is 'obtrusive and distracting', a ban on it is not unreasonable. It is here claimed to be distracting. Tupper Lake Village Board members and some segment of the public aver that they are distracted from the business at hand because they do not wish to appear on television - the sole justification offered in defense of the policy.

Mitchell, supra, held that fear of public airing of one's comments at a public meeting is insufficient to sustain a ban on audio recording.

Is Mr. Peloquin's (or anyone's else's) video recording of a village board proceedings obtrusive?...

"...Hand held audio recorders *are* unobtrusive (*Mitchell*, supra); camcorders may or may not be depending, as we have seen, on the circumstances. Suffice it to say, however, in the face of *Mitchell*, the Committee on Open Government's (Robert Freeman's) well-reasoned opinions supra and the court system's pooled video coverage rules/options, a blanket ban on all cameras and camcorders when the sole justification is a distaste for appearing on public access cable television is unreasonable. While "distraction" and "unobtrusive" are subjective terms, in the face of the virtual presumption of openness contained in Article 7 of the Public Officers law and the insufficient justification offered by the Village, the 'Recording Policy' in issue here must fall" (id., 717, 718; emphasis added by the court).

From my perspective, since the basis for the denial of the use of video recording devices in Peloquin, "distaste for appearing on public access television", is analogous to the basis of the proposed action, that action would, if implemented, be found by a court to be equally unreasonable and void.

I note that the foregoing as it pertains to the use of a video recorder was cited favorably in a more recent decision of the Appellate Division, Csorny v. Shoreham-Wading River Central School District, 305 AD2d 83 (2003).

In an effort to enhance their understanding of the issue, a copy of this opinion will be forwarded to the Town Board.

I hope that I have been of assistance.

RJF:tt
cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3750

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January 27, 2004

E-MAIL

TO: Donald Symer <[redacted]

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Mr. Symer:

As you are aware, I have received your letter of January 5 in which you sought my views concerning closed caucuses held by the Lancaster Town Board. You indicated that the Board "is now comprised of members of a single political party."

In this regard, first, by way of background, the Open Meetings Law applies to meetings of public bodies, such as town boards, and the definition of "meeting" [see Open Meetings Law, §102(1) has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals 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.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> making of public policy. The people must be able to remain informed if they are to retain control over those who are their public servants. It is the only climate under which the commonwealth will prosper and enable the governmental process to operate for the benefit of those who created it.
>
> "A literal reading of Section 108, as urged by Respondent, could effectively preclude the public from any participation whatsoever in a government which is entirely controlled by one political party. Every public meeting dealing with sensitive or controversial issues could be preceded by a 'political caucus' which would have no public input, and the public meetings decisions on such issues would be a mere formality. Such interpretation would negate the Legislature's declaration in Section 100. The Legislature could not have contemplated such a result by amending Section 108 and at the same time preserving Section 100" (id., 277).

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

I hope that I have been of assistance.

RJF:tt

cc: Town Board

STATE OF NEW YORK
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January 27, 2004

E-MAIL

TO: Hon. Kimberly Swink <kswink@stny.rr.com>

FROM: David Treacy, Assistant Director

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

Dear Councilwoman Swink:

Mr. Larry Weintraub asked me to respond to your e-mail in which you raised issues concerning a situation where the "Town Board held a private meeting with the Attorney for the Town to discuss, in general terms, his arrangement for working for the Town. This meeting directly followed a regular Town Board meeting. During the meeting, the subject came up regarding the attorney, and it was decided that [the Board] would have a discussion with the attorney at the conclusion of other business. The meeting continued until all other issues had been addressed and then the Supervisor called for a motion to adjourn which was made and seconded. As soon as the meeting was adjourned the Supervisor gathered the Board members and the Attorney for the Town and entered a private meeting."

In this regard, I offer the following comments.

The Open Meetings Law generally pertains to meetings of public bodies, gatherings of a majority of the members of public bodies for the purpose of conducting public business. I note that there are two vehicles that may authorize a public body to discuss public business in private.

The first vehicle 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.

Based upon the information that you presented, in my view the proper procedure would not have been followed for entering into an executive session. Furthermore, it appears that the only potential basis for entry into an executive session would have been §105(1)(f). That provision permits a public body to conduct an executive session to discuss:

> "the medical, financial, creditor 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 this instance, if the issue primarily involved the functions and duties inherent in the position of town attorney, and if the matter was relevant to any person who serves in the position of town attorney, the matter would not have focused on any particular person, but rather upon the position. In that circumstance, there would have been no basis, in my view, for consideration of the matter in executive session.

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

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

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

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

In terms of background, it has long been held that a municipal board may establish a privileged relationship with its attorney [People ex rel. Updyke v. Gilon, 9 NYS 243 (1889);

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

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

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

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

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

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

> "While there is no question that Executive Sessions can be conducted for proper reasons and that an exception exists under the Open

Meetings Law for attorney-client privileged communications, the scope of that privilege is limited. Once the legal advice is offered, discussions with regard to substance (e.g.) the closing date of a bus system, do not fall within the privilege of the exception. See Exhibit C, April 8, 1996 Open Meetings Law Advisory Opinion #2595, Robert J. Freeman, Executive Director of Committee on Open government at page 4:

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

If I understand the situation correctly, the discussion at issue related to the functions of the town attorney, rather than the rendition of legal advice. If that is so, I do not believe that the attorney-client privilege would have been applicable.

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

DT:tt

cc: Larry Weintraub

STATE OF NEW YORK
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January 28, 2004

Ms. Michelle Solomon
Assistant District Manager
Manhattan Community Board No. 4
330 West 42nd St., 26th Floor
New York, NY 10036

The staff of the Committee on 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. Solomon:

I have received your letter of January 2 and appreciate your interest in compliance with the Open Meetings Law by Community Board No. 4 in Manhattan. You have raised questions that deal with various practices of the Board and its members in relation to the Open Meetings Law.

First, the Board has designated several committees that lay the foundation for action to be taken by the full board, and those committees frequently suggest that the Board transmit a letter to a government entity, a business enterprise, or a developer, for example, concerning matters of local concern. A committee in that circumstance discusses the issue in public, votes with respect to the substance of any such letter and delegates the task of drafting the letter to one of its members. The letter is then presented to the full Board, at which time it is considered in public. The process of preparing a letter may include transmitting a draft to other members "for comments, both substantive and grammatical, via email, before submitting it to the full Board"; "[d]iscussion, such as it is, happens in emails sent back and forth, or occasionally in one-on-one phone calls. *Never in an additional meeting or by conference call or chat room*" (emphasis mine).

You have asked whether "this method of drafting letters seems...to be in accord with the Open Meetings Law. From my perspective, the method that you described is appropriate, for the Open Meetings Law would not be implicated. In short, 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. I note, however, that a series of communications between individual members or telephone calls among the members which results in a collective decision, a meeting or vote held by means of a telephone conference, by mail or e-mail would in my opinion be inconsistent with law.

Based upon legislation enacted in 2000, it is clear in my view 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. The Open Meetings Law, as you know, 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 Board or a committee, 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.

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

In contrast, if e-mail communications are made via a listserv or other means through which the members receive them at different times, and there is no instantaneous or simultaneous communication, that circumstance would be equivalent to the transmission of inter-office

memoranda. In that kind of situation, the recipients open their mail at different times and, in my view, the Open Meetings Law would not be applicable or implicated.

Second, you referred to situations in which there is "a problem achieving a quorum at our committee meetings", and you asked "how those who are present at the appointed time and place may conduct themselves in the absence of a quorum." In this regard, unless a quorum is present the Open Meetings Law does not apply [see e.g., Mobil Oil Corp. v. City of Syracuse Industrial Development Agency, 224 AD2d 15, motion for leave to appeal denied, 89 NY2d 811 (1997)]. That being so, I do not believe that the public would have right to attend. The committee members present, however, could choose to permit the public to attend. Those members present could also discuss the issues of their interest with no restriction.

Your remaining question merits a similar outcome. You wrote that "Board members may meet with government agency representatives, visit local businesses, call developers...or meet with each other to talk about an issue...." If a quorum is not involved or present, you asked whether those events would be subject to the Open Meetings Law. In short, that statute is inapplicable unless and until a quorum, a majority of the total membership of a public body, convenes for the purpose of conducting public business, collectively, as a body.

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

OML-AO-3753

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January 28, 2004

Mr. Christopher Venator
Ingerman Smith, L.L.P.
167 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 information presented in your correspondence.

Dear Mr. Venator:

I have received your letter of January 9 in which you offered details concerning the City of Long Beach School District's Health and Safety Team ("the Team") in relation to its status under the Open Meetings Law.

You indicated previously that the Team is not the same entity as either the district-wide safety or building level teams created pursuant to §2801-a of the Education Law. Those latter entities are, in my view, likely required to comply with the Open Meetings Law. In brief, the Team gathers to discuss health and safety issues concerning schools within the District, and participants consist largely of building administrators and other personnel. You added that Board of Education members do not participate in meetings of the Team, and that "there is no direct oversight or review of the topics discussed."

As suggested in the opinion addressed to you on December 22, the Open Meetings Law applies to public bodies, which, in general, are governing bodies, such as boards of education, committees consisting of two or members of governing bodies, and bodies that are created by law, including advisory bodies that perform a necessary or required function in the decision making process. It was also suggested other kinds of advisory bodies are generally beyond the coverage of the Open Meetings Law.

If I correctly understand the nature of the Team, it consists largely, if not entirely, of staff of the District, and its primary function involves the discussion and identification health and safety issues. If that is so, I do not believe that it would constitute a public body or, therefore, that it would be subject to the Open Meetings Law.

If my understanding of the matter is inaccurate, please so inform me.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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January 30, 2004

St. Lawrence County Board
of Legislators
c/o Sallie Brothers
48 Court Street
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 facts presented in your correspondence, unless otherwise indicated.

Dear St. Lawrence County Legislators:

I have received your letter in which you asked whether the County Legislature may enter into an executive session to discuss a lawsuit involving the Human Services Building.

Based on a conversation with Legislator Brothers, the Human Services Building is owned by a not-for-profit corporation (hereafter "the corporation") and is leased by St. Lawrence County. The Village of Canton has collected or is attempting to collect real property tax from the corporation, which has sued the Village and the Town concerning that issue. She indicated that the County is not a party to the lawsuit. Nevertheless, Legislator Brothers indicated that it has been contended that the County Legislature may enter into executive session in relation to the matter to discuss "litigation."

If I understand the facts accurately, the exception cited as justification for conducting an executive would not be applicable. In this regard, I offer the following comments.

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

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

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

Second, 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. In my view, a key word in the decision and in the context of your inquiry is "its." If the county is not and does not expect to be a party to the litigation, there would be no consideration of "its" litigation strategy; the County would have no adversary in any legal proceeding. If that is so, based on the direction offered by the courts, I do not believe that the exception regarding litigation would serve as valid basis for conducting an executive session.

If my understanding of the facts is inaccurate, please so inform me.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: William F. Maginn, County Attorney

OML-AO-3754

From: Robert Freeman
To: Village of Schuylerville
Date: 2/2/2004 3:34:51 PM
Subject: Re: Written request for inclusion in minutes

Hi - -

It's not up to the residents to have their statements or complaints read into the minutes; they are not members of the Board. Absent direction from the Board, your obligation is to prepare minutes in accordance with the Open Meetings Law. As you likely recall, at a minimum, minutes must consist of a record or summary of motions, proposals, resolutions, action taken and the votes of the members. You may but are not required to include additional information. If, however, the Board, by means of a majority vote of its total membership, directs that the statements be included in the minutes, I believe that you would be required to do so.

I hope that I have been of assistance. If you have additional questions, please feel free to call.

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

[redacted]

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3255

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February 4, 2004

E-Mail

TO: Lew Benton <[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. Benton:

I have received your letter in which you requested my views concerning an executive session that was scheduled by the City of Saratoga Springs Planning Board.

You attached an agenda indicating that the Board would conduct an executive session to discuss "legal services to the Planning Board", "possible procedures for City Attorney recusing on selected matters before the Planning Board" and "possible revisions to the City Code of Ethics." Issues have arisen concerning the City Attorney, who serves as attorney for the Planning Board, because his spouse is a partner in a law firm "that frequently represents clients before our board", and you surmised that the initial item "deals with when and if he might be required to disclose or recuse." You also referred to a provision of rules and regulations adopted by the City Council entitled "Workshops" stating that "[n]o decisions are to be made at a workshop and no minutes or records need to be kept."

You have asked whether the items listed for consideration in executive session may properly be discussed in private and, if so, whether a separate motion to enter into executive session must be made for each. In this regard, I offer the following comments.

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

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

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

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

For the reasons expressed in the preceding commentary, a public body cannot in my view schedule an executive session in advance of a meeting. In short, because a vote to enter into an executive session must be made and carried by a majority vote of the total membership during an open meeting, it cannot be known with certainty in advance of that vote that the motion will indeed be approved. However, an alternative method of achieving the desired result that would comply with the letter of the law has been suggested in conjunction with similar situations. Rather than scheduling an executive session, the Board on its agenda or notice of a meeting could refer to or schedule a motion to enter into executive session to discuss certain subjects. Reference to a motion to conduct an executive session would not represent an assurance that an executive session would ensue, but rather that there is an intent to enter into an executive session by means of a vote to be taken during a meeting. By indicating that an executive session is likely to be held (rather than *scheduled*), the public would implicitly be informed that there may be no overriding reason for arriving at the beginning of a meeting.

Second, based on the language of §105(1) quoted above, a motion for entry into executive session may include reference to more than one topic to be discussed.

Third, with respect to the propriety of consideration of the topics listed on the agenda in executive session, based on their language of the first two, I cannot offer definitive guidance. However, it appears that §105(1)(f) may be pertinent. That provision authorizes a public body to conduct an executive session to discuss:

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

Insofar as a discussion involves the recusal or "removal" of the City Attorney from participation in a matter before the Board due to the relationship with his spouse and her or her firm's role in such a matter, it would appear that §105(1)(f) could properly be cited.

Lastly, I point out 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)].

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

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

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

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

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

I hope that I have been of assistance.

RJF:jm

cc: Planning Board
Matthew Dorsey, City Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3256

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(518) 474-2518
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February 6, 2004

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

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

Dear Ms. Mackin:

As you are aware, I have received a draft of the public speaking policy that is under consideration by the Town Board of the Town of Clinton.

In this regard, the Open Meetings Law authorizes the public to attend meetings of public bodies, but it is silent with respect to the ability of the public to speak or otherwise participate. That being so, if the Town Board, for example, does not want to authorize the public to speak at its meetings, the public would have no right to do so. Many public bodies, however, authorize some sort of limited public participation. It has been suggested that when they do so, they authorize the public to speak by means of reasonable rules that treat members of the public equally.

With respect to the draft proposal, under the heading of "Public Discussion periods", subdivision 1 states in part that:

> "A member of the Town Board shall make a motion to open and/or close a meeting to Public Discussion, which must be seconded and then approved by a majority of the Town Board (3 yes votes)."

If I understand the quoted language correctly, a motion to authorize public participation would have to be made at every Town Board meeting. From my perspective, it is possible that the provision, if challenged, might be found to be unreasonable. If the Board is considering topics that are not controversial, it might routinely authorize public participation. On the other hand, when an issue arises that evokes controversy or strong sentiment on the part of the public, the Board might not approve a motion authorizing the public to speak. In essence, the Board would seemingly have the ability to pick and choose the topics that might be addressed by those in attendance. In my view,

if that were to be so, the Board could be the subject of criticism and, again, the provision might be found to be unreasonable.

Under the heading of "Public Speakers", subdivision (1) would require that a member of the public recognized to speak must state his or her name and address. Section 103 of the Open Meetings Law provides that any member of the public has the right to attend a meeting. That being so, I do not believe that the ability to speak should be dependent upon a person's identity or residence. Moreover, situations have arisen in which people have been reluctant to speak when they are required to disclose their names and addresses. They may be battered spouses or victims of crimes, for example, who do not want their residences or identities to become known. For that reason, it is suggested that providing one's name and address be optional rather than mandatory.

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-14497
OML-AO-3757

41 State Street, Albany, New York 12231
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February 9, 2004

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 inquiries, both of which pertain to the right to gain access to a draft environmental impact statement. You wrote that you were informed that the document in question would not be available until it had been reviewed by a town planning board and asked whether my advice would be the same as that offered in FOIL-AO-12388.

In this regard, assuming that the statement was prepared by or for a developer, my response would be the same. In short, since the Freedom of Information Law is applicable to all records maintained by or for an agency, such as a town, the statement would be subject to rights of access as soon as it comes into the possession of an agency or its representative. Further, in my view, none of the grounds for denying access would apply. That the Planning Board has not reviewed or made a determination concerning the statement is, in my view, irrelevant to rights of access or the town's ability to deny access.

You also referred to a request for minutes of a meeting that occurred in June of 2003. In response, you were told that "the minutes might not be available yet and even if they are, [you] would have to FOIL them." As suggested above, the Freedom of Information Law includes all agency records within its coverage, including minutes of meetings. Therefore, in a technical sense, an agency may require that a request for minutes of meetings be made pursuant to that statute. However, I point out that the Open Meetings Law provides specific direction relative to minutes, and §106 requires that minutes of a meeting be prepared and made available to the public within two weeks of the meeting. I note, too, that there is no law that requires that minutes be approved. That being so, if it is the practice of a board to approve its minutes and it has not had the opportunity to do so within two weeks of a meeting, it has been suggested that the person who prepares minutes

must do so and disclose them within the statutory time, and that he or she may mark the minutes as "draft" or "preliminary", for example.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-1414/99
OML-AO-3758

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February 10, 2004

Hon. Barbara Tierney
Clerk/Treasurer
Village of Schuylerville
P.O. Box 56/35 Spring Street
Scuylerville, NY 12871

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. Tierney:

I have received your letter and the correspondence attached to it. You have sought guidance concerning a contention by a resident that "she did not need to FOIL for" a certain document and that she could "demand" immediate access to records.

In this regard, first, the Freedom of Information Law includes all government agency records within its coverage, and §89(3) of that statute states in part that an agency, such as a village, may require that a request for a record be made in writing. Although a clerk or other official may choose to accept and respond to a request made orally, the law authorizes an agency or its representative to require a written request.

Second, while an agency may respond instantly to a request, there is no obligation to do so. The same provision as that cited above states that an agency must respond to a request within five business days of its receipt by granting access to records, denying access in writing, or acknowledging the receipt of a request in writing if more than five business days will be needed to grant or deny access. When the receipt of a request is acknowledged because additional time is needed, the law requires that the acknowledgment must include an approximate date indicating when it is believed that a determination concerning access to the records will be rendered. So long as the approximate date is reasonable in consideration of the volume of a request, the need to search for or review the records, an agency's workload, etc, it has been held that agency would be acting in a manner consistent with law (see Linz v.Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

You also sought my opinion "on the requirement to have public presentations on reviews of financial statements conducted by an independent accountant at the request of the Board." If I have

interpreted your question correctly, you have asked whether the Open Meetings Law would be applicable in that context. In short, it has been held that any gathering of a majority of a public body for the purpose of conducting public business, irrespective of the absence of an intent to vote or take action, constitutes a "meeting" that falls within the coverage of the Open Meetings Law [see Orange County Publications v. Council of the City of Newburgh, 60 AD2d 409, aff'd 45 NY2d 947 (1978)].

If I have misconstrued your question, please feel free to offer clarification.

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-14500
OML-AO-3759

41 State Street, Albany, New York 12231
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February 11, 2004

E-Mail

TO: [redacted]

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Ms. Schoettle:

As you are aware, I have received your letter of January 22 in which you raised several questions relating to the Open Meetings and Freedom of Information Laws.

You referred initially to an executive session held by a committee of the governing board of a public library, and you asked whether the committee may conduct an executive session and, if so, who, other than members of the committee, may attend. In this regard, as indicated in the opinion addressed to you on January 12, a committee consisting of two or members of a public body, such as the board of trustees of municipal library, is itself a "public body" subject to the Open Meetings Law. As stated further in that opinion, such a committee "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." In short, I believe that a committee may conduct an executive session in accordance with the provisions of §105 of the Open Meetings Law.

Subdivision (2) of that provision states that: "Attendance at an executive session shall be permitted to any member of the public body and any other persons authorized by the public body." Stated differently, members of a committee, a public body, have the right to attend an executive session of that body, and the committee may permit others to attend. It is assumed that persons who attend who are not members of a public body are permitted to do so due to some function that they carry out, i.e., taking minutes, or due to some knowledge, expertise, or connection with the subject matter under consideration.

If it is believed that a public body has failed to comply with the Open Meetings Law, any person may complain to this office and seek an advisory opinion. While advisory opinions are not

binding and cannot alter events that have already occurred, it is our hope that they are educational and persuasive, and that they enhance compliance with law. In the alternative, a person may seek judicial review or intervention pursuant to §107(1), which provides 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."

You also asked whether I informed the library that you made an inquiry. There is nothing in the correspondence received from you that identifies the library, and I am unaware of which library is the subject of your inquiries.

Next, you questioned whether the president of a board may appoint a committee "which in effect represents a quorum of the Board itself." Without additional information concerning the powers and duties of the Board and its president or chairman, I cannot effectively respond. However, again, a committee as you described it would be subject to the requirements of the Open Meetings Law.

Your remaining questions pertain to the Freedom of Information Law, and you asked, first, whether you may "assume that whatever is not delivered does not exist." In this regard, when any portion of a request is denied, an agency is required to provide the reason and inform the applicant of the right to appeal the denial. Viewing your question from a different perspective, when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search."

Lastly, §87(1)(b) of the Freedom of Information Law and the regulations promulgated by the Committee on Open Government, 21 NYCRR §1401.8, indicate the only fee that can be imposed under the law is for the reproduction of a record; no fee may be charged for search, personnel time or other administrative expenses. Under the provisions cited, an agency may charge up to twenty-five cents per photocopy up to nine by fourteen inches; in the case of other records, i.e., tape recordings, computer disks, etc., the agency may assess a fee based on the actual cost of reproduction, which does not include fixed costs of the agency, such as salaries, or overhead.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3760

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

February 12, 2004

Mr. Frederic M. Gang
[redacted]

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. Gang:

I have received your letter pertaining to a "change in format" adopted by the Syosset Central School District Board of Education concerning responses to questions raised by persons attending its meetings.

According to your letter, at prior meetings, "after each speaker, the Board President or the Superintendent responded to his remarks or questions." You wrote that under the new format:

> "...all speakers are invited to speak in turn, and then after all have finished speaking, the Board President or Superintendent then comments on the issues raised by the speakers. No follow up questions or clarifications are permitted....the public's questions are sometimes only partially answered or even ignored [and] the public is not permitted to question a response or lack of response."

You have sought the views of the Committee on Open Government concerning the new procedure and asked that this office "direct the Syosset School Board to comply with the spirit and the letter and the letter of the Open Meetings Law."

In this regard, first, this office has the authority to provide advice and opinions. It is not empowered to "direct" a public body, such as a board of education, to take certain action or comply with law.

Second, the Open Meetings Law clearly provides the public with the right "to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy" (see Open Meetings Law, §100). However, that statute is silent with respect to the issue of public participation. Consequently, if a public body does not want to answer

questions or permit the public to speak or otherwise participate at its meetings, I do not believe that it would be required to do so.

In short, from my perspective, neither the Board nor the Superintendent is obliged by any provision of law to answer questions raised at Board meetings. Again, they may choose to do so, but in my view, they are not required to do so.

I hope that the foregoing serves to clarify your understanding and 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-3261

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

February 18, 2004

Ms. Kristen Allen Kelley
Rapport, Meyers, Whitbeck,
Shaw & Rodenhausen, LLP
One Civic Center Plaza, Suite 501
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 facts presented in your correspondence.

Dear Ms. Kelley:

I have received your letter of January 21 in which you referred to "legal procedural and substantive questions on which the ZBA [the Town of Dover Zoning Board of Appeals] wanted to seek advice from its attorney." In that situation, you asked whether it is "violation of the Open Meetings Law to go into an 'Attorney-Client' session" and whether "attorney-client communications [constitute] a 'matter made confidential by federal or state law.'"

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

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

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

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

With respect to the assertion of the attorney-client privilege, relevant is §108(3), which exempts from the Open Meetings Law:

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

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

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

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

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

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

litigation 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.

It is emphasized 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.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
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February 18, 2004

Ms. Joann Zinsmeyer
[redacted]

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. Zinsmeyer:

As you are aware, I have received your letter of January 23.

You wrote and informed me by phone that you had been an employee of the Town of Schroeppel for nine years, "salaried and in the exempt class", and that you were surprised to read in a news article of a "modified job description for [your] position" and that you were not reappointed. You indicated that the Town Board entered into an executive session to discuss "personnel" and that minutes of the executive session are sparse and merely describe the subject as "personnel matters." Your question involves "[h]ow and when did they make the decision if no action (on every copy of minutes) was taken."

In this regard, I offer the following comments.

First, it is possible that no action would have been required in relation to your employment. If, for example, you had a term appointment that expired, it would end with no action taken.

Second, on the other hand, when action is taken or is required to have been taken, the Open Meetings Law requires that any such action be memorialized in minutes. The Open Meetings Law contains what might be characterized as minimum requirements concerning the contents of minutes. Specifically, §106 states that:

> "1. Minutes shall be taken at all open meetings of a public body which shall 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 session 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 made available to the public in accordance with the provision 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, whether action is taken during another meeting or an executive session, minutes indicating the nature of the action taken and vote of each member must be recorded. I note that minutes need not be expansive or descriptive of a public body's deliberations. Further, if a matter is discussed during an executive session but no action is taken, there is no requirement that minutes of the executive session be prepared.

Third, with respect to the executive session and " personnel matters", I point out that the Open Meetings Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, §105(1) states in relevant part that:

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

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

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

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

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

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

In my view, insofar as a discussion involved the modification of a position, there would be no basis for conducting an executive session. When, however, the discussion pertains to a particular person in relation to a topic appearing in §105(1)(f), an executive session may properly be held. In short, consideration of an issue of that nature would apparently not focus on a "particular person" in relation to the topics listed in §105(1)(f).

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

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

> "...the public body must identify the subject matter to be discussed (See, Public Officers Law § 105 [1]), and it is apparent that this must be accomplished with some degree of particularity, i.e., merely reciting the statutory language is insufficient (see, Daily Gazette Co. v Town Bd., Town of Cobleskill, 111 Misc 2d 303, 304-305). Additionally, the topics discussed during the executive session must remain within the exceptions enumerated in the statute (see generally, Matter of Plattsburgh Publ. Co., Div. of Ottaway Newspapers v City of Plattsburgh, 185 AD2d §18), and these exceptions, in turn, 'must be narrowly scrutinized, lest the article's clear mandate be thwarted by thinly veiled references to the areas delineated thereunder' (Weatherwax v Town of Stony Point, 97 AD2d 840, 841, quoting Daily Gazette Co. v Town Bd., Town of Cobleskill, supra, at 304; see, Matter of Orange County Publs., Div. of Ottaway Newspapers v County of Orange, 120 AD2d 596, lv dismissed 68 NY 2d 807).

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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February 25, 2004

E-Mail

TO: Brian Kovalchik [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. Kovalchik:

As you are aware, I have received your correspondence concerning executive sessions held by a board of education.

According to your letter, in some instances, following executive sessions, the board "will vote on unspecified resolutions", i.e, "Vote to pass the resolution discussed in Executive Session." You also referred to the board informing the superintendent that she would not be rehired, "even though she would be paid until the end of the year", and that no minutes relating to the matter had been prepared.

Based on those and other comments, I offer the following remarks.

First, based on judicial precedent, minutes that merely indicate approval of a resolution discussed during an executive session are inadequate. Section 106(1) of the Open Meetings Law provides direction concerning the contents of minutes of open meetings and states that:

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

In Mitzner v. Goshen Central School District Board of Education [Supreme Court, Orange County, April 15, 1993], the case involved a series of complaints that were reviewed by the School Board president, and the minutes of the Board meeting merely stated that "the Board hereby ratifies the action of the President in signing and issuing eight Determinations in regard to complaints

received from Mr. Bernard Mitzner." The court held that "these bare-bones resolutions do not qualify as a record or summary of the final determination as required" by §106 of the Open Meetings Law. As such, the court found that the failure to indicate the nature of the determination of the complaints was inadequate. In the context of your inquiry, I believe that, in order to comply with the Open Meetings Law and to be consistent with the thrust of the holding in Mitzner, minutes must indicate in some manner the precise nature of the Board's action.

The remainder of §106 of the Open Meetings Law provides that :

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

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

I am unaware of the factual circumstances relating to the employment of the superintendent. If, for example, her contract was due to expire, it is possible that no action would be required to be taken; the board and the superintendent would merely complete their contractual obligations. In that event, in a situation in which there was, in essence, an absence of action, I do not believe that there would have been a requirement to prepare minutes. Only if action is taken must minutes be prepared.

It is also emphasized that minutes of meetings need not be expansive or include reference to every topic discussed or each speaker. They are required to include only those items described in subdivision (1) of §106.

Lastly, 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. In short, a public body, such as a board of education, cannot enter into executive session to discuss the subjects of its choice. The full text of the Open Meetings Law and a variety of related materials are accessible on our website.

I hope that I have been of assistance.

RJF:jm

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February 27, 2004

E-Mail

TO: Ray Waterman <LGOURD@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 Mr. Waterman:

As you are aware, I have received your letter in which you wrote that the Village of Hamburg "is dealing on a piece of property that may be a park - they don't know" and "won't divulge any information that may upset the sale." You asked whether that may be "against the law."

Because I have little detail concerning the matter, I cannot offer definitive advice. It is unclear whether the Village wants to purchase or sell property or whether the site of the property is known to the public. It is also unknown whether there is one party with which the Village may be negotiating, or whether there are or may be many. Those factors, in my view, would be pertinent in considering the issues. Nevertheless, in an effort to provide basic information, I offer the following comments.

It is noted at the outset that the Committee on Open Government is authorized to provide advice and opinions pertaining to the Freedom of Information and Open Meetings Laws, and my remarks will be limited to consideration of those statutes. There may, however, be other laws of significance, such as those involving zoning, environmental concerns, public hearings, etc.

As the Open Meetings Law relates to the matter, that statute is based on a presumption of openness, and meetings of public bodies must be conducted open to the public, except to the extent that an executive session may properly be conducted in accordance with paragraphs (a) through (h) of §105(1). Consequently, a public body, such as a village board of trustees, cannot enter into an executive session to discuss the subject of its choice. From my perspective, the grounds for entry into executive session are based on the need to avoid some sort of harm that would arise by means of public discussion, and that is so with respect to the 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.

Again, since I am unaware of the factual circumstances relating to the matter, I cannot offer unequivocal guidance.

With respect to the disclosure of 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.

Most pertinent is likely §87(2)(c), which authorizes an agency to withhold records to the extent that disclosure would "impair present or imminent contract awards...." That provision was asserted in a case in which appraisals maintained by a municipal agency were requested prior to the consummation of a transaction, and the Court of Appeals, the state's highest court, upheld the denial [Murray v. Troy Urban Renewal Agency, 561 NY2d 888 (1982)]. In short, premature disclosure of the appraised value would have placed the agency at a disadvantage in the negotiating process.

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

RJF:jm

cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
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February 27, 2004

E-MAIL

TO: Arlene <[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 Arlene:

As you are aware, I have received your letter. You raised the following question:

> "If the town board does not have posted 48 hours before a meeting a certain zoning problem on its agenda involving a particular person, can this person simply show up at a meeting and discuss with the zoning board at length their problem and have extensive interaction with the board and town lawyer regarding it?"

You added that you have been unable to find anything in Robert's Rules of Order indicating that "such an action on the part of a board or resident is legal."

In this regard, I offer the following comments.

First, Robert's Rules of Order is not law. There is no obligation on the part of a public body, such as a town board or a zoning board of appeals, to follow Robert's Rules. Further, insofar as Robert's Rules is inconsistent with law, I believe that it is void.

Second, there is nothing in the Open Meetings Law or any other law of which I am aware that requires that an agenda be prepared. Public bodies in most instances do so, but not because there is a legal obligation to do so. If an agenda is prepared, a public body is not, in my view, required to follow or abide by it, unless it has adopted its own rule specifying that the agenda must be followed.

Lastly, the Open Meetings Law is silent with respect to public participation at meetings of public bodies. That being so, a public body is not required to permit the public to speak or otherwise participate at meetings. Many public bodies, however, choose to authorize limited public participation. When that is so, it has been advised that they do so by means of reasonable rules that treat members of the public equally. In the context of the situation that you described, although the person in question did not, in my opinion, have the right to participate, the board was authorized to permit him to do so.

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

RJF:tt

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March 1, 2004

Hon. Susan Zimet
Ulster County Legislator
P.O. Box 205
New Paltz, NY 12561

The staff of the Committee on 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. Zimet:

I have received your letter and appreciate your kind words. You referred to a situation in which the Town of Lloyd is "working with a few residents to have a portion of New Paltz annexed to Lloyd. In a news article that described an agreement that appears to have been reached, it was reported that:

> "Under terms of the contract, the town will make three payments totaling $50,000, on top of the $10,000 down payment it has already paid, provided the annexation efforts succeeds in 'going forward.' Shepard (the Supervisor of the Town of Lloyd) said he didn't have a problem with discussing and making the deal in executive session. 'We make lots of decisions about money without public debate,' he said. 'People elect us do to a job and we do it to the best of our ability.'"

You have asked whether, in my view, it is "legal to take action and allocate money in executive session." Secondarily, if action was taken during executive and none taken later in public, you asked whether the action to allocate money is "legal and binding."

In this regard, it appears that your questions are based on the assumption that one or more executive sessions could properly have been held to consider the annexation. If my understanding of the facts is accurate, there would not have been any basis for conducting an executive session to consider the issue, reach an agreement or determine to make payments.

As a general matter, the Open Meetings Law is based on a presumption of openness. Stated differently, meetings of a public body, such as a town board, must be conducted open to the public,

except to the extent that one or more of the grounds for entry into executive session may properly be asserted. Those grounds are limited to the subject matter described in paragraphs (a) through (h) of §105(1). In short, a public body cannot enter into an executive session to discuss the subject of its choice.

In this instance, based on a review of the eight grounds for entry into executive session, it does not appear that any would have applied. The provision dealing with what often is characterized as "contracts" or "contractual matters", paragraph (e), pertains to discussions relating to collective bargaining negotiations involving a public employee union. Clearly not all negotiations relating to contracts involve collective bargaining. The provision dealing with real property transactions is also limited in its scope. Paragraph (h) authorizes a public body to enter into an executive session to discuss the proposed acquisition, sale or lease of real property, "but only when publicity would substantially affect the value" of the property. As I understand the matter, publicity would have had no effect on the value of the property considered for annexation. If that so, paragraph (h) would not have justified consideration of the issue in executive session. None of the other grounds, in my opinion, would have been pertinent.

I note, too, that a procedure must be accomplished in public before an executive session may properly 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 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. Only by means of an indication of the subject proposed to be discussed would the public or perhaps other members of a public body have information sufficient to ascertain whether there the matter indeed involves a proper subject for consideration during an executive session.

Based on the final clause of the provision quoted above, a public body may generally vote during a proper executive session; however, any vote to appropriate public monies must be taken during an open meeting. As such, there may be situations in which a discussion may be conducted during an executive session, but where a public body may be required to return to an open meeting to vote to appropriate public monies in relation to the subject previously considered behind closed doors. However, if the action involves an allocation or expenditure of funds that have previously been appropriated, rather than a new appropriation, such an action could, in my opinion, be taken during a proper executive session.

If a public body reaches a consensus upon which it relies, I believe that minutes reflective of decisions reached must be prepared and made available. In Previdi v. Hirsch [524 NYS 2d 643 (1988)], the issue involved access to records, i.e., minutes of executive sessions held under the Open Meetings Law. Although it was assumed by the court that the executive sessions were properly held,

it was found that "this was no basis for respondents to avoid publication of minutes pertaining to the 'final determination' of any action, and 'the date and vote thereon'" (id., 646). The court stated that:

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

Therefore, if the Town Board reached a "consensus" that is reflective of its final determination of an issue, I believe that minutes must be prepared that indicate its action, as well as the manner in which each member voted. I note that §87(3)(a) of the Freedom of Information Law states that: "Each agency shall maintain...a record of the final vote of each member in every agency proceeding in which the member votes." As such, members of public bodies cannot take action by secret ballot.

Lastly, §107 of the Open Meetings Law pertains to its enforcement, and subdivision (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, it is discretion, upon good cause shown, to declare any action or part thereof taken in violation of this article void in whole or in part."

In an effort to enhance compliance with and understanding of the open government laws, copies of this opinion will be sent to the Town Board.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm
cc: Town Board

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March 3, 2004

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:

As you are aware, I have received your correspondence concerning a request for records of the Town of Poughkeepsie. The issue involves access to minutes of a meeting held by the Planning Board in June, 2003. You wrote that you were informed that "that the minutes might not be available yet and even if they are, [you] would have to FOIL them." You asked whether you can be required to "foil minutes from a public meeting."

In this regard, I offer the following comments.

First, all records maintained by or for an agency fall within the scope of the Freedom of Information Law, including those that are clearly public, such as minutes of meetings of a public body, i.e., a planning board. Section 89(3) of that statute provides in part that an agency may require that a request for a record be made in writing. Therefore, the Town, in my view, may require that a request for minutes be made in writing in accordance with the Freedom of Information 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.

RJF:tt

cc: Planning Board
Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OMC-AO-3268

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

March 3, 2004

E-Mail

TO: Eli Dickinson <esd2@buffalo.edu>

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Mr. Dickinson:

As you are aware, I have received your letter in which you sought an advisory opinion concerning the Open Meetings Law.

You wrote that you were "asked to leave a Student Association Senate meeting because the chair of the meeting decided to enter an executive session." When questioned regarding the ability to do so, she indicated that the "SA constitution provides for the chair to enter executive sessions at her discretion." Although you offered her a copy of the Open Meetings Law, "she insisted simultaneously that it did not matter because she was following the SA constitution and, further, since they did not make any budgetary decisions she is still following the OML." You added that you were "not even allowed to know the general topic being discussed at the session."

In this regard, first, whether the Student Association Senate is subject to the Open Meetings Law does not appear to at issue. The Court of Appeals, the state's highest court, determined that a similar entity functioning within a public college or university is required to comply with that statute [see Smith v. City University of New York, 92 NY2d 707 (1999).

Second, §110 of the Open Meetings Law entitled "Construction with other laws" states in subdivision (1) 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 [the Open Meetings Law] shall be deemed superseded hereby to the extent that such provision is more restrictive with respect to public access than this article."

Stated differently, any provision other than an act of Congress or the State Legislature that is more restrictive with respect to public access than the Open Meetings Law is void to that extent. In the context of the situation that you described, it is clear in my view that the SA constitution cannot impose a limitation on public access to a meeting that is in any way inconsistent with the Open Meetings Law, and that the provision authorizing the chair to enter into executive session at his or her discretion is invalid and void.

Third, as a general matter, the Open Meetings Law is based on a presumption of openness. Stated differently, meetings of a public body must be conducted open to the public, except to the extent that one or more of the grounds for entry into executive session may properly be asserted. Those grounds are limited to the subject matter described in paragraphs (a) through (h) of §105(1). In short, a public body cannot enter into an executive session to discuss the subject of its choice. I note, too, that a procedure must be accomplished in public before an executive session may properly 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 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. Only by means of an indication of the subject proposed to be discussed would the public or perhaps other members of a public body have information sufficient to ascertain whether there the matter indeed involves a proper subject for consideration during an executive session.

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

I hope that I have been of assistance.

RJF:jm

cc: Cheryl Rozario
Paul Balzano
George Pape

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14550
OML-AO-3269

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March 3, 2004

E-MAIL

TO: Michael J. Dollard <MJDollard@town-victor-ny.us>

FROM: David Treacy, Assistant Director

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

Dear Mr. Dollard:

I have received your e-mail concerning the Victor Local Development Corporation ("VLDC"). You wrote that the VLDC "is a joint venture between the village and town of Victor. They fund it but significant amounts of money comes from grants, donations, sales of services, P.R. support etc... It is a Not for Profit corp. and files the appropriate tax returns. Town and village assistance stops at giving cash, there is no sharing of staff." Although the VLDC "is willing to meet the requirements of the Freedom of Information Law and they do hold open meetings", you asked what is required concerning notice of its meetings and the publication of an agenda.

In my view, the primary issue is whether the VLDC is an "agency" for purposes of the Freedom of Information Law or a "public body" for purposes of the Open Meetings Law.

Section 86(3) of the Freedom of Information Law defines the term "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office of other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature" [§86(3)].

In this regard, specific reference is found in §1411 of the Not-for-Profit Corporation Law to local development corporations. The cited provision describes the purpose of those corporations and states in part that:

> "it is hereby found, determined and declared that in carrying out said purposes and in exercising the powers conferred by paragraph (b) such corporations will be performing an essential governmental function."

Therefore, due to its status as a not-for-profit corporation, it is not clear in every instance that a local development corporation is a governmental entity. However, it is clear that such a corporation performs a governmental function.

Relevant to your inquiry is a decision rendered by the Court of Appeals in which it was held that a particular not-for-profit local development corporation is an "agency" required to comply with the Freedom of Information Law [Buffalo News v. Buffalo Enterprise Development Corporation, 84 NY 2d 488 (1994)]. In so holding, the Court found that:

> "The BEDC seeks to squeeze itself out of that broad multipurposed definition by relying principally on Federal precedents interpreting FOIL's counterpart, the Freedom of Information Act (5 U.S.C. §552). The BEDC principally pegs its argument for nondisclosure on the feature that an entity qualifies as an 'agency' only if there is substantial governmental control over its daily operations...The Buffalo News counters by arguing that the City of Buffalo is 'inextricably involved in the core planning and execution of the agency's [BEDC] program'; thus the BEDC is a 'governmental entity' performing a governmental function of the City of Buffalo, within the statutory definition.
>
> "The BEDC's purpose is undeniably governmental. It was created exclusively by and for the City of Buffalo to attract investment and stimulate growth in Buffalo's downtown and neighborhoods. As a city development agency, it is required to publicly disclose its annual budget. The budget is subject to a public hearing and is submitted with its annual audited financial statements to the City of Buffalo for review. Moreover, the BEDC describes itself in its financial reports and public brochure as an 'agent' of the City of Buffalo. In sum, the constricted construction urged by appellant BEDC would contradict the expansive public policy dictates underpinning FOIL. Thus, we reject appellant's arguments" (id., 492-493).

Based on the foregoing, if the relationship between the VLDC and the Village and Town of Victor is similar to that of the BEDC and the City of Buffalo, the VLDC would constitute an "agency" required to comply with the Freedom of Information Law.

Notwithstanding the status under the Freedom of Information Law, I believe that its board would constitute a "public body" for purposes of the Open Meetings Law. Section 102(2) defines that phrase to mean:

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

By breaking the definition into its components, I believe that each condition necessary to a finding that the board of VLDC is a "public body" may be met. It is an entity for which a quorum is required pursuant to the provisions of the Not-for-Profit Corporation Law and it likely consists of more than two members. Further, based upon the language of §1411(a) of the Not-for-Profit Corporation Law, which was quoted in part earlier, and if there is a substantial degree of governmental control exercised by the Village and Town, I believe that the VLDC would be conducting public business and performing a governmental function for a public corporation, in this instance, the Village and Town of Victor.

You have also asked "what constitutes a "legal notice announcing a meeting." Section 104 of the Open Meetings Law pertains to notice of meetings. In brief, if a meeting is scheduled at least a week in advance, notice of the time and place must be given to the news media and to the public by means of posting in one or more designated public locations, not less than seventy-two hours prior to the meeting. If a meeting is scheduled less than a week an advance, again, notice of the time and place must be given to the news media and posted in the same manner as described above, "to the extent practicable", at a reasonable time prior to the meeting. Therefore, if, for example, there is a need to convene quickly, the notice requirements can generally be met by telephoning the local news media and by posting notice in one or more designated locations.

I point out that subdivision (3) of §104 specifies that a legal notice need not be given prior to a meeting. Stated differently, to comply with the Open Meetings Law, a public body is not required to pay to place a legal notice in a newspaper or to "advertise" that a meeting will be held at a certain time and place; a public body must merely "give" notice to the news media and post the notice. In some circumstances, public bodies have given notice to the news media, and the newspapers or radio stations in receipt of the notices have chosen not to print or publicize the meetings to which the notices relate. In those cases, despite the failure of a notice to be publicized, a public body would have complied with law.

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

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

DT:tt

cc: Debra Denz

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3770

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March 15, 2004

Mr. Peter D. Costa, Jr.
[redacted]

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

Dear Mr. Costa:

As you are aware, I have received your inquiry of February 20. According to your letter:

> "Last evening the Village Board call[ed] a 'Trustee work session' in which 3 of 5 board members were present. They only posted sometime during the day yesterday on Cable 75, Tuckahoe TV."

You asked whether there may be "requirements as to amount of time they are required to post meetings open to the public in which there is no emergency."

In this regard, §104 of the Open Meetings Law states that:

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

Stated differently, if a meeting is scheduled at least a week in advance, notice of the time and place must be given to the news media and to the public by means of posting in one or more designated

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

It is emphasized that notice must be "conspicuously posted in one or more designated public locations." Consequently, I believe that a public body must designate, presumably by resolution, the location or locations where it will routinely post notice of meetings. To meet the requirement that notice be "conspicuously posted", notice must in my view be placed at a location that is visible to the public. In addition, notice must be given to the news media prior to every meeting.

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

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

> practicable, to the news media' nor was it 'conspicuously posted in one or more designated public locations' at a reasonable time 'prior thereto' (emphasis added)" [524 NYS 2d 643, 645 (1988)].

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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March 15, 2004

E-Mail

TO: Jane Wiercioch [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. Wiercioch:

As you are aware, I have received your correspondence in which you sought an advisory opinion concerning certain practices of the Cheektowaga Town Board. You indicated that the Board conducts "closed door meetings at work sessions." By means of example, you referred to closed sessions with "developers, sports teams, etc." and pointed out that those sessions did not involve "negotiations or lawsuits."

In this regard, I offer the following comments.

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

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

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

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

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

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

Based upon the direction given by the courts, if a majority of a public body gathers to discuss public business, any such gathering, in my opinion, would ordinarily constitute a "meeting" subject to the Open Meetings Law that must be preceded by notice given in accordance with §104 of the Law.

Second, the Open Meetings Law is based on a presumption of openness, and §102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. Moreover, the Open Meetings Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into executive session. Specifically, §105(1) states in relevant part that:

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

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed and the motion must be carried by majority vote of a public body's membership before such a session may validly be held. The ensuring 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 separate from a meeting or 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 opinion will be forwarded to the Town Board.

I hope that I have been of assistance.

RJF:jm

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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OML-AO-3772

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March 15, 2004

E-MAIL

TO: Sandy Hubble <[redacted]

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Mr. Hubble:

As you are aware, I have received your correspondence in which you sought guidance concerning both the Open Meetings Law and the Freedom of Information Law.

You asked, in brief, "what can and cannot be done in executive session" and asked whether a certain document is an "interoffice memo." Having requested the record in question from the Town of Richmond, you were informed that it would be withheld. The same record, however, was made available "without hesitation" by Ontario County.

In this regard, first, the Open Meetings Law is based on a presumption of access. Stated differently, meetings of public bodies, such as town boards, must be conducted in public, except to the extent that an executive session may 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. 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.

I note that the full text of the Open Meetings Law, as well as numerous other materials, are available via the Committee on Open Government website.

Second, when a public body takes action of any sort, minutes must be prepared in accordance with §106 of the Open Meetings Law. That provision states that:

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

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.

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

With respect to the "interoffice memo", a written communication sent by one government agency (i.e., a county planning board) to another government agency (i.e., a town), would fall within §87(2)(g) of the Freedom of Information Law. That provision authorizes an agency to deny access to records that:

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

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

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

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

Although I have no knowledge of the content of the document at issue, I point out that the Freedom of Information Law is permissive. While an agency *may* withhold records in accordance with the exceptions listed in §87(2), it is not required to do so. Therefore, it is possible that the Town could have chosen to withhold a record if authorized to do so, by §87(2)(g), but that the County could have opted to disclose the same record.

Lastly, again, a variety of material pertaining to both the Freedom of Information Law and the Open Meetings Law is available on our website.

I hope that I have been of assistance.

RJF:tt

cc: Town Board, Town of Richmond

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3773

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March 15, 2004

E-MAIL

TO: Susan Zimet, <[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. Zimet:

I have received your letter which, as in the case of previous correspondence, relates to action taken by the Town Board of the Town of Lloyd. You sent copies of correspondence pertaining to the matter between the Town Supervisor and the law firm retained to provide services to the Town concerning the "proposed annexation territory", including the terms of the agreement. The phrase "annexation territory" appears several times in the agreement.

The minutes of the meeting during which the Board approved a resolution to retain the law firm states as follows:

> "Resolution made by Shepard, seconded by Hammond, to authorize Supervisor to sign an agreement with Huff Wilks, LLP regarding procurement of border land."

You have questioned the adequacy of the minutes.

In this regard, §106(1) of the Open Meetings Law pertains to minutes of open meetings and requires 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."

From my perspective, every law, including the Open Meetings Law, must be implemented in a manner that gives reasonable effect to its intent. Based on that presumption, I believe that minutes must be sufficiently descriptive to enable the public and others (i.e., future Town officials), upon their preparation and upon review perhaps years later, ascertain the nature of action taken by a public body, such as a town board.

In my opinion, in consideration of the substance of the agreement, an agreement to pay for legal services relative to the "annexation [of] territory", the minutes do not include sufficient information to ascertain the nature of the Board's action. This is not to suggest that the minutes must include reference to each element of the agreement. However, at a minimum, I believe that the minutes should clearly have reflected the intent of the Board to attempt to engage in the "annexation [of] territory." I note that it has been held that a "bare bones" resolution referenced in minutes is inadequate to comply with the Open Meetings Law [see Mitzner v. Sobol, 570 NYS 2d 402, 173 AD 2d 1064 (1991)].

I hope that I have been of assistance.

RJF:tt

cc: Town Board
Hon. Rosaria Schiavone Peplow

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3724

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March 24, 2004

Commissioner Henry M. Sloma
Niagara Frontier Transportation Authority
181 Ellicott Street
Buffalo, NY 14203

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 Commissioner Sloma:

I have received your letter of February 24. You wrote that you have for several years "served as a Commissioner and Secretary for the Niagara Frontier Transportation Authority (NFTA)." You added that there is:

> "...a pattern of behavior that has become unsettling with the abuse of the 'executive session' privileges. In many cases, an 'executive session' is called for the purpose of discussion on 'qualifying issues' and, once the public and the press are excused, the 'executive session' is used as a shelter for unqualified, sensitive issues.
>
> "It would appear that the Chairman, Luiz Kahl, is oblivious to the Board's responsibility to, wherever possible, do its work in public."

You have sought guidance, and in this regard, I offer the following comments.

First, by way of background, as you are aware, the Open Meetings Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Section 105(1) states in relevant part that:

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

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed, and the motion must be carried by majority vote of a public body's 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, it has been held judicially 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)"

In sum, it is reiterated that a public body may validly conduct an executive session only to discuss one or more of the subjects listed in §105(1) and that a motion to conduct an executive session must be sufficiently detailed to enable the public to know that there is a proper basis for entry into the closed session.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: David Gregory, General Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3775

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March 24, 2004

Mr. James W. Fowler
[redacted]

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

Dear Mr. Fowler:

I have received your letter of February 22. As I understand your remarks, you have questioned whether a person other than a member of a public body or a person chosen by the Town Board may be designated to prepare minutes of meetings.

In this regard, neither the Open Meetings Law nor any other provision of law of which I am aware imposes a limitation or provides direction concerning who may prepare minutes. In some instances, there is specific direction provided by law. For example, §30 of the Town Law states that the town clerk is required to prepare minutes of meetings of a town board. However, in the circumstance that you described, I believe that anyone may be authorized to prepare minutes.

I note, too, that the Open Meetings law provides 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."

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

Based on the foregoing, it is clear that minutes need not consist of a verbatim account of what is expressed at meetings. So long as minutes consist of a record or summary of motions, proposals, resolutions, action taken and the vote of each member, I believe that the requirements imposed by the Open Meetings Law would be met.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
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March 24, 2004

Ms. Ann P. Slatin
President
Stamford Village Library
117 Main Street
Stamford, NY 12167

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. Slatin:

I have received your letter of February 23. In your capacity as President of the Stanford Village Library, you wrote that:

> "A question has been raised recently regarding our status as a free association library and the NY State Open Meetings Law. We are not connected with any government or school district, save for providing library services to the Village of Stanford, on a contractual basis for an annual fee."

Even though the Stamford Village Library is not a governmental entity, I believe that meetings of its board of trustees must be conducted in accordance with the Open Meetings Law.

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

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

> public notice of the time and place of a meeting scheduled at least two weeks prior thereto shall be given to the public and news media at least one week prior to such meeting."

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

Enclosed for your review is a copy of the Open Meetings Law. If you have questions relating to that law, please feel free to contact me.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

Enc.

STATE OF NEW YORK
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OML-AO-3777

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March 24, 2004

E-MAIL

TO: Commissioner Davenport [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 Commissioner Davenport:

I have received your letters of February 25 and 26 in which you raised a series of questions concerning the Open Meetings Law. You indicated that you serve as a member of the Mechanicville Housing Authority ("MHA"), and that the MHA's governing body consists of seven members when there are no absences or vacancies.

Your first question involves a situation in which a public body conducts an executive session to discuss a matter that falls within one or more of the grounds for entry into executive session and then returns to an open meeting to take action immediately concerning matters that "had nothing whatsoever to do" with the stated reasons for entry into executive session. You asked whether it is "legal" to do so and whether the actions taken are valid. You added that the actions taken "banned the use of audio tape" and disallowed the inclusion of comments in minutes of meetings unless a Board member "specifically wanted a comment (s) to put on the record."

Neither of those subjects in my view would have qualified for consideration during an executive session. However, there is no indication of what in fact was discussed during the executive session. It is possible that the members might have been briefed in writing prior to the meeting regarding the two actions taken and there was no need for extensive discussion of those matters in public. In short, without knowledge of the actual matters discussed during the executive session, it is impossible to advise whether the executive session was "legal."

With respect to the validity of the action taken, §107(1) of the Open Meetings Law provides that:

> "Any aggrieved person shall have standing to enforce 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 whole or in part."

I point out that action taken in private that should have been taken in public is not automatically valid or invalid. Rather, I believe that the action remains in effect unless and until a court declares the action to be invalid.

Although you did not question of the validity of the nature of the action taken, I point out that the courts have held that members of the public 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, 759 NYS2d 513, 305 AD2d 83 (2003)].

Second, you asked whether:

> "If a public body cites one (or more), of the 8 specified reasons for entering into an Executive Session and then enters that Executive Session only to then come back out into Open session stating for the record that the Board took no action on the matter discussed in Executive Session, but in fact; secretly decided to take action during that Executive Session, is that action legal?"

In my view, if indeed action was taken by means of an affirmative vote of a majority of the total membership of a public body, the action must be memorialized in minutes of a meeting. You indicated that the Board of the MHA has seven members when there are no vacancies or disqualifications. If that is so, based on §41 of the General Construction Law entitled "Quorum and majority", four affirmative votes are required for the Board to take action or to carry out its powers, authority or duties.

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

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

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

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

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

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

Therefore, if a public body reaches a "consensus" that is reflective of its final determination of an issue, I believe that minutes must be prepared that indicate its action, as well as the manner in which each member voted. I note that §87(3)(a) of the Freedom of Information Law states that: "Each agency shall maintain...a record of the final vote of each member in every agency proceeding in which the member votes."

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
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March 25, 2004

Mr. Michael E. Goldstein
[redacted]

The staff of the Committee on 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. Goldstein:

I have received your letter in which you asked whether votes and decisions made at meetings are valid "if a public body makes no effort to follow the notice of meeting rule."

In this regard, as you are likely aware, §104 of the Open Meetings Law requires that notice of the time and place be given to the news media and posted prior to every meeting of a public body.

When a public body fails to comply with the Open Meetings Law, any "aggrieved person" may seek to enforce the Law. Specifically, §107(1) states 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. The provisions of this article shall not affect the validity of the authorization, acquisition, execution or disposition of a bond issue or notes."

Based upon the foregoing, the action taken by a public body at a meeting remains valid unless and until a court determines to nullify action taken in violation of the law. In addition, the provision cited above specifies that an unintentional failure to fully comply with the notice requirements alone is insufficient for a court to invalidate action.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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OMC-AO-3779

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March 29, 2004

Chairman William J. Ryan
County Board of Legislators
Westchester County
800 Michaelian Office Building
148 Martine Avenue
White Plains, NY 10601

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 Ryan:

I have received your letter of February 27 and the materials attached to it.

You wrote that the Westchester County Medical Center several years ago was a part of the government of Westchester County but was "spun off and became the Westchester County Health Center Corporation ('WCHCC'), a public benefit corporation created in accordance with the provision of Article 10C of the New York State Public Authorities Law." Although the WCHCC is a corporate entity separate from the County, you indicated that the County "continues to provide various forms of financial assistance to WCHCC, including being a guarantor to certain financial obligations of WCHCC."

In this regard, you wrote that:

> "Currently, WCHCC is experiencing severe financial difficulties and finds itself faced with several difficult financial choices which must be made in order to meet its financial obligations. Information including, but not limited to, marketing strategy, analyses, evaluations and other financial reviews and proposals must be reviewed in order to determine what options are available to WCHCC.
>
> "In light of these critical financial decisions and the potential significant impact upon the County should WCHCC fail to meet its financial obligations, the County Board has held (and will be holding) meetings to discuss issues relating to the administration and

> financial condition of the WCHCC. For example, matters relating to WCHCC personnel, lease agreement, and various other administrative and financial alternatives will need to be discussed before any determinations by WCHCC and/or the County could be finalized.
>
> "Clearly these discussions and certain detailed documentation relating to WCHCC's current and future status are of general public interest. Furthermore, any final determinations by the County in connection with WCHCC would have to be addressed by the full County Board at a meeting open to the general public. The dilemma concerns the extent to which the County Board is required to conduct its deliberative process regarding its final determination in a forum that is open to the general public. If certain information revealed to the County Board as part of the deliberation process were released to the general public, such information could be utilized by WCHCC's competitors to make WCHCC lose its competitive edge or to taint WCHCC's reputation. In addition, despite the County Board's policy that discussions be open to the general public, the County Board does not want to unnecessarily expose either WCHCC or the County to any liability resulting from the release of confidential information which could be discussed in a public forum."

In consideration of the foregoing and your intent to comply with law, you have sought "guidance as to the circumstances under which it would be appropriate to hold an open meeting or enter into executive session to discuss matters relating to WCHCC's financial conditions."

As you are aware, the Open Meetings Law is based on a presumption of openness. Stated differently, meetings of public bodies, such as the County Board of Legislators and the governing body of WCHCC, must be conducted open to the public, except to the extent that there is a basis for entry into executive session. Paragraphs (a) through (h) of §105(1) of the Open Meetings Law specify and limit the subjects that may properly be considered during executive sessions. In most instances the grounds for entry into executive session relate to some sort of harm that might arise by means of public discussion. For example, it has been held that, §105(1)(d) pertaining to "proposed, pending or current litigation" is intended to enable a public body to discuss its litigation strategy in private so as not to divulge its strategy to its adversary [see e.g., Weatherwax v. Town of Stony Point, 97 AD 2d 840 (1983)]. Similarly, (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" of the property."

Discussions concerning the financial condition of a public corporation must generally be conducted in public, for none of the grounds for entry into executive session would ordinarily apply. In this instance, however, the State legislature appears to have recognized that WCHCC, unlike most governmental entities, carries out its functions in competition with private sector organizations. The

statute to which you referred that created the WCHCC, §3304 of the Public Authorities Law provides as follows in subdivision (11)(b):

> "In addition to the matters listed in section one hundred five of the public officers law, the corporation may conduct an executive session for the purpose of considering marketing strategy or strategic marketing plans, analyses, evaluations and pricing strategies of the corporation, relating to business development, which, if disclosed, would be likely to injure the competitive position of the corporation."

The provision quoted above, like most of the grounds for entry into executive session, includes language relating to the possibility of harm that could result by means of disclosure or public discussion. Specifically, insofar as public discussion "would be likely to injure the competitive position" of WCHCC when its "marketing strategy or strategic marketing plans, analysis, evaluations and pricing strategies" are considered, §3304(11)(b) authorizes entry into executive session. In essence, subdivision (11)(b) creates a ninth ground for conducting an executive session that is unique to and may be asserted only in connection with the functions of the WCHCC.

I note that subdivision (11)(a) contains language concerning access to records pertaining to WCHCC and permits a denial of access to a variety of records insofar as disclosure "would be likely to injure the competitive positions of the corporation." That provision is analogous to §87(2)(d) of the Freedom of Information, which authorizes an agency to withhold records that:

> "are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise."

Although §87(2)(d) refers to a "commercial enterprise", it has been advised by this office and held judicially that records may be withheld when a governmental entity functions in competition with private entities and disclosure would cause substantial injury to the competitive position of that governmental entity(see e.g., Syracuse & Oswego Motor Lines, Inc. v. Frank, Sup. Ct., Onondaga Cty., October 15, 1985]). For example, the State Insurance Fund performs its duties in competition with private insurance carriers; public transportation authorities may in some cases compete with private bus companies.

Based upon my understanding of the functions of the WCHCC, and particularly in view of the terms of §3304 of the Public Authorities Law, it appears that WCHCC functions in competition with private entities. When that is so, and when disclosure would cause harm to its competitive position, subdivision (11) of §3304 permits the holding of executive sessions or a denial of access to records relative to its "marketing strategy or strategic marketing plans, analysis, evaluations and pricing strategies or pricing commitments."

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Charlene Indelicato, County Attorney

OML-AO-3780

From: Robert Freeman
To: [redacted]
Date: 4/6/2004 9:40:48 AM
Subject: Re: o3227

Dear Ms. Gannon- Tyliszczak:

You are correct that there is nothing in the Open Meetings Law dealing with a change in location of a meeting due to overcrowding. In my view, the issue involves whether a public body is acting reasonably and in a manner consistent with the intent of the law.

As inferred in the opinion forwarded to you, if it cannot reasonably be anticipated that the number of those seeking to attend would be greater than the usual meeting location can accommodate, I do not believe that a public body could be faulted for not choosing a different location. On the other hand, if it is known in advance that a larger number will likely attend than the meeting room will hold, and if there is another location available that would likely accommodate those interested in attending, I believe and it has been held that it would be unreasonable not to move the meeting to that larger location.

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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Albany, NY 12231
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[redacted]

OML-AO - 3781

From: Robert Freeman
To: Sheriffpvb@aol.com
Date: 4/6/2004 3:45:10 PM
Subject: o2269

http://www.dos.state.ny.us/coog/otext/o2269.txt

Dear Councilman Van Blarcum:

I have received your letter, and this is to inform you that this office has always advised that ethics boards, commissions or committees are required to comply with the Open Meetings Law. That being so, every meeting of such a body must be preceded by notice of the time and place given to the news media and by means of posting, and every meeting must be convened open to the public. If and when a subject arises that may properly be considered during an executive session, the same procedure for entry into executive session would be followed as it is in the case of a town board.

In short, I would not and have never advised that meetings of ethics boards are not subject to the requirements imposed by the Open Meetings Law.

I hope that I have been of assistance.

Robert J. Freeman
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STATE OF NEW YORK
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OML-AO-3782

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April 15, 2004

Mr. Frank J. Phillips
Stony Point Town Attorney
74 East Main Street
Stony Point, NY 10980

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. Phillips:

I have received your letter in which sought an advisory opinion concerning the Open Meetings Law. You asked whether an executive session may be held during a "'workshop' meeting", and whether votes may be taken at those gatherings. You also questioned:

> "Whether an executive session requires a list of the specific topics to be discussed at the executive session. (For example, more specific than 'pending litigation' or 'personnel matters'). Is it sufficient to list the topics as general topics as general as above, but, before adjourning into executive session, the Supervisor advises the public and is more specific as to the subject matter."

In this regard, I offer the following comments.

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

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

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

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

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

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

Second, §105(1), which will be considered expansively later in this response, refers in part to the inability of a public body to take action to appropriate public moneys during executive session, thereby indicating that other kinds of actions may be taken during executive session. In addition, §106 concerning minutes refers to minutes of open meetings and executive sessions, stating 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.

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)].

Third, if one of your questions is whether executive sessions must be referenced on an agenda, I note that there is no requirement that an agenda be prepared or followed. More importantly in my view, the Open Meetings Law contains a procedure that must be accomplished during an open meeting before an executive session may be held. Specifically, §105(1) states in relevant part that:

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

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.

With regard to the sufficiency of motions for entry into executive session, again, the law requires that motion include reference to the subject or subjects to be discussed, and any such motion must be memorialized in minutes of the open meeting. Identifying the subjects to be discussed as "pending litigation" or "personnel matter" would be inadequate according to judicial decisions.

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.

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].

Therefore, a proper motion might be: "I move to enter into executive session to discuss the Town's litigation strategy relative to the case of the XYZ Company v. Town of Stony Point."

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

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

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

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

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

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

Due to the insertion of the term "particular" in §105(1)(f), I believe that a discussion of "personnel" may be considered in an executive session only when the subject involves a particular person or persons, and only when at least one of the topics listed in §105(1)(f) is considered. Matters of policy that affect personnel, consideration of the budget or the creation or elimination of positions, for example, typically cannot validly be considered in executive session.

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

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)]

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

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April 16, 2004

E-Mail

TO: Keith Alexander <mailalex@twcny.rr.com>

FROM: Robert J. Freeman, Executive Director

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

Dear Mr. Alexander:

I have received your letter in which, as President of the Dexter Volunteer Fire Department, you asked whether the Department's meetings "fall under the open meeting law."

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

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

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

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

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

I hope that I have been of assistance.

RJF:jm

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April 22, 2004

Mr. Tim O'Brien
Staff writer
Times Union
News Plaza
Box 15000
Albany, NY 12212

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. O'Brien:

As you are aware, I have received your letter in which you sought an advisory opinion relating to requests made to Rensselaer County under the Freedom of Information Law.

One request involved "records pertaining to the Rensselaer County Local Conditional Release Commission and its decision to vote to release inmate Mary Beth Anslow." You also referred in that request to the requirement that a record indicate the manner in which each Commission member voted, and you focused on records pertaining to the Commission's deliberations. In the other request, you asked for "records pertaining to any and all decisions [made by the Commission] to release inmates within the past five years." The County denied access to the records in question on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" in accordance with §87(2)(b) of the Freedom of Information Law. You also referred to the §96 of the Public Officers Law as it relates to inmates.

In this regard, I offer the following comments.

First, §96 is part of the Personal Privacy Protection Law, which is Article 6-A of the Public Officers Law. That statute applies only to state agencies [see definition of "agency", §96(1)] and does not apply to a county or its records. In contrast, the Freedom of Information Law, based in its definition of the term "'agency", applies to entities of both state and local government.

Second and 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 ability

to withhold "records or portions thereof" that fall within the scope of the exceptions to rights of access that follow. The phrase quoted in the preceding sentence indicates that a single record may include information accessible to the public, as well as information that may be withheld. It also requires that an agency review records sought, in their entirety, to determine which portions, if any, may properly be withheld.

It is also noted that the Court of Appeals, the State's highest court, has stressed that the Freedom of Information Law should be construed expansively. For instance, in Gould v. New York City Police Department [87 NY 2d 267 (1996)], the Court reiterated its general view of the intent of the Freedom of Information Law, stating that:

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

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

> "...to invoke one of the exemptions of section 87(2), the agency must articulate 'particularized and specific justification' for not disclosing requested documents (*Matter of Fink v. Lefkowitz, supra*, 47 N.Y.2d, at 571, 419 N.Y.S.2d 467, 393 N.E.2d 463). If the court is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an in camera inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material (*see, Matter of Xerox Corp. v. Town of Webster*, 65 N.Y.2d 131, 133, 490 N.Y.S. 2d, 488, 480 N.E.2d 74; *Matter of Farbman & Sons v. New York City Health & Hosps. Corp., supra*, 62 N.Y.2d, at 83, 476 N.Y.S.2d 69, 464 N.E.2d 437)" (id.).

In the context of your request, all of the records that you requested have been withheld. While I am not suggesting that they must be disclosed *in toto*, based on the direction given by the Court of Appeals, the records must be reviewed for the purpose of identifying those portions that might fall within the scope of one or more of the grounds for denial of access. As the Court stated later in the decision, an agency may deny access records under an exception "as long as the requisite particularized showing is made" (id., 277).

With respect to the privacy of inmates, while some aspects of records, such as those containing intimate or highly personal details, might properly be withheld based on considerations of privacy and §87(2)(b), others, in my view, must be disclosed. In a case involving a request for videotapes made under the Freedom of Information Law, it was unanimously found by the Appellate Division that:

> "...an inmate in a State correctional facility has no legitimate expectation of privacy from any and all public portrayal of his person in the facility...As Supreme Court noted, inmates are well aware that their movements are monitored by video recording in the institution. Moreover, respondents' regulations require disclosure to news media of an inmate's 'name *** city of previous residence, physical description, commitment information, present facility in which housed, departmental actions regarding confinement and release' (7 NYCRR 5.21 [a]). Visual depiction, alone, of an inmate's person in a correctional facility hardly adds to such disclosure" [Buffalo Broadcasting Company, Inc. v. NYS Department of Correctional Services, 155 AD 2d 106, 111-112 (1990)].

Nevertheless, the Court stated that "portions of the tapes showing inmates in states of undress, engaged in acts of personal hygiene or being subjected to strip frisks" could be withheld as an unwarranted invasion of personal privacy (id., 112), and that "[t]here may be additional portrayals on the tapes of inmates in situations which would be otherwise unduly degrading or humiliating, disclosure of which 'would result in *** personal hardship to the subject party' (Public Officers Law § 89 [2] [b] [iv])" (id.).

In another case involving videotapes of events occurring at a correctional facility, in the initial series of decisions relating to a request for videotapes of uprisings at a correctional facility, it was determined that a blanket denial of access was inconsistent with law [Buffalo Broadcasting Co. v. NYS Department of Correctional Services, 155 AD2d 106]. Following the agency's review of the videotapes and the making of a series of redactions, a second Appellate Division decision affirmed the lower court's determination to disclose various portions of the tapes that depicted scenes that could have been seen by the general inmate population. Other portions, such as those showing "strip frisks" and the "security system switchboard", were found to have been properly withheld on the grounds, respectively, that disclosure would constitute an unwarranted invasion of personal privacy and endanger life and safety [see 174 AD2d 212 (1992)].

While the records sought are not videotapes or similar depictions, I believe that the principles discussed in the decisions cited above are applicable, that a blanket or categorical denial of access to the records sought is inconsistent with law, and that the ability to protect an inmate's privacy is far from absolute.

I point out that the fact of person's commitment in a county jail must be included in a record accessible to the public that includes a variety of information. Specifically, §500-f of the Correction Law, which pertains to county jails, states that:

> "Each keeper shall keep a daily record, to be provided at the expense of the county, of the commitments and discharges of all prisoners delivered to his charge, which shall contain the date of entrance, name, offense, term of sentence, fine, age, sex, place of birth, color, social relations, education, secular and religious, for what any by whom committed, how and when discharged, trade or occupation, whether so employed when arrested, number of previous convictions. The daily record shall be a public record, and shall be kept permanently in the office of the keeper."

In short, a variety of information concerning any person confined in a county jail is clearly public.

Consideration should also be given, in my view, to the privacy of others. While I am not familiar with the nature of the records used in the Commission's deliberative process, they might include letters or similar communications from friends, relatives, neighbors, etc. who expressed their opinions concerning the release of Ms. Anslow or other inmates. I believe that personally identifying details pertaining to members of the public who transmitted such communications may be deleted on the ground that disclosure would constitute an unwarranted invasion of those persons' privacy.

Also potentially relevant is §87(2)(g), 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.

When Commission members transmit opinions or recommendations among one another, or when other government officers or employees offer opinions concerning an inmate's release, I believe that those opinions may be withheld. For instance, in a case in which a district attorney sent a recommendation to the Parole Board regarding the release of a certain inmate, it was determined that the record could be withheld [Ramalho v. Bruno, 273 AD2d 521 (2000)]. However, statistical or factual information contained within those kinds of communications must generally be disclosed pursuant to §87(2)(g)(i), and in addition, §87(2)(g)(iii) requires that "final agency...determinations" be made available. From my perspective, any determination by the Commission to grant or deny an inmate's release would constitute a final agency determination that must be disclosed. Moreover, assuming that a determination of that nature does not include intimate, personal information, I believe that it would be available in its entirety. If it does contain intimate, personal information, I believe that that portion may be redacted.

Third, although you did not raise any issue directly relating to the Open Meetings Law, I believe that its provisions are pertinent and related to the records sought. As you may be aware, that statute is applicable to public bodies, and §102(2) defines the phrase "public body" to mean:

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

Based on the provisions of §§271 and 272 of the Correction Law, which respectively describe the creation and organization of local conditional release commissions and their functions, powers and duties, it is clear in my view that those entities constitute public bodies that fall within the coverage of the Open Meetings Law. While it is likely that some of the Commission's discussions and deliberations may validly occur in private, other aspects of its duties must, in my view, be performed in public and result in the creation of records accessible to the public.

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.

In the context of the activities of the Commission, it would appear that only one of the grounds for entry into executive session, §105(1)(f), would be pertinent to its duties. That provision authorizes a public body to conduct an executive session to discuss:

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

I would conjecture that a local conditional release commission might in some instances discuss, for example, the medical history of an inmate or perhaps a victim or that person's relations. In that event, I believe that an executive session could properly be held.

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

Relevant in the context of 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. I believe, however, 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. In a 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)].

According to §272 of the Correction Law, a local conditional release commission has the power to determine that certain persons sentenced within a county are eligible for conditional release, to revoke conditional release, and to authorize its members to administer oaths and take testimony of persons under oath. In consideration of those powers, I believe that the deliberations

of such a commission leading to a determination to grant or revoke conditional release may be characterized as quasi-judicial and exempt from the requirements of the Open Meetings Law. Nevertheless, its other business, such as policy making, the development of rules and procedures, and the taking of action could not be so characterized in my opinion, and could only validly occur during meetings held in compliance with the Open Meetings Law. 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)].

In short, while I believe that the Commission may deliberate in private when considering the release of an individual, it can take action or vote only at a meeting held in accordance with the Open Meetings Law.

Section 106 of that statute requires the preparation of 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."

In view of the foregoing, a motion to enter into executive session, as well as any other action taken during an open meeting, must be memorialized and included within minutes. Further, 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. While the Commission might in some instances have the authority to take action during executive session, for reasons described earlier, I do not believe that a record indicating the nature of its action, i.e., to grant or deny conditional release, could justifiably be withheld under the Freedom of Information Law.

Lastly, the Freedom of Information Law has since its enactment included what some have considered an "open vote" requirement. Section 87(3)(a) provides that:

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

Based upon the foregoing, when a final vote is taken by an agency, such as the Commission, 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 have voted individually with respect to particular issues. Although the Open Meetings Law does not refer specifically to the manner in which votes are taken or recorded, I believe that the thrust of §87(3)(a) of the Freedom of Information Law is consistent with the Legislative Declaration that appears at the beginning of the Open Meetings Law and states that:

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

Moreover, in an Appellate Division decision that was affirmed by the Court of Appeals, it was found that "The use of a secret ballot for voting purposes was improper." In so holding, the Court stated that: "When action is taken by formal vote at open or executive sessions, the Freedom of Information Law and the Open Meetings Law both require open voting and a record of the manner in which each member voted [Public Officers Law §87[3][a]; §106[1], [2]" Smithson v. Ilion Housing Authority, 130 AD 2d 965, 967 (1987); aff'd 72 NY 2d 1034 (1988)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Conditional Release Commission
Thomas N. Cioffi

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3784A

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April 27, 2004

Mr. Steven 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 facts presented in your correspondence.

Dear Mr. Getman:

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

You wrote that the Seneca County Board of Supervisors has established several committees that typically consist of four members of the fourteen member Board. Committee meetings are normally scheduled for the fourth Tuesday of each month, notice of the time place of committee meetings is given, the public is authorized to attend, and minutes of those meetings are prepared by the Clerk of the Board of Supervisors. Meetings of committees are held sequentially in a conference room. You added that:

> "Board members not on a particular committee are not allowed to move or vote upon a resolution or agenda item before that committee. However, as a practice, Board members are allowed to ask questions, make comments, and participate in deliberations of committees that they are not members of, in otherwise the same manner as committee members" (emphasis yours).

In consideration of the foregoing, you have been asked to raise the following questions:

> "1. Because of the number of Supervisors in attendance, and potential participation therein, are the 'committee meetings,' in fact, meetings of the Board of Supervisors?

> 2. If these meetings are actually Board meetings, does the description of these meetings as committee meetings in the public notices comply with the notice requirements of the Open Meetings Law?
>
> 3. If there is a violation of the open meetings law, does this potentially render the action taken in committee void in whole or in part?"

In this regard, I offer the following comments.

First, as you are aware, the Open Meetings Law pertains to meetings of public bodies, including governing bodies, such as the Board of Supervisors, and committees and similar bodies consisting of members of governing bodies. Section 102(2) of that statute defines the phrase "public body" to include:

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

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

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

It has been advised in similar situations that a member of the governing body who is not a member of a committee has the same right to attend a meeting of the committee as any member of the public. However, it has also been suggested that the only members of a committee who have the right to attend an executive session of the committee are the members of that committee, and that members of the governing body who are not members of the committee do not have the right to attend an executive session of the committee, unless a rule adopted by the governing body provides

such a right. In short, in my view, although a committee of a governing body may be a component of the governing body, again, I believe that it is an entity separate and distinct from the governing body.

Second, the term "meeting" is defined in §102(1) of the Open Meetings Law to mean "the official convening of a public body for the purpose of conducting public business." Inherent in the definition is the notion of intent, and a key issue often involves whether there is an intent on the part of a public body to convene for the purpose of conducting public business collectively, as a body. Based on the facts that you offered, notice is given indicating that certain committees intend to convene to conduct meetings. Although members of the Board of Supervisors other than members of a committee may attend a meeting of a committee, there does not appear to be an intent on the part of the Board to gather as the Board.

Further, and in my view, significantly, you wrote that members of the Board who are not members of a committee that is conducting a meeting cannot "move or vote upon a resolution or agenda item before that committee." If that is so, I do not believe that a committee meeting is transformed into or becomes a meeting of the Board of Supervisors, even though other members of the Board are present, and the total number of Board members in attendance involves a majority of the Board. It appears, too, that the matters considered at a meeting of a committee are limited to the subjects indicated on the committee's agenda. That limitation suggests that the meeting is indeed a meeting of a committee during which other members of the governing body may be present, but that the meeting is not and is not intended to be a meeting of the Board as a whole. Assuming that only committee members may vote at committee meetings, it does not appear that the participation of Board members who are not members of the committee would transform a committee meeting into a meeting of the Board.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
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April 28, 2004

Mr. Peter Tonery
[redacted]

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. Tonery:

I have received your letter in which you raised two issues. One involves the status of the Town of Hamlin "Comprehensive Plan/Zoning Code Committee", which is characterized on the Town's website as the "Comprehensive Master Plan Committee" (hereafter "the Committee"); the other pertains to the ability to disclose information obtained during closed meetings.

By way of background, you wrote that the Committee evolved from a predecessor organization created to draft a new zoning law pertaining to telecommunication towers, and that the Supervisor invited the members of that entity to be members of the Committee. Some of them chose to join the Committee, while others declined. You were "invited" by a co-chair of the Committee to join, and you did so. In addition, the Supervisor appointed other new members. You wrote that following the Committee's second meeting, you were "confronted by the Supervisor, the Co-Chairman and a Town Board member" and were "told that [you] would have to be silent, both on [your] website and to the media, with regard to the discussions of the Committee." According to your letter, soon after, the "Supervisor posted a message on the Town's website which stated that further appointments were planned and that the Committee meetings would be closed to the public." He contended that the Committee is advisory in nature and, therefore, is not subject to the Open Meetings Law. Because the meetings could be closed, he, in your words, said that "the conversations would be private" and that you could be "prevented" from "reporting to the public." It is your view that the meetings of the Committee must be held open to the public based on the provisions of §272-a of the Town Law.

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

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

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

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

In the decisions cited above, 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).

From my perspective, if the Committee is a "special board" as that phrase is defined in §272-a(2)(c) of the Town Law, it would exist by means of a statutory authorization and would constitute a public body required to comply with the Open Meetings Law. "Special board" is defined in that provision to mean:

> "a board consisting of one 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."

Based on the information that you provided, the Committee does not appear to be a special board. As you described it, the Committee consists of persons appointed by the Supervisor and perhaps the co-chairs; the Committee does not appear to have been created nor have its members been appointed by the Town Board. If that information is accurate, again, the Committee would not appear to be a special board, but rather an advisory body. If that is so, based on the decisions cited above, it would not be required to comply with the Open Meetings Law. This is not to suggest that it could not hold open meetings, but rather that it would not be obligated to do so.

Second, whether a meeting is open to the public or closed is generally irrelevant with respect to your ability to disseminate information that you have acquired. Even when the Open Meetings Law applies and a public body validly enters into an executive session, there is ordinarily nothing privileged or confidential about the information expressed or acquired during the executive session.

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 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.

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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Hon. Austin Warner, Supervisor

STATE OF NEW YORK
DEPARTMENT OF STATE
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April 28, 2004

E-MAIL

TO: Sue Montgomery Corey <[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. Corey:

As you are aware, I have received your letter concerning meetings of the Town of Minerva "emergency preparedness committee" (hereafter "the committee"). You wrote that the committee was created by the Town "in cooperation with the nonprofit Minerva Service Organization and the Minerva Volunteer Department." You added that the membership "is voluntary (no formal appointments by the Town other than the creation of the group) and so it tends to fluctuate with a core group of about a dozen who regularly attend."

You have asked how the committee might "handle the discussion of sensitive issues" and when the committee can "legitimately do an executive session when something comes up that is legitimately a confidential issue."

As I understand the matter, the committee is not required to comply with 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. I note 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 (i.e., a county legislature, a town board, a board of education etc.), 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. Further, there appears to be no established membership in terms of either a number of members or the source of members. It also appears that the committee has the ability to recommend, but that it cannot take final and binding action on behalf of a government agency. If my understanding is accurate, the committee would not constitute a public body, and it would not be required to conduct its meetings in accordance with the Open Meetings Law.

The foregoing is not intended to suggest that the committee cannot hold meetings open to the public. While it may choose to do so, again, I do not believe that it is obliged to do so. If there is an intent to conduct meetings open to the public, unless, in your words, "sensitive issues" arise, the committee in my view would have ability to close its meetings at its discretion. It might also be worthwhile to consider the provisions of the Open Meetings Law as a non-binding guide. As you may be aware, when that statute applies, it provides that a public body may enter into executive session in circumstances described in §105(1). The first ground for entry into executive session, for example, may be particularly relevant to the work of the committee, for it pertains to "matters which will imperil the public safety if disclosed."

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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May 4, 2004

Ms. Megan O'Neil-Haight
Board of Education Representative
[redacted]

Mr. Thomas O'Brien < bfobrien@stny.rr.com>

Dr. Judith Staples
Superintendent
Corning Painted Post Area School District
165 Charles Street
Painted Post, NY 14870

Mr. Alfred Streppa
Harris Beach
99 Garnsey Road
Pittsford, NY 14534

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 Board Members O'Neil-Haight and O'Brien, Superintendent Staples and Attorney Streppa:

This response is addressed to you collectively because each of you has written to me concerning communications between or among members of the Corning-Painted Post Area Board of Education outside of meetings during which a majority of the Board is physically present. Ms. O'Neil-Haight has raised other issues as well, which will be considered following consideration of the primary matter; which focuses largely on the ability of Board members to communicate via email and the relationship between those communications and the Open Meetings Law.

It appears that the issue concerning email communications arose following receipt of a letter to the Superintendent prepared by Mr. Streppa in which he wrote that:

> "It is my understanding that the Open Meetings Law is not violated when Board members e-mail each other on such matters as scheduling Board of Education meetings or discussing items to be placed on Board meeting agendas. I believe there is also authority

> from your office that e-mails received at different times with no *simultaneous* communication is considered an inter-office memoranda and *not* subject to the provisions of the Open Meetings Law (emphasis his).
>
> "I have advised the Board of Education that 'Accordingly, communications between Board members by any means including e-mails, letters and telephone calls which generate responses and dialogue would be inappropriate, and should only occur in an open meeting session of the Board.'"

That letter also referred to opinions rendered by this office and the decision rendered in Cheevers v. Town of Union (Supreme Court, Broome County, September 3, 1998). Materials transmitted by others involve a variety of commentary, including articles entitled "The Perils of E-Mail" and "School boards in hot water over using e-mail for board business."

In this regard, it is emphasized at the outset that each of the fifty states has enacted some sort of an open meetings law, and that each such law is different. Activity that may violate the law in one jurisdiction may be valid in another. While it may be fully appropriate and wise to be alert and aware of emerging issues and possible pitfalls associated with the performance of your duties, I do not believe that guidance or judicial decisions from other jurisdictions are necessarily of value in New York. Further, due to its breadth, I disagree with the advice offered by the attorney.

An initial key issue involves the term "meeting", which is defined in §102(1) of the Open Meetings Law 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., a 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: by means of a physical gathering or a gathering by means of video-conference. Any other means of conducting a meeting, i.e., by telephone conference, by mail, or by e-mail, would be inconsistent with law.

I note, too, that meetings involving a physical convening or videoconferencing are consistent with the intent of the Open Meetings Law as expressed in its Legislative Declaration (§100). The Declaration states in part that the public has the right to "observe the performance of public officials." That right does not exist when the members of a public body communicate by telephone or e-mail.

In my opinion, inherent in the definition of "meeting" is the notion of intent, and a question often involves whether there is an intent that the majority of the membership of a public body, a quorum, seeks to convene for the purpose of conducting public business.

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)]. The Court affirmed a decision rendered by the Appellate Division that dealt specifically with so-called "work sessions" and similar gatherings during which there was merely an intent to discuss, but no intent to take formal action. In so holding, the court stated:

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

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

> "We agree that not every assembling of the members of a public body was intended to be included within the definition. Clearly casual encounters by members do not fall within the open meetings statutes. But an informal 'conference' or 'agenda session' does, for it permits

> 'the crystallization of secret decisions to point just short of ceremonial acceptance'" (id. at 416).

If a majority of a public body is present at a social gathering, and the intent is indeed to socialize, I do not believe that their presence would constitute a meeting of a public body. If a majority of the members meet one another by chance, in a "casual encounter", again, absent an intent to conduct public business, it is unlikely that the Open Meetings Law would apply [see Orange County Publications v. Council of the City of Newburgh, 60 AD2d 409, 416 (1978)]. However, if, by design, a majority of the members of a public body convene for the purpose of conducting public business, I believe that the gathering would constitute a meeting that falls within the coverage of the Open Meetings Law.

The definition of the phrase "public body"in §102(2) refers to entities that are required to conduct public business by means of a quorum. The term "quorum" is defined in §41 of the General Construction Law, which has been in effect since 1909. The cited provision, which was also amended to include language concerning videoconferencing, states that:

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

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

If there is an intent to ensure the presence of less than a quorum at any given time in order to evade the Open Meetings Law, in an Appellate Division decision, the court appears to have

inferred that such activity would contravene that statute. As stated in Tri-Village Publishers v. St. Johnsville Board of Education:

> "It has been held that, in order for a gathering of members of a public body to constitute a 'meeting' for purposes of the Open Meetings Law, a quorum must be present (*Matter of Britt v County of Niagara*, 82 AD2d 65, 68-69). In the instant case, there was never a quorum present at any of the private meetings prior to the regular meetings. Thus, none of these constituted a 'meeting' which was required to be conducted in public pursuant to the Open Meetings Law.
>
> "We recognize that a series of less-than-quorum meetings on a particular subject which together involve at least a quorum of the public body could be used by a public body to thwart the purposes of the Open Meetings Law...However, as noted by Special Term, the record in this case contains no evidence to indicate that the members of respondent engaged in any attempt to evade the requirements of the Open Meetings Law" [110 AD 2d 932, 933-934 (1985)].

In Tri-Village, the Court found no evidence of an intent to circumvent the Open Meetings Law when a series of meetings was held, each involving less than a quorum of a board of education. However, as I interpret the passage quoted above, when there is an intent to evade the application of the Open Meetings Law by ensuring that less than a quorum is present, and, by design, a series of gatherings each consisting of less than a quorum occurs to discuss public business, such action would represent a failure to comply with that statute.

From my perspective, in most instances, contrary to Mr. Streppa's suggestion, "communications between Board members by any means including e-mails, letters and telephone calls which generate responses and dialogue" may be, but are not generally inappropriate. In my experience, there are numerous situations in which detailed communications have been prepared and disseminated to or among members of public bodies in which the Open Meetings Law is not implicated. Often those communications serve as a means of acquiring or exchanging information, knowledge, expertise or different points of view, all of which enable members of public bodies to carry out their duties more effectively on behalf of the public.

If a member of a board having a particular interest or expertise offers information in writing to other members, by means of intra-agency memorandum or perhaps via email, I do not believe that it could be concluded that such action, by itself, would constitute a meeting, even if it leads to responses by other members. In my capacity as the director of an agency headed by a public body, I frequently transmit a variety of detailed materials to the members of the Committee on Open Government prior to its meetings in order that the members can become familiar with the issues, and to be prepared and conversant at the meetings. In some cases, the materials may be clear and

convincing, thereby eliminating the need for a lengthy discussion of their contents at an upcoming meeting. I do not believe that the transmission, whether accomplished through receipt or consideration of the materials by use of email or the Postal Service, would constitute a meeting or that such activity in any way circumvents or contravenes the Open Meetings Law. If a superintendent of schools transmits materials to board members prior to meetings for the same reason, to enable the members to prepare for a meeting, I do not believe that the Open Meetings Law would be implicated. If two of the members want to discuss or communicate with respect to the content of the materials, whether briefly or in detail, unless the board consists of three members, I do not believe that the Open Meetings Law would apply or be implicated in any way.

As you are likely aware, there are different kinds of telephonic or email communications. Depending on their nature and factual circumstances, there may or may not be considerations involving the Open Meetings Law.

When a list of recipients of email, a listserv or its equivalent, is developed, those on the list receive an email message from a sender. The recipients generally open the contents at different times. If I am on the list, if the pc on my desk is on and a message is sent to me, I will open it now. Another recipient may be out of the office or receive the message on his or her home computer, and that person might not open the mail until the next day. A third might not routinely open his or her email and might not see the message until three days have passed. In that kind of circumstance, irrespective of the nature or content of the communication, even though each person on the list has received the same message, and even though the message might engender a response, I do not believe that the transmission or receipt of messages or information by means of email would constitute a "meeting" or that the Open Meetings Law would be implicated, unless, of course, the response involves a vote. In my opinion, there is little distinction between the communication of messages, memoranda and the like via the listserv and traditional inter-office mail. In both of those situations, although the same message may be distributed to all of the recipients, the messages are received at different times, there is no instantaneous interactive communication among the recipients, and no meeting, in my opinion, would be conducted.

If the members of a board of education are on a listserv or its equivalent and one member transmits an email message to all of the other members, again, the members would likely open the message at different times. But what if the receipt of a message precipitates a series of exchanges among the members? What if a majority of the members engage in instantaneous or simultaneous communications in a chat room or by means of instant messaging on what often is known as a "buddy list"? In that situation, what might be characterized as a "virtual" meeting would occur, absent the ability of the public to know of the meeting or to observe the performance of public officials. In my view, a court would determine that a virtual convening of that nature would constitute a secret meeting held in contravention of the Open Meetings Law.

Another possible scenario pertains to what might be characterized as "serial" communications. Although it did not involve email, the decision cited at the outset, Cheevers, supra,

involved an effort to take action by means of a series of telephone conversations. In that case, the court determined that the action effectively taken was a nullity. The court cited and relied upon an opinion rendered by this office and 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 Cheevers, which involved a town board consisting of five members, one member contacted another by phone, who in turn phoned a third member, and that member phoned a fourth. Together they drafted a letter, determined to have it published and submitted a voucher for payment by the town to a newspaper. The fifth member, who had not been contacted, contended that the action taken by means of a series of telephone conversations constituted a meeting held in violation of the Open Meetings Law, and the court agreed.

In like manner, if a series of email communications among members of a board of education involves action taken by the board, I would agree that a meeting would effectively have been held in contravention of the Open Meetings Law. Nevertheless, I believe that there is a distinction between that situation and one in which the members, via email or telephone, exchange questions, information or points of view, so long as there is no virtual convening of a majority and "votes" are not collected or taken. Further, the kinds of exchanges exemplified by the printed email communications between two members, "megan" and "pop3" that Ms. O'Neil-Haight attached to her letter in my opinion would not contravene the Open Meetings Law. In my view, a conversation or exchange of questions or information between or among less than a majority of a public body does not implicate the Open Meetings Law. Even if copies of those communications between megan and pop3 were sent via listserv to the other members, again, there would be no instantaneous communication, and no virtual meeting; the communications would be equivalent to carbon copies, "cc's" of correspondence, distributed to the members.

I recognize that it may difficult to draw a clear line of demarcation between a serial meeting and the kinds of communications described in the preceding paragraph involving Megan and pop3. However, I believe that a distinction can be made between communications of that nature, which in my view would not run afoul of the Open Meetings Law, and a situation in which a group of members constituting a majority function or act, *collectively, as a body*. In that latter instance, it is likely in my view that it would be determined that the Open Meetings Law applies and was contravened.

The remaining issues were raised by Ms. O'Neil-Haight. One involves a retreat conducted by the Board of Education last summer "as a two day private meeting, not open to the public." The topics considered at the retreat included the financial status of the District, the District's capacity and demographics and a variety of other matters. Based on the decision cited earlier, Orange County Publications, supra, I believe that the retreat clearly constituted a meeting that fell within the coverage of the Open Meetings Law. In short, based on her description of the event, the Board convened for the purpose of conducting public business.

The other involved Ms. O'Neil-Haight's contention that "weighing the pros and cons of possible scenarios to house children during renovations [should] take place in public session." She wrote that "[t]he Superintendent's stated position is that she can not discuss this swing space issue in public because she fears that contractual details she is broaching may be compromised should we [the Board] have open debate." Ms. O'Neil-Haight added that "all conversations to date on this issue have taken place exclusively in executive session", and that the public has no knowledge of Board members' views concerning such matters as "safety, what safety issues we are asking to be addressed, which one or more of us is concerned about relative costs, what the relative costs may be, and so on."

In my view, as Ms. O'Neil-Haight described the matter, the ability to conduct an executive session would be minimal.

The Open Meetings Law, in brief, is based on a presumption of openness. Further, 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.

Based on a review of the grounds for entry into executive session, which are set forth in paragraphs (a) through (h) of §105(1), it does not appear that any of those grounds would have been applicable to the kinds of subjects that were described. I note, too, that there no provision concerning executive sessions that relates generally to contracts or contractual matters. The only provision dealing directly with contract negotiations is §105(1)(e), which pertains to collective bargaining negotiations involving a public employee union.

I hope that the foregoing will be considered to be educational and instructive, and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
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May 4, 2004

Ms. Lynn Jackson
[redacted]

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. Jackson:

I have received your letter in which you indicated that you are "an elected member of the Albany County Democratic Committee." You asked "how the Open Meetings Law applies to meetings of members of the Albany County Democratic Committee."

In this regard, in short, I do not believe that the Open Meetings Law applies in any way to the entity in question.

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, in general, is a governmental entity. A political party organization may seek to influence the course of government, but is not itself a governmental entity.

Further, even when members of a legislative body, such as a city council or county legislature, are involved in political party activity, the Open Meetings Law ordinarily does not apply. Section 108(2) of the Open Meetings Law exempts political committees, conferences, and caucuses from the requirements of that law, and paragraph (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 of the legislative body of a county, city, town or village, who are members or adherents of the same political party, without regard to (i) of 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."

It is suggested that you review the rules or by-laws of the Committee, for they may include provisions containing direction that would be responsive to your questions.

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

OML-AO-3789

From: Robert Freeman
To: [redacted]
Date: 5/10/2004 10:58:16 AM
Subject: Dear Mr. Collins:

Dear Mr. Collins:

I have received your letter in which you asked whether the Title Insurance Rate Service Association (TIRSA) is required to conduct its meetings open to the public in accordance with the Open Meetings Law.

In this regard, the Open Meetings Law generally applies public bodies, and §102(2) of the law defines the phrase public body to mean an entity consisting of two or more members that conducts public business and performs a governmental function for one or more governmental entities in New York.

Having reviewed §2313 of the Insurance Law concerning rate service organizations such as TIRSA, I do not believe that such entities conduct public business. Similarly, although they are licensed by the state, I do not believe that the perform what could be characterized as a governmental function.

In short, based on my understanding of the Insurance Law, a rate service organization would not constitute a public body and, therefore, would not be subject to 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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OML-AO-3790

From: Robert Freeman
To: [redacted]
Date: 5/10/2004 11:27:01 AM
Subject: Dear Ms. Bloomquist:

Dear Ms. Bloomquist:

I have received your letter in which you expressed the belief that a town supervisor does not vote unless there is a tie. You asked whether that is accurate.

Although a town supervisor presides at meetings of a town board, in many respects, he or she merely serves as one of five board members. I know of no provision indicating that a town supervisor cannot or should not vote on each matter in which a vote is taken. In short, I do not believe that a town supervisor may or should only vote to break a tie; rather, I believe that supervisor may vote any time that the board votes.

You also asked for the source of written materials pertaining to the Open Meetings Law. In this regard, on our website, which is identified below, contains a variety of material on the Open Meetings Law. Under the heading of "publications" is "Your Right to Know", which is a general guide to the Freedom of Information and Open Meetings Laws. The website includes frequently asked questions and hundreds of written opinions indexed by key phrase rendered by this office.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
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May 10, 2004

E-Mail

TO: Thomas Sobczak, Jr. <tsobczak@barnard.edu>

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Mr. Sobczak:

As you are aware, I have received your letter concerning a meeting of the Carle Place Library Funding District Board of Trustees.

According to your letter, after the adjournment of a meeting held open to the public, "the president called for an executive session." When you asked to know the subject of the executive session, you were told, in your words, that "it was none of [your] business."

In this regard, first, §102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. Therefore, an executive session is not separate from an open meeting, but rather is a portion of such a meeting. 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 membership before such a session may validly be held. The ensuing provisions of §105(1) specify and limit the subjects that may appropriately be considered during an executive session. That being so, a public body 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 opinion will be forwarded to the Board of Trustees.

I hope that I have been of assistance.

RJF:jm

cc: Board of Trustees

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May 11, 2004

Mr. Kenneth L. Packer
[redacted]

The staff of the Committee on 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. Packer:

I have received your letter in which you complained with respect to the content of minutes of a meeting held in July of 2001 by the Town of Sand Lake Planning Board. It is your view that the minutes are inaccurate and create "a false impression." You added that a review of audio and video recordings of that meeting indicate that the minutes are inconsistent with what in fact transpired.

In this regard, I offer the following comments.

First, subdivision (1) of §106 of the Open Meetings Law pertains to minutes of open meetings and states that:

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

Based on the foregoing, it is clear in my opinion that minutes need consist of verbatim account of what is said at a meeting or that the kinds of entries to which you referred are required to be included in the minutes. In short, it appears that the minutes of your interest include more than the law requires. So long as minutes consists of a record or summary of motions, proposals, resolutions, action taken and the vote of each member, I believe that the requirements of the law would be satisfied.

Second, if information above and beyond the elements described in §106(1) is included in minutes, it has been advised that the minutes should be consistent in terms of content and emphasis.

It would be unreasonable, for example, to include in the minutes the comments made by members of one political party, while excluding the comments made by members of a different or opposing political party.

Third, it is implicit in my opinion that minutes must be accurate. I do not believe that they can validly include reference to events that did not occur or erroneously reflect actions or events that did occur.

Since you indicated that the meeting in question was recorded, it might be worthwhile to share the recording with the Board, highlighting what you consider to be inaccuracies, and ask that the Board amend its minutes accordingly.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Planning Board.

STATE OF NEW YORK
DEPARTMENT OF STATE
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May 12, 2004

Ms. Bonnie Barkley
[redacted]

The staff of the Committee on 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. Barkley:

As you are aware, I have received your letter. In your capacity as a new member of a board of education, you asked "what can and can not be discussed in executive session", and whether you may "discuss what was discussed in Executive Session with a BOE member or anyone else." You also asked: "What things need a unanimous vote?"

In this regard, first, paragraphs (a) through (h) of §105(1) of the Open Meetings Law specify the grounds for entry into executive session. That being so, a public body, such as a board of education, cannot enter into executive session to discuss the subject of its choice. Rather than listing the eight grounds for entry into executive session, I have enclosed a copy of the Open Meetings Law.

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

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

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

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

While there may be no prohibition against disclosure of the information acquired during executive sessions or records that could be withheld, the foregoing is not intended to suggest such disclosures would be uniformly appropriate or ethical. Obviously, the purpose of an executive session is to enable members of public bodies to deliberate, to speak freely and to develop strategies in situations in which some degree of secrecy is permitted. Similarly, the grounds for withholding records under the Freedom of Information Law relate in most instances to the ability to prevent some sort of harm. In both cases, inappropriate disclosures could work against the interests of a public body as a whole and the public generally. Further, a unilateral disclosure by a member of a public body might serve to defeat or circumvent the principles under which those bodies are intended to operate. Historically, I believe that public bodies were created to order to reach collective determinations, determinations that better reflect various points of view within a community than a single decision maker could reach alone. Members of boards should not in my opinion be unanimous in every instance; on the contrary, they should represent disparate points of view which, when conveyed as part of a deliberative process, lead to fair and representative decision making. Nevertheless, notwithstanding distinctions in points of view, the decision or consensus by the majority of a public body should in my opinion be recognized and honored by those members who may dissent. Disclosure made contrary to or in the absence of consent by the majority could result

in unwarranted invasions of personal privacy, impairment of collective bargaining negotiations or even interference with criminal or other investigations. In those kinds of situations, even though there may be no statute that prohibits disclosure, release of information could be damaging to individuals and the functioning of government.

Third, while I am not an expert with respect to the Education Law, I know of no instance in which a board of education must vote unanimously. I note, too, that the Freedom of Information Law has long required in §87(3)(a) that a record must be prepared that indicates how each member of a public body cast his or her vote whenever a final action is taken. The record of members' votes is typically included within minutes of meetings.

Lastly, in consideration of your correspondence, I point out that Robert's Rules are not law. To the extent that they are inconsistent with law, I believe that they are of no effect, weight or value.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
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May 12, 2004

E-Mail

TO: Robert Pozzi <rjp@ci.carmel.ny.us>

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. Pozzi:

I have received your letter in which you asked which "topics...can be discussed in a caucus."

In this regard, I offer the following comments.

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.

Another decision, Buffalo News v. Buffalo Common Council [585 NYS 2d 275 (1992), 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, which states 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 v. Council of the City of Newburgh [60 AD2d 409, aff'd 45 NY2d 947 (1978)]. In that landmark decision, it was held that work sessions and similar gatherings constitute "meetings" that fall within the coverage of the Open Meetings Law, even though there may be no intent to take action, and irrespective of the characterization of the gathering. 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). 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 majority of that 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

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May 12, 2004

E-Mail

TO: James Green <jacsgreen@msn.com>

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Mr. Green:

As you are aware, I have received your letter. You wrote that your board of education has repeatedly failed to "advertise board meetings". That being so, you wrote that you are "considering placing on the ballot, by petition, the following proposition....No action may be taken at School Board meeting [sic] that has not been legally advertised."

You have asked whether the foregoing would be appropriate. In this regard, I offer the following comments.

First, to attempt to be clear, I point out that the Open Meetings Law does not require that meetings be "advertised" or that they be preceded by publication of a legal notice. Rather, the law requires that notice must be "given" pursuant to §104 indicating the time and place of a meeting. Specifically, 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.

I note, too, that subdivision (3) states that the notice given need not be a legal notice. Further, when the news media receives notice of a meeting, it may choose to publicize the meeting, but it is not required 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". Further, I believe that action taken by a public body remains valid unless and until a court reaches a conclusion to the contrary. Therefore, your proposal, in my view, would be of questionable effect or validity.

I hope that I have been of assistance.

RJF:jm

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May 14, 2004

Mr. Stephen Smith
[redacted]

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

Dear Mr. Smith:

I have received your letter in which you raised questions concerning executive sessions held to discuss "personnel matters", as well as a retreat held in which the Superintendent's contract was discussed by the Board of Education of the Campbell-Savona Central School District. You also indicated that a consensus was reached at the retreat to renew the Superintendent's contract, that notes and written materials were produced at that meeting, and that it is your view that those materials should be made available to the public upon request. You stated that you wrote a letter to the Board President concerning these issues and that the Board met with its attorney in executive session to discuss your letter.

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

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

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

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

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

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

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

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

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

> "...the public body must identify the subject matter to be discussed (See, Public Officers Law § 105 [1]), and it is apparent that this must be accomplished with some degree of particularity, i.e., merely reciting the statutory language is insufficient (see, Daily Gazette Co. v Town Bd., Town of Cobleskill, 111 Misc 2d 303, 304-305). Additionally, the topics discussed during the executive session must remain within the exceptions enumerated in the statute (see generally, Matter of Plattsburgh Publ. Co., Div. of Ottaway Newspapers v City

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

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

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

Inherent in the definition and its judicial interpretation is the notion of intent. If there is an intent that a majority of a public body 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, insofar as the retreat dealt with the Superintendent's contract or any other matter of public business, it constituted a "meeting" that should have been conducted open to the public in accordance with the Open Meetings Law and preceded by notice given pursuant to §104 of that statute.

Next, if indeed a decision was made by "consensus" or otherwise, I believe that it must be memorialized in minutes.

Assuming that the retreat constituted a meeting and that a decision was made, minutes should have been prepared pursuant to §106 of the Open Meetings Law, which provides what might be characterized as minimum requirements concerning the contents of minutes and states in relevant part that:

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

> resolutions and any other matter formally voted upon and the vote thereon...
>
> 3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meetings except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

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

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

I note, too, that the law requires the maintenance of a record indicating the manner in which each member voted. Section 87(3)(a) of the Freedom of Information Law states that: "Each agency shall maintain...a record of the final vote of each member in every agency proceeding in which the member votes." As such, members of public bodies cannot take action by secret ballot.

If records of the proceedings were prepared, such as notes or other written materials, they would be subject to rights of access conferred by the Freedom of Information Law. That statute pertains to agency records, and §86(4) defines the term "record" to mean:

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

In view of the breadth of the definition of "record", notes or written materials, for example, would fall within the scope of rights of access.

The Freedom of Information Law is based on a presumption of access; all agency records are accessible, except to the extent that they may be withheld in accordance with one or more of the grounds for denial appearing in paragraphs (a) through (i) of §87(2). In my view, one of the grounds for denial would be pertinent in ascertaining rights of access to summaries or notes. Specifically, §87(2)(g) enables an agency to deny access to records that:

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

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

To the extent that notes or written materials consist of a factual rendition of what transpired, it appears that they would be available.

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

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

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

When an attorney-client relationship has been invoked, it is considered confidential under §4503 of the Civil Practice Law and Rules. Therefore, if an attorney and client establish a privileged

relationship, the communications made pursuant to that relationship would in my view be confidential under state law and, therefore, exempt from the Open Meetings Law.

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

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

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

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

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

> "While there is no question that Executive Sessions can be conducted for proper reasons and that an exception exists under the Open Meetings Law for attorney-client privileged communications, the scope of that privilege is limited. Once the legal advice is offered, discussions with regard to substance (e.g.) the closing date of a bus system, do not fall within the privilege of the exception. See Exhibit C, April 8, 1996 Open Meetings Law Advisory Opinion #2595,

Robert J. Freeman, Executive Director of Committee on Open government at page 4:

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Mr. Robert Plaskov

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May 17, 2004

Mr. Barton D. Graham
Director
Student Advocate Group for Education, Inc,
[redacted]

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

Dear Mr. Graham:

I have received your letter in which you sought an advisory opinion relating to a variety of questions pertaining to meetings of the Board of Education of the Elmira School District.

You referred initially to a minutes of a meeting indicating that a motion was made to enter into executive session "for the purpose of discussion a particular person" and asked whether a motion of that nature is adequate.

In this regard, by way of general 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.

The language of the exception to which you referred, §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..."

From my perspective, a proper motion for entry into executive session under the exception quoted above would include two elements: reference to the term "particular" in order to enable Board members and others in attendance that the subject focuses on a certain person or corporation, and one or more of the subjects indicated in that provision. For instance, a proper motion might be: "I move to enter into an executive session to discuss the employment history of a particular person (or persons)". Such a motion would not in my opinion have to identify the person or persons who may be the subject of a discussion. By means of the kind of motion suggested above, members of a public body and others in attendance would have the ability to know that there is a proper basis for entry into an executive session. 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 matter that relates to a particular person, without more, 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.

If a public body "fails to identify one of the enumerated items in sec, 105 1. (f)", you asked whether all discussions then held [are] considered as being part of an open meeting." I must admit that I do not understand the question. If you are asking whether a failure to make a proper motion to enter into executive session nullifies the ability to conduct an executive session, I do not believe that would be the result. In my view, most important in ascertaining the propriety of an executive session is whether the subject or subjects fall within the scope of one or more among the eight grounds for entry into executive session listed in §105(1).

You asked what the consequences may be if a public body is "deliberately flouting applicable laws." If members of the public recognize that to be so, they may elect new members. There may be criticism by the public and the news media. Additionally, §107 of the Open Meetings Law states in part that:

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

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".

I note that §107 also authorizes a court to award attorney's fees to the successful party.

Next, you raised several questions concerning the responsibility of a school district attorney to be knowledgeable and to provide proper services. Those questions do not deal directly with the laws within the scope of the advisory jurisdiction of this office. As such, I cannot appropriately answer.

You questioned the validity of a Board policy that requires that any matter discussed in executive session "must be treated as confidential; that is, never discussed outside of that executive session." While Board members are not ordinarily required to discuss or divulge what occurred during executive sessions, I do not believe that they are generally prohibited from doing so.

For purposes of considering the issue of "confidentiality", reference will be made to the Open Meetings Law, as well as the Freedom of Information Law. Both of those statutes are based on a presumption of openness. In brief, the former requires that meetings of public bodies, such as boards of education, be conducted open to the public, except when an executive session may properly be held under §105(1) or when a matter is exempt from its coverage; the latter requires that agency records be made available to the public, except to the extent that one or more grounds for denial access appearing in §87(2) may properly be asserted. The first ground for denial in the Freedom of Information Law, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." Similarly, §108(3) of the Open Meetings Law refers to matters made confidential by state or federal law as "exempt" from the provisions of that statute.

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

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

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

> "Exemption 3 excludes from its coverage only matters that are:
>
> > *specifically* exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) **requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue**, or (B) establishes

> particular criteria for withholding or refers to particular types of matters to be withheld.
>
> "5 U.S.C. § 552(b)(3) (1982) (emphasis added). Records sought to be withheld under authority of another statute thus escape the release requirements of FOIA if – and only if – that statute meets the requirements of Exemption 3, including the threshold requirement that it specifically exempt matters from disclosure. The Supreme Court has equated 'specifically' with 'explicitly.' *Baldridge v. Shapiro*, 455 U.S. 345, 355, 102 S. Ct. 1103, 1109, 71 L.Ed.2d 199 (1982). '[O]nly *explicitly* non-disclosure statutes that evidence a congressional determination that certain materials ought to be kept in confidence will be sufficient to qualify under the exemption.' *Irons & Sears v. Dann*, 606 F.2d 1215, 1220 (D.C.Cir.1979) (emphasis added). In other words, a statute that is claimed to qualify as an Exemption 3 withholding statute must, on its face, exempt matters from disclosure"[Reporters Committee for Freedom of the Press v. U.S. Department of Justice, 816 F.2d 730, 735 (1987); modified on other grounds,831 F.2d 1184 (1987); reversed on other grounds, 489 U.S. 789 (1989); see also British Airports Authority v. C.A.B., D.C.D.C.1982, 531 F.Supp. 408; Inglesias v. Central Intelligence Agency, D.C.D.C.1981, 525 F.Supp, 547; Hunt v. Commodity Futures Trading Commission, D.C.D.C.1979, 484 F.Supp. 47; Florida Medical Ass'n, Inc. v. Department of Health, Ed. & Welfare, D.C.Fla.1979, 479 F.Supp. 1291].

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

In contrast, when records are not exempted from disclosure by a separate statute, both the Freedom of Information Law and its federal counterpart are permissive. Although an agency *may* withhold records in accordance with the grounds for denial appearing in §87(2), the Court of Appeals has held that the agency is not obliged to do so and may choose to disclose, stating that:

> "...while an agency is permitted to restrict access to those records falling within the statutory exemptions, the language of the exemption provision contains permissible rather than mandatory language, and it is within the agency's discretion to disclose such records...if it so chooses" [Capital Newspapers v. Burns, 67 NY2d 562, 567 (1986)].

The only situations in which an agency cannot disclose would involve those instances in which a statute other than the Freedom of Information Law prohibits disclosure. The same is so under the federal Act. While a federal agency *may* withhold records in accordance with the grounds for denial, it has discretionary authority to disclose. Stated differently, there is nothing inherently

confidential about records that an agency may choose to withhold or disclose; only when an agency has no discretion and must deny access would records be confidential or "specifically exempted from disclosure by statute" in accordance with §87(2)(a).

The same analysis is applicable in the context of the Open Meetings Law. While that statute authorizes public bodies to conduct executive sessions in circumstances described in paragraphs (a) through (h) of §105(1), there is no requirement that an executive session be held even though a public body has the right to do so. The introductory language of §105(1), which prescribes a procedure that must be accomplished before an executive session may be held, clearly indicates that a public body "may" conduct an executive session only after having completed that procedure. If, for example, a motion is made to conduct an executive session for a valid reason, and the motion is not carried, the public body could either discuss the issue in public or table the matter for discussion in the future.

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

By means of example, if a discussion by a board of education concerns a record pertaining to a particular student (i.e., in the case of consideration of disciplinary action, an educational program, an award, etc.), the discussion would have to occur in private and the record would have to be withheld insofar as public discussion or disclosure would identify the student. As you may be aware, the Family Educational Rights and Privacy Act (20 USC §1232g) generally prohibits an educational agency from disclosing education records or information derived from those records that are identifiable to a student, unless the parents of the student consent to disclosure. In the context of the Open Meetings Law, a discussion concerning a student would constitute a matter made confidential by federal law and would be exempted from the coverage of that statute [see Open Meetings Law, §108(3)]. In the context of the Freedom of Information Law, an education record would be specifically exempted from disclosure by statute in accordance with §87(2)(a). In both contexts, I believe that a board of education, its members and school district employees would be prohibited from disclosing, because a statute requires confidentiality.

In a case in which the issue was whether discussions occurring during an executive session held by a school board could be considered "privileged", it was held that "there is no statutory provision that describes the matter dealt with at such a session as confidential or which in any way restricts the participants from disclosing what took place" (Runyon v. Board of Education, West Hempstead Union Free School District No. 27, Supreme Court, Nassau County, January 29, 1987). In the context of most of the duties of most municipal boards, councils or similar bodies, there is no statute that *forbids* disclosure or requires confidentiality. Again, the Freedom of Information Law states that an agency *may* withhold records in certain circumstances; it has discretion to grant or deny access. The only instances in which records may be characterized as "confidential" would, based on judicial interpretations, involve those situations in which a statute prohibits disclosure and leaves no discretion to a person or body.

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

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

In Harman v. City of New York [140 F.3d 111 (2nd Cir. 1998)], the New York City Human Resources Administration (HRA) adopted an executive order that forbade its employees:

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

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

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

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

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

> "Individuals do not relinquish their First Amendment rights by accepting employment with the government. See *Pickering v. Board*

> *of Educ.*, 391 U.S. 563, 568, 88 S. Ct. 1731, 1734, 20 L. Ed. 2d 811 (1968). However, the Supreme Court has recognized that the government 'may impose restraints on the job-related speech of public employees that would be plainly unconstitutional if applied to the public at large.' *United States v. National Treasury Employees Union*, 513 U.S. 454, 465, 115 S. Ct. 1003, 1012, 130 L. Ed2d 964 (1995) (NTEU). In evaluating the validity of a restraint on government employee speech, courts must 'arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting efficiency of the public services it performs through its employees. *Pickering*, 391 U.S. at 568, 88 S.Ct. at 1734-35"(id., 117).

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

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

> ails the agencies for which they work; public debate may gain much from their informed opinions.' *Waters v. Churchill*, 511 U.S. 661, 674, 114 S.Ct. 1878, 1887, 128 L.Ed.2d 686 (1994)..." (id., 118-119).

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

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

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

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

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

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

> "The City contends that employee speech will be permitted as long as it will not interfere with the efficient and effective operations of the agencies. We do not find this standard to be sufficiently definite to limit the possibility for content or viewpoint censorship. Because the press policies allow suppression of speech before it takes place, administrators may prevent speech that would not actually have had a disruptive effect. See e.g., *NTEU*, 513 U.S. at 475 n.21, 115 S.Ct. at 1017 n.21 ('Deferring to the Government's speculation about the pernicious effects of thousands of articles and speeches yet to be written or delivered would encroach unacceptably on the First Amendment's protections.'). Furthermore, the standard inherently disfavors speech that is critical of agency operations, because such comments will necessarily seem more potentially disruptive than comments that 'toe[] the agency line.' *Sanjour*, 56 F3d at 96-97 (striking down regulation that permitted reimbursement for only those speaking engagements consistent with the 'mission of the agency' as a restriction on anti-government speech).

> "The challenged regulations thus implicate all of the above concerns. By mandating approval from an employee's superiors, they will discourage speakers with dissenting views from coming forward. They provide no time limit for review to ensure that commentary is not rendered moot by delay. Finally, they lack objective standards to limit the discretion of the agency decision-maker. For these reasons we agree with the district court that 'ACS 101 and HRA 641 clearly restrict the First Amendment rights of City employees..."(id., 121).

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

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

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

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

In my opinion, in the context of school district business, matters would be "confidential" only on rare occasions. Those situations might involve information that is derived from student records or perhaps attorney work product or records subject to the attorney-client privilege. In most instances, however, there would be no prohibition against disclosure based on a statute that forbids release of records or their contents.

A general prohibition is in my view contrary to the holding rendered in Harman. It is vague, or in the words of Harman, not "sufficiently definite"; it is prospective and "chills speech before it

happens", for it does not focus on any harm that has actually occurred. In short, it stifles free speech in a manner that has been found to be unconstitutional.

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

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.

Lastly, you asked whether members of the public may "make a FOIL request verbally at public meetings." In my opinion, although an agency may choose to accept requests made in that manner, it would not be required to do so. Under §89(3) of the Freedom of Information Law, an agency may require that a request be made in writing. In addition, pursuant to the procedural

regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), an agency may establish the times and places during which requests for records can be made, i.e., regular business hours.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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May 18, 2004

Ms. Judith Winters
[redacted]

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. Winters:

I have received your letter and the news article relating to it. The article states that the chief financial officer for the Roslyn School District was "forced to retire and make restitution after allegedly embezzling $250,000 from the district, [and] may have stolen as much as $1 million..." The article also indicates that District officials chose not to pursue criminal charges, but rather is suing to recover moneys and forced the officer to retire. Residents of the District were informed of the matter in a letter sent to them by the Board of Education and the Superintendent.

Since a board of education cannot take action during an executive session to appropriate public moneys, you contended "the converse would hold true as well", that action to recover public moneys should be taken in public. You questioned, too, whether a board of education is "obligated to make known to the public a loss of public funds at the time of discovery..."

In this regard, I offer the following comments.

First, as you suggested, a public body cannot appropriate public moneys during an executive session. However, there is nothing in the Open Meetings Law or any other statute of which I am aware that would in every instance stand for the proposition that you offered, that an action to recover public moneys must be taken during an open meeting.

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

Those situations would arise, for example, when a board initiates charges against a tenured person pursuant to §3020-a of the Education Law, which requires that a vote to do so be taken during an executive session. The other instance would involve a situation in which action in public could identify a student. When information derived from a record that is personally identifiable to a student, the federal Family Educational Rights and Privacy Act (20 USC §1232g) would prohibit disclosure absent consent by a parent of the student. Since §102(2) of the Open Meetings Law states that minutes need not include information that may be withheld under the Freedom of Information Law, and since records identifiable to students may be withheld, minutes containing those kinds of information would not be accessible to the public.

In my view, if action was taken with respect to the officer alleged to have misappropriated funds, i.e., to terminate her or to accept her retirement, I believe that any such action could properly have been taken only during an open meeting.

Second, when the problem was discovered and connected to the chief financial officer, it is likely that an executive session could have been held to discuss the nature of action that might be taken relative to her. Section 105(1)(f) authorizes a public body to enter into executive session to discuss:

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

Under the circumstances, it appears that some aspects of the Board's discussion of the situation would have involved a matter leading to the demotion, discipline or dismissal of a particular person.

Lastly, I know of no law that would have required District officials, on their own initiative, to inform the public of the loss of funds when the problem was discovered. Any person, however, may seek school district records at any time under the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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May 19, 2004

E-MAIL

TO: Don Christensen <[redacted]

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Mr. Christensen:

I have received your letter in which you raised a variety of concerns and questions relating to access to records of the City of Hudson.

Your initial area of inquiry involves whether it is "legal for an office to destroy the 'paper trail' of documents during a so-called process of 'revision.'" In this regard, the Freedom of Information Law does not include or provide direction or requirements concerning the preservation or destruction of records. Pertinent is Article 57-A of the Arts and Cultural Affairs Law, which deals with the management, custody, retention and disposal of records by local governments. For purposes of those provisions, §57.17(4) of the Arts and Cultural Affairs Law defines "record" to mean:

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

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

> "1. It shall be the responsibility of every local officer to maintain records to adequately document the transaction of public business and the services and programs for which such officer is responsible;

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

As such, 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. To ascertain the length of time that the records of your interest must be retained, it is suggested that you might contact the State Archives, the unit of the Education Department that devises the retention schedules, at 474-6928.

Second, you wrote that the City of Hudson's Code Enforcement Officer"demanded a $25 'administration fee' in advance of any compliance with [your] request....even if the question ended up without any resulting documents." You added that it is your understanding that a fee of that nature cannot be charged "unless there was a local statute prescribing such a fee..." Based on the legislative history of the Freedom of Information Law, the City cannot assess such a fee, even if a local law or "local statute" prescribes the assessment of the fee.

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

> "The problem is that the term 'law' may include regulations, local laws, or ordinances, for example. As such, state agencies by means of regulation or municipalities by means of local law may and in some instances have established fees in excess of twenty-five cents per photocopy, thereby resulting in constructive denials of access. To remove this problem, the word 'law' should be replaced by 'statute',

> thereby enabling an agency to charge more than twenty-five cents only in situations in which an act of the State Legislature, a statute, so specifies."

Therefore, prior to October 15, 1982, a local law, an ordinance, or a regulation for instance, establishing a search fee or a fee in excess of twenty-five cents per photocopy or higher than the actual cost of reproduction was valid. However, under the amendment, only an act of the State Legislature, a statute, would in my view permit the assessment of a fee higher than twenty-five cents per photocopy, a fee that exceeds the actual cost of reproducing records that cannot be photocopied, (i.e., electronic information), or any other fee, such as a fee for "administration", search or overhead costs. In addition, it has been confirmed judicially that fees inconsistent with the Freedom of Information Law may be validly charged only when the authority to do so is conferred by a statute [see Gandin, Schotsky & Rappaport v. Suffolk County, 640 NYS 2d 214, 226 AD 2d 339 (1996); Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)].

Further, 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)."

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

Your remaining questions deal with minutes of meetings, and you wrote that you "found several errors" in the minutes of a meetings of the Zoning Board of Appeals. Although you pointed out the errors to the Chairman, he informed you that you have no right to "question the minutes" and that only board members may do so. You added that the mayor "impounded" the minutes of local boards, commissions and committees" and asked whether it is "common practice to have copies of such minutes and requests for copies of these minutes filtered through the Mayor's office."

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

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

The provisions quoted above offer guidance in relation to several of the issues that you raised. It is clear, for example, that minutes need not consist of a verbatim of account of all that is stated a meeting. It is also clear that minutes must be prepared and made available to the public "within two weeks of the date of such meeting." I note, too, that there is nothing in the Open Meetings Law or any other statute of which I am aware that requires that minutes be approved. Nevertheless, as a matter of practice or policy, many public bodies approve minutes of their meetings. In the event that minutes have not been approved, to comply with the Open Meetings Law, it has consistently been advised that minutes be prepared and made available within two weeks, and that if the minutes have not been approved, they may be marked "unapproved", "draft" or "preliminary", for example. By so doing within the requisite time limitations, the public can

generally know what transpired at a meeting; concurrently, the public is effectively notified that the minutes are subject to change. If minutes have been prepared within less than two weeks, I believe that those unapproved minutes would be available as soon as they exist, and that they may be marked in the manner described above.

I do not believe that it is "common practice" for a mayor to control access to minutes of meetings, and there is nothing in the Open Meetings Law that provides guidance concerning who should have custody of minutes or where they must be kept. There may, however, be provisions in the City code or charter that offer direction. Notwithstanding the absence of any such provision, in my experience, minutes are among the most public and readily accessible records maintained by local governments. In many instances, they are routinely and informally made available without any written or formal request. While there is no requirement that minutes be placed on a municipality's website, either in their "official" or summary form, local governments often do so, again, because minutes are unquestionably public.

Lastly, inherent in the law is that the minutes must be accurate and reflect the reality of what occurred or was expressed. In my view, a member of the public has no right to insist upon the amendment or correction of minutes; I believe that only a public body, by means of a majority vote of its total membership, may amend or correct minutes. However, certainly you or anyone else may seek to bring perceived inaccuracies to the attention of government officials.

As you inferred, meetings are frequently recorded, and it was held more than twenty-five years ago that a tape recording of an open meeting constitutes a record that must be made available to the public under the Freedom of Information Law (see Zaleski v. Hicksville Union Free School District, Supreme Court, Nassau County, NYLJ, December 27, 1978). Moreover, it has been held that a member of the public may audio or video record an open meeting of a public body, so long as the use of the recording device is neither disruptive nor obtrusive [see e.g., Csorny v. Shoreham-Wading River Central School District, 305 AD2d 83 (2003)]. Through a review of a recording, whether it was prepared by a government agency or the public, there should be an opportunity to ascertain whether the contents of minutes are indeed accurate.

I hope that I have been of assistance.

RJF:tt

cc: City Council
Mayor, City of Hudson
Code Enforcement Officer

From: Robert Freeman
To: [redacted]
Date: 5/21/2004 8:56:33 AM
Subject: Dear Ms. Cabral Marrero:

Dear Ms. Cabral Marrero:

I have received your inquiry. In short, the Open Meetings Law does not become pertinent unless there is a "meeting" of a public body, such as a village board of trustees. A "meeting" is a gathering of a majority of the members of a public body for the purpose of conducting public business, collectively as a body.

In the context of the situation that you described, if the Mayor meets with residents and no majority of the Board is present, the Open Meetings Law would not apply. On the other hand, again, if a majority of the Board convenes and functions as a body, the gathering, in my view, would constitute a meeting that must be preceded by notice and must be held open to the public in accordance with the Open Meetings Law.

With respect to your concern that the Mayor may be acting unethically, that kind of issue is not addressed in the Open Meetings Law. If there is a Village ethics board or equivalent body, it is suggested that your concern be expressed there. If there is no such entity, perhaps the issue should be raised at a Board meeting so that the Board might consider developing some sort of rules of conduct.

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

Robert J. Freeman
Executive Director
NYS Committee on Open Government
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STATE OF NEW YORK
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May 25, 2004

Mr. Roy Hochberg
[redacted]

The staff of the Committee on 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. Hochberg:

As you are aware, I have received your letter and the materials attached to it. You referred to minutes of meetings held by the Hurley Town Board indicating that the Board frequently has entered into executive sessions to discuss "a personnel issue" or "a personnel matter." Having reviewed opinions rendered by this office, it is your view that those characterizations are inadequate to comply with the Open Meetings Law.

In this regard, I offer the following comments.

First, from my perspective, more important than the reference in the minutes is whether the subject matter qualifies for entry into executive session. By way of background, §105(1) of the Open Meetings Law requires that a procedure be accomplished in public before an executive session may be held. One element of that procedure requires that a motion for entry into executive session must identify "the general area or areas of the subject or subjects to be considered." If indeed a motion merely indicates that the topic to be considered involves "a personnel issue" or "a personnel matter", that kind of description is insufficient to enable either Board members or others in attendance to know whether the subject matter to be considered can appropriately be discussed during an executive session.

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

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

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

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

Even when §105(1)(f) may be validly asserted, it has been advised that a motion describing the subject to be discussed as a personnel matter or a phrase similar to that, is inadequate, and it has been advised and held 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 issue" or a "personnel matter" is inadequate, for it fails to enable the public or even members of the Board to know whether subject at hand may properly be considered during an executive session.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3802

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May 25, 2004

Mr. Robert W. Nathan
[redacted]

The staff of the Committee on 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. Nathan:

As you are aware, I have received your letter in which you asked whether the board of directors of a townhouse association, a not-for-profit corporation, is required to comply with the state's Open Meetings Law.

In this regard, 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, the Open Meetings Law generally pertains to governmental entities. In my view, a townhouse association that is not a governmental entity and would not constitute a public body. Therefore, it would not be required to give effect to or comply with the Open Meetings Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
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May 27, 2004

E-MAIL

TO: "Supervisor Susan Cockburn" <tomsupervisor@frontiernet.net>

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Supervisor Cockburn:

As you are aware, I have received your letter in which you raised questions relating to the Open Meetings and Freedom of Information Laws.

You wrote that members of the Town Board and others "have repeatedly met in a local village bar...and have discussed town matters amongst themselves in full view of the public", often after Town Board meetings.

In this regard, by way of background, in a landmark decision rendered in 1978, the state's highest court, the Court of Appeals, held that any gathering of a majority of a public body for the purpose of conducting public business constitutes a "meeting" subject to the Open Meetings Law, whether or not there is an intent to take action, and regardless of the manner in which a gathering may be characterized [see Orange County Publications, Division of Ottoway Newspapers, Inc. v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

In my opinion, inherent in the definition of "meeting" is the notion of intent. If a majority of a public body gathers in order to conduct public business collectively, as a body, I believe that such a gathering would constitute a "meeting" subject to the Open Meetings Law. In the decision cited above, the Court affirmed a decision rendered by the Appellate Division,that dealt specifically with so-called "work sessions" and similar informal gatherings during which there was merely an intent to discuss, but no intent to take formal action. In so holding, the court stated:

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

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

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

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

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

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

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

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

From my perspective, every provision of law, including the Open Meetings Law, should be implemented in a manner that gives reasonable effect to its intent. While a bar or restaurant is open to the public, I believe that it would be inappropriate and inconsistent with the Open Meetings Law to hold a meeting in a location where those who attend must be members or are expected to make a purchase. Any member of the public has the right to attend meetings of public bodies. In my view, a meeting held at a bar would represent an impediment to free access by the public.

Next, you referred to a situation in which a town employee quit without notice and claimed payment for more than a thousand hours of compensatory, vacation and sick time. When you asked for the records from the Town Clerk indicating those accruals, you were told that they do not exist. However, a Town Board member said that he has the records at his home. You indicated that you would like to see them prior to any payment.

As you are likely aware, the Freedom of Information Law pertains to existing records. However, due to the scope of that statute, I believe that the records of your interest must be made available insofar as they exist, irrespective of their physical location. The Freedom of Information Law includes all agency records within its coverage, 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 upon the language quoted above, documents need not be in the physical possession of the Town Clerk or located in Town offices to constitute agency records; so long as they are produced, kept or filed for an agency, the courts have held they constitute "agency records", even if they are maintained apart from an agency's premises.

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

Perhaps most significant is a decision rendered by the Court of Appeals in which it was found that materials received by a corporation providing services pursuant to a contract for a branch of the State University that were kept on behalf of the University constituted "records" falling with the coverage of the Freedom of Information Law. I point out that the Court rejected "SUNY's contention that disclosure turns on whether the requested information is in the physical possession

of the agency", for such a view "ignores the plain language of the FOIL definition of 'records' as information kept or held 'by, with or for an agency'" [see Encore College Bookstores, Inc. v. Auxiliary Services Corporation of the State University of New York at Farmingdale, 87 NY 2d 410. 417 (1995)].

In the context of the matter as you presented it, if the materials at issue are kept by a Town Board member or other person at his or her home or private office, I believe that they would constitute Town records subject to rights conferred by the Freedom of Information Law. I note, too, that §30 of the Town Law states in part that a town clerk is the legal custodian of all town records. That being so, if the records sought are kept outside of Town offices, I believe that the Town Clerk would have the responsibility to obtain them or direct their disclosure in response to a request for their review by yourself or a member of the public.

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

Section 87(2)(b) authorizes an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy", and the courts have provided substantial direction regarding the privacy of public employees. According to those decisions, 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 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); 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].

One of the decisions referenced above, Capital Newspapers v. Burns, involved a request for records reflective of the days and dates of sick leave claimed by a particular municipal police officer, and in granting access, the Court of Appeals found that the public has both economic and safety reasons for knowing when public employees perform their duties and whether they carry out those duties when scheduled to do so. As such, attendance records are in my opinion clearly available, for they are relevant to the performance of public employees' official duties. Similarly, I believe that records reflective of leave used or accrued must be disclosed, for the public has an economic interest in obtaining those records and because the records are relevant to the performance of public employees' official duties.

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

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

Based on the preceding analysis, it is clear in my view that the records at issue must be disclosed under the Freedom of Information Law.

I hope that I have been of assistance.

RJF:tt

FOIL-AO-3804

From: Robert Freeman
To: [redacted]
Date: 5/27/2004 3:12:34 PM
Subject: Dear Supervisor Zatz:

Dear Supervisor Zatz:

I have received your letter in which you asked whether the Gardiner Planning Board may interview a candidate for a vacancy on that Board in private.

In this regard, I offer the following comments.

First, if a majority of the Planning Board convenes to conduct an interview or to discuss the strengths and weaknesses of a candidate, any such gathering would, according to judicial decisions, constitute a "meeting" subject to the Open Meetings Law. That being so, the meeting must be preceded by notice of the time and place given to the news media and the public and convened open to the public.

Second, when the Board is about to conduct the interview or discuss the merits of a candidate, I believe that the Board could enter into executive session pursuant to §105(1)(f) of the Open Meetings Law. That provision states in part that an executive session may be held to discuss a matter leading to the appointment of a particular person, and it is suggested that the motion for entry into executive session indicate exactly that (without the name).

If the interview is to be the only item considered by the Planning Board at its meeting, it is recommended that notice given prior to the meeting indicate that to be so and that a motion for entry into executive session will be made immediately after the meeting begins.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
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May 27, 2004

Hon. Roberta Puritz
Otsego County Legislator
[redacted]

Hon. Ronald Feldstein
[redacted]

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 County Representatives Puritz and Feldstein:

As you are aware, I have received your correspondence in which you suggested that Public Administration Committee ("the Committee") of the Otsego County Board of Representatives ("the Board") might have failed to comply with the Open Meetings Law.

Specifically, you wrote that the Committee "'met' by telephone which resulted in them sponsoring a resolution for the Board to consider at a special meeting of the Board" that was called by the Chair for the following day. The action taken by the Committee by phone was significant, for if that action was invalid, a matter considered by the Board could not have been "brought forth...in the manner that it was..."

In this regard, I offer the following comments.

First, 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, it is clear in my view that the Open Meetings Law includes within its scope governing bodies, such as the Board, as well as any committee or subcommittee of the Board, such as the Committee that is the subject of your inquiry [see also Glens Falls Newspapers, Inc. v. Solid Waste And Recycling Committee of the Warren County Board of Supervisors, 601 NYS2d 29, 195 AD2d 898 (1993)].

Second, based on case law and the relatively recent enactment of amendments to the Open Meetings Law and another statute, 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.

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 the Committee, or a convening that occurs through videoconferencing. I point out, too, that §103(c) of the Open Meetings Law states that "A public body that uses videoconferencing to conduct its meetings shall provide an opportunity to attend, listen and observe at any site at which a member participates."

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

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

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

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

In consideration of the language quoted above, 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.

That statement of intent clearly indicates that 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 do not believe that the Committee could validly have taken action by means of a telephone conference call or a series of phone calls.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Chairman Higgins, Board of Representatives

STATE OF NEW YORK
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May 28, 2004

Ms. Paulette Glasgow
[redacted]

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. Glasgow:

I have received your letter in which you asked that I address a variety of questions. In this regard, it is noted at the outset that the advisory jurisdiction of the Committee on Open Government primarily concerns matters relating to the Open Meetings and Freedom of Information Laws. Your initial questions involve referenda that fall beyond the jurisdiction or expertise of this office. The others pertain to the Open Meetings Law, and I offer the following comments.

You asked how "a town board may notice meetings." Section 104 of the Open Meetings Law pertains to notice and states that:

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

In consideration of the foregoing, first, I point out that a public body is required only to provide notice of the time and place of a meeting. There is nothing in the Open Meetings Law that requires that notice of a meeting include reference to the subjects to be discussed. Similarly, there is nothing in that statute that pertains to or requires the preparation of an agenda.

Section 104 imposes a dual requirement, for notice must be posted in one or more conspicuous, public locations, and in addition, notice must be given to the news media. That notice of a meeting is faxed to various locations or offices does not necessarily suggest or indicate that a public body has complied with law. Again, the law requires that notice of a meeting be "posted"in one or more "designated" locations. The term "designated" in my opinion involves a requirement that a public body, by resolution or through the adoption of policy or a directive, must select one or more specific locations where notice of meetings will consistently and regularly be posted. If, for instance, a bulletin board located at the entrance of a town hall 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.

From my perspective, 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.

Second, you asked that I "explain the proper motion to enter into executive session", and you referred specifically to a motion to discuss "legal matters." I point out that §102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. While there is no requirement that the public be informed of whether a public body intends to return to the open meeting following an executive session, I believe that it would be considerate and courteous to do so.

With respect to the subject matter, there is no provision that directly authorizes a public body to discuss "legal matters" during an executive session. To put your question in context, the Open Meetings Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, §105(1) states in relevant part that:

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

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

The provision most analogous to "legal matters" is §105(1)(d), which permits a public body to enter into executive session to discuss "proposed, pending or current litigation." 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 Lewiston." 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.

Lastly, you asked whether discussion of "a contract to secure the services of a developer" may be considered during an executive session. In my view, the only provision that might apply would be §105(1)(f), which authorizes a public body to enter into executive session to discuss:

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

It would appear that the issue would involve a matter leading to the employment of a particular corporation, perhaps as well as that entity's financial, credit or employment history.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board

STATE OF NEW YORK
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June 1, 2004

Ms. Sandy Williams
[redacted]

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

Dear Ms. Williams:

I have received your letter in which you referred to a meeting of the Owego Apalachin Central School District Board of Education that was held without notice given to the news media. You have sought my opinion concerning the matter.

In this regard, §104 of the Open Meetings Law requires that notice be given by a public body prior to every meeting. Specifically, that provision states that:

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

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

"emergency" meetings, if, for example, there is a need to convene quickly, the notice requirements can generally be met by telephoning or faxing notice of the time and place of a meeting to the local news media and by posting notice in one or more designated locations.

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

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

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

In an effort to enhance understanding of and compliance with 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 Education

STATE OF NEW YORK
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June 1, 2004

E-MAIL

TO: John Visentin <jcv44wf@mac.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. Visentin:

As you aware, I have received your letter. Please accept my apologies for the delay in response.

In your capacity as a member of a village board of trustees, you asked whether a motion for entry into executive session may include reference to the topic to be discussed "with impunity." You referred to a situation in which a person recently appointed by the village might have falsified his educational records, and you asked whether such a motion may state that: "The board would like to enter executive session in order to discuss the validity of educational records stated by (name of individual) for the position he holds."

In this regard, although there is nothing in the Open Meetings Law that would prohibit the inclusion of a person's name in a motion for entry into executive session, it has been advised by this office and confirmed by the Appellate Division that the name need not be included. Further, the motion as you recited it would not necessarily have indicated that the subject matter clearly fell within one of the grounds for entry into executive session.

By way of background, §105(1) of the Open Meetings Law 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.

From my perspective, the provision that would have been applicable is §105(1)(f), which authorizes a public body to enter into executive session to discuss:

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

It has been held that a motion under §105(1)(f) that describes the subject as a "personnel matter" or similarly is inadequate. Specifically, it has been found 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 the context of the situation that you described, I believe that a proper motion might have been: "I move to enter into executive session to discuss a matter leading to the discipline of a particular person", without naming the individual, or perhaps to discuss "the employment history of a particular person", again, without naming him.

I hope that I have been of assistance.

RJF:tt

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June 1, 2004

Ms. Barbara Mattson
[redacted]

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. Mattson:

I have received your letter and the materials attached to it. You referred to a meeting held by the Hunter Town Board during which the Board entered into executive session "to discuss several private issues that were listed as 'Executive Session' on the agenda for that meeting." On the following day, you were informed by the Supervisor that a motion to eliminate the Town's grant writer position was approved during the executive session.

You have questioned the propriety "of this action taken in executive session" and asked whether "a town position call lawfully be eliminated in secret." In this regard, I offer the following comments.

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

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

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

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

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

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

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

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

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

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

When a discussion concerns matters of policy, such as the manner in which public money will be expended or allocated, I do not believe that §105(1)(f) could be asserted, even though the discussion relates to "personnel". For example, if a discussion involves staff reductions or layoffs due to budgetary concerns, the issue in my view would involve matters of policy, and it has been held that when a matter pertains to a position, and not to the performance of a person holding that position, there would be no basis for conducting an executive session [see Gordon v. Village of Monticello, 207 AD 2d 55 (1994)]. Similarly, in the only decision of which I am aware that dealt specifically with the discussion of layoffs, a decision rendered prior to the enactment of the amendment discussed earlier and the renumbering of the Open Meetings Law, 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 [section] 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 [section] 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 6, 1978).

In short, insofar as a public body focuses on a particular person in relation to his or employment history or performance, I believe that an executive session may properly be held. However, to the extent that a discussion involves the needs of a municipality or budgetary matters in relation to the retention or elimination of a position, I do not believe that there is a basis for conducting an executive session.

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
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June 1, 2004

E-MAIL

TO: Gary Fredericks <[redacted]

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Mr. Fredericks:

As you are aware, I have received your letter in which you questioned the legality of certain activities of the City Council in Beacon.

According to your letter, the Council voted unanimously to promote two police officers and place their promotions on the agenda for final approval at the Council's next meeting. An executive session was held later during that meeting, and a few days later, the Mayor indicated that the promotions would not be made and that the decision to reject the promotions was made by the Council during an executive session. You have asked whether such action could validly have occurred during an executive session.

In this regard, when a public body, such as the City Council, has properly entered into executive session, it may vote during the executive session, unless the vote is to appropriate public money.

Specifically, the introductory language of §105(1) of the Open Meetings Law states that:

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

Following the provision quoted above, there are eight grounds for entry into executive session. Pertinent in the context of the situation that you described is §105(1)(f), which authorizes a public body to conduct an executive session to discuss:

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

It appears that the discussion during the executive session likely involved the employment histories of the two officers. If that is so, I believe that the Council could properly have entered into executive session.

Additionally, §106 of the Open Meetings Law pertains to minutes of meetings and includes provisions concerning the preparation of minutes when action is taken during an executive session. Subdivisions (2) and (3) state that:

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

In view of the foregoing, as a general rule, a public body may take action during a properly convened executive session. If action is taken during an executive session, minutes reflective of the action, the date and the vote must be recorded in minutes pursuant to §106(2) of the Law. If no action is taken, there is no requirement that minutes of the executive session be prepared.

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

reference to or identify the person, for the Freedom of Information Law authorizes an agency to withhold records to the extent that disclosure would result in an unwarranted personal privacy [see Freedom of Information Law, §87(2)(b)].

In this instance, since the matter involved police officers, I do not believe that details concerning the matter would have been required to have been disclosed or included in minutes. As you may be aware, §50-a of the Civil Rights Law prohibits the disclosure of personnel records pertaining to police officers that are used to evaluate performance toward continued employment or promotion.

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

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

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

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

I hope that I have been of assistance.

RJF:tt

cc: City Council

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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June 2, 2004

E-MAIL

TO: Hon. Joy Canfield <[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. Canfield:

As you are aware, I have received your letter. You wrote that you recall that I indicated during a presentation that there can be "no interrogation" from the public during a meeting of a public body, such as the Town Board upon which you serve.

Having given numerous presentations, I do not believe that I would have referred to "interrogation" during meetings. It is more likely that I would have suggested that the public has no right to speak or interrupt during meetings.

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

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

A public body's rules pertaining to public participation typically indicate when, during a meeting (i.e., at the beginning or end of a meeting, for a limited period of time before or after an agenda item or other matter is discussed by a public body, etc.), members of the public may speak.

Most rules also limit the amount of time during which a member of the public may speak (i.e., no more than three minutes).

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

RJF:tt

STATE OF NEW YORK
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June 2, 2004

E-MAIL

TO: Ronald Lineman <[redacted]

FROM: Robert J. Freeman, Executive Director

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

Dear Mr. Lineman:

As you are aware, I have received your letter. Please accept my apologies for the delay in response.

You wrote that the Clerk in the Village of Forestville has suggested that the Board is required only "to put [notice of meetings] in the paper once a year since the meeting where held [sic] at the same time every month." You asked whether that is proper, and whether notice must be given prior to "workshops."

In this regard, I offer the following comments.

First, I do not believe that there is any legal distinction between a "workshop" and a "meeting." By way of background, the definition of "meeting" [see Open Meetings Law, §102(1)] has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that any gathering of a 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 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 convenes to discuss the Village business, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law, even if it is characterized as a "workshop."

Second, the Open Meetings Law requires that notice be given to the news media and posted prior to every meeting. Specifically, §104 of that statute provides that:

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

Stated differently, if a meeting is scheduled at least a week in advance, notice of the time and place must be given to the news media and to the public by means of posting in one or more designated

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

In the context of your inquiry, if a series of meetings have been scheduled in advance to be held at particular times, the posting of a notice of a schedule of those meetings in a conspicuous public location and transmittal of that notice once to the news media would in my view satisfy §104 of the Open Meetings Law regarding those meetings. The only instances in which additional notice would be required would involve unscheduled meetings that are not referenced in the notice.

Therefore, if, for instance, the Board of Trustees, establishes at its organizational meeting that formal meetings will be held on the second Thursday of each month at 7 p.m. in Village Hall, and that workshop meetings will be held on the fourth Thursday of each month at 7 p.m. in Village Hall, and if notice containing that information is posted continuously and transmitted once to the local news media, I believe that the board would satisfy the notice requirements imposed by the Open Meetings Law. Again, the only additional notice would involve unscheduled meetings. I point out, too, that although notice of meetings must be given to the news media, there is no requirement that the news media print or publicize that a meeting will be held.

I hope that I have been of assistance.

RJF:tt

cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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June 3, 2004

Mr. Robert Hawley
[redacted]

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. Hawley:

As you are aware, I have received your correspondence concerning your efforts in obtaining records from the Village of Penn Yan.

It is noted at the outset that you requested "rulings" from this office. In this regard, the Committee on Open Government and its staff are authorized to render advisory opinions relating o the Freedom of Information and Open Meetings Laws. Therefore, the following commentary should be considered advisory and not binding upon a government agency or a member of the public.

The matter focuses on enforcement of the Village's snowmobile law at a meeting held in January. Having listened to a tape of the meeting, you contend that the matter was not discussed in public and allege that the Board conducted an executive to consider the issue, citing "pending litigation" as the reason. Approximately two months later, you requested that the Board "make known the discussion on the snowmobile matter during its executive session", but the Mayor denied your request. In connection with the foregoing, you asked:

> "1. Whether the Village can discuss enforcement of its snowmobile law in executive session, given that there is no pending or ongoing litigation on the matter.
>
> 2. Whether the Mayor can take it upon himself to rule on behalf of the Board of Trustees in denying FOIL access to notes or other documents on enforcing the snowmobile law.
>
> 3. Whether the Mayor and Board of Trustees can be compelled to disclose a discussion of the snowmobile law in executive session. By way of further explanation, at issue is the Village's earlier removal of signs prohibiting snowmobile use in certain parts of the Village,

> and the failure to restore the signs as a necessary part of effective enforcement of the law."

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

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. 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.

If indeed the issue concerning the snowmobile law involved the removal or restoration of signs as you suggested, it seems unlikely that there would have been a basis for consideration of the matter during an executive session. In short, based on a review of paragraphs (a) through (h) of §105(1), none of the grounds for entry into executive session appear to have been pertinent.

Second, when a public body enters into executive session and merely discusses an issue or issues but takes no action, there is no requirement that minutes or any other record of the executive session be prepared. In the context of your inquiry, if no action was taken and no record of the executive session exists, the Freedom of Information Law would not apply, for that statute pertains to existing records. Further, §89(3) provides in part that an agency, such as a village, is not required to create or prepare a record in response to a request. In a similar vein, there is nothing in either the

Freedom of Information or Open Meetings Laws, assuming that no record exists, that would require the Mayor and the Board of Trustees to disclose the nature of its discussion in executive session. It is possible that the executive session was improperly held; nevertheless, I know of no provision that would require that they honor your request to disclose the details of their discussion.

Third, when an initial request for records is denied, the person denied access may 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. In addition, each agency shall immediately forward to the committee on open government a copy of such appeal and the ensuing determination thereon."

The applicable provision of the Village Code, a copy of which you attached, states that "The Board of Trustees of the Village of Penn Yan shall hear appeals for denial of access to records under the Freedom of Information Law." That being so, I believe that the Board, not the Mayor, would have the duty of determining an appeal.

You also questioned the propriety of the deletion of telephone numbers appearing on the bills relating to the cell phone assigned to the Mayor.

In this regard, in a manner analogous to the Open Meetings Law, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. It is emphasized that the introductory language of §87(2) refers to the capacity to withhold "records or portions thereof" that fall within the scope of the grounds for denial that follow. In my opinion, the phrase quoted in the preceding sentence indicates that a single record may be both accessible or deniable in whole or in part. I believe that the quoted phrase also imposes an obligation on agency officials to review records sought, in their entirety, to determine which portions, if any, may justifiably be withheld.

Perhaps most relevant is §87(2)(b), which permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy."

Although the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public officers and employees. It is clear that those persons enjoy a lesser degree of privacy than others, for it has been found in various contexts that public officers and employees are required to be more accountable than others. With regard to records pertaining to them, 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].

When a public officer or employee uses a telephone in the course of his or her official duties, bills involving the use of the telephone would, in my opinion, be relevant to the performance of that person's official duties. On that basis, I do not believe that disclosure would result in an unwarranted invasion of personal privacy with respect to an officer or employee of the Village or other government agency.

Since phone bills often list the numbers called, the time and length of calls and the charges, it has been contended by some that disclosure of numbers called might result in an unwarranted invasion of personal privacy, not with respect to a public employee who initiated the call, but rather with respect to the recipient of the call.

There is but one decision of which I am aware that deals with the issue. In Wilson v. Town of Islip, one of the categories of the records sought involved bills involving the use of cellular telephones. In that decision, it was found that:

> "The petitioner requested that the respondents provide copies of the Town of Islip's cellular telephone bills for 1987, 1988 and 1989. The court correctly determined that the respondents complied with this request by producing the summary pages of the bills showing costs incurred on each of the cellular phones for the subject period. The petitioner never specifically requested any further or more detailed information with respect to the telephone bills. In view of the information disclosed in the summary pages, which indicated that the amounts were not excessive, it was fair and reasonable for the respondents to conclude that they were fully complying with the petitioner's request" [578 NYS 2d 642, 643, 179 AD 2d 763 (1992)].

The foregoing represents the entirety of the Court's decision regarding the matter; there is no additional analysis of the issue. I believe, however, that a more detailed analysis is required to deal adequately with the matter.

When phone numbers appear on a bill, those numbers do not necessarily indicate who in fact was called or who picked up the receiver in response to a call, and in many cases an indication of the phone number would disclose nothing regarding the nature of a conversation. Further, even though the numbers may be disclosed, nothing in the Freedom of Information Law would require

an individual to indicate the nature of a conversation. In short, I believe that the holding in Wilson is conclusory in nature and lacks a substantial analysis of the issue.

This is not to suggest, however, that the numbers appearing on a phone bill must be disclosed in every instance. Exceptions to the general rule of disclosure might arise if, for example, a telephone is used to contact recipients of public assistance or persons seeking certain health services. It has been advised in the past that if a government employee contacts those classes of persons as part of the employee's ongoing and routine duties, there may be grounds for withholding phone numbers listed on a bill. For instance, disclosure of numbers called by a caseworker who phones applicants for or recipients of public assistance might identify those who were contacted. In my view, the numbers could likely be deleted in that circumstance to protect against an unwarranted invasion of personal privacy due to the status of those contacted, i.e., as recipients of public assistance or persons having particular health problems or issues.

Similarly, in the case of phone bills reflective of calls made by law enforcement officials, depending upon an official's function and how an official uses a phone, there may be grounds for withholding the numbers on a bill. If a phone is frequently or routinely used in connection with criminal investigations, disclosure of numbers called could permit an applicant for the bills to ascertain the course of an investigation, identify witnesses or even confidential informants. When that is so, I believe that appropriate deletions (i.e., the numbers called) could be made on the ground that disclosure would constitute an unwarranted invasion of personal privacy and/or endanger the lives or safety of law enforcement personnel and perhaps others who might be identified by means of a phone number appearing on a bill. In that latter situation involving the possibility of endangerment, §87(2)(f) of the Freedom of Information Law would serve as a basis for denial.

Lastly, many fire and law enforcement officials perform functions related to emergency situations and that their cell phones must be free of interference to the greatest extent possible. If their cell phone numbers were to be made public, potential law breakers might call those numbers constantly, thereby precluding the effective use of the cell phones to the detriment of the public. In that kind of situation, I believe that §87(2)(f) might properly be cited. That provision authorizes an agency to deny access to records insofar as disclosure "could endanger the life or safety of any person."

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Trustees

STATE OF NEW YORK
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June 14, 2004

E-MAIL

TO: Hon. Walt Johnson [redacted]

FROM: Robert J. Freeman, Executive Director

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

Dear Legislator Johnson:

As you are aware, I have received your letter. Please accept my apologies for the delay in response.

You referred to a passage contained in an opinion rendered by this office concerning the contents of minutes. Specifically, when, during a meeting or "workshop" there are no motions, proposals, resolutions or action taken, it was advised that, in a technical sense, there is no requirement that minutes be prepared. You referred, however, to "straw polls" taken during workshops "which decide which way to bring a resolution to the formal meeting, to kill a resolution or make a modification to a proposed resolution." You also wrote that you "also take these straw polls, or reach a consensus, on direction to various county department heads, the county manager, the county attorney or other functionaries within the county."

You asked whether "these kind of actions need to be the subject of minutes."

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

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

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

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

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

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

Therefore, if a public body reaches a "consensus" that is reflective of its final determination of an issue, I believe that minutes must be prepared that indicate its action, as well as the manner in which each member voted [see FOIL, §87(3)(a)].

In contrast, a "straw vote", or something like it, that is not binding and does not represent members' action that could be construed as final, could in my view be taken but not recorded in minutes 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, I do not believe that minutes including the votes of the members would be required to be prepared.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
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June 15, 2004

Mr. Mitchell Markides
[redacted]

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. Markides:

As you are aware, I have received your letter concerning a "workshop" being held by the Lynbrook Board of Trustees concerning a controversial development that will require "many variances" and a "re-zoning."

You wrote that the portion of the meeting, the workshop, during which the development will be discussed will not be televised. Because the Board's meetings are generally televised, and in consideration of the significance of the matter to the public, you asked whether the Board should televise that portion of the meeting as well.

In this regard, first, there is nothing in the Open Meetings Law that requires that a public body record or televise its meetings. Unless the Board has adopted a policy rule requiring that its meetings be televised, I do not believe that there would be any obligation to do so.

I note, however, that it has been held that any person may audio or video record an open meeting of a public body, so as the use of the recording equipment is neither disruptive nor obtrusive [see Mitchell v. Board of Education of the Garden City Union Free School District, 113 AD2d 924 (1985); Csorny v. Shoreham-Wading River Central School District, 759 NYS2d 513, 305 AD2d 83 (2003)].

Second, since the developer will be allowed to speak at the meeting, in your words, "for informational purposes", you asked whether the public must be given the opportunity to do so. You indicated that the Board did not intend to permit the public to speak at the workshop during which the developer will be authorized to discuss the project.

It is clear that you have reviewed the advisory opinions rendered by this office, and it is your contention that the public must be given the same opportunity to speak as the developer. In short, I disagree. While I know of no judicial decision or other opinion concerning an analogous situation,

it appears that the developer would be speaking at the request of the Board for the purpose of offering information to the public. If, as you suggest, variances and re-zoning will be necessary to go forward with the project, I believe that there will be many opportunities, i.e., public hearings, for members of the public to express their views.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Trustees

STATE OF NEW YORK
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June 15, 2004

E-MAIL

TO: John Cody <John.Cody@oft.state.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 Mr. Cody:

As you are aware, I have received your correspondence in which you questioned the adequacy of minutes of meetings of a library board of trustees insofar as they involve motions for entry into executive session. Since the preparation of your initial communication, you indicated that the board appears to have been using "correct executive session terminology." However, you requested clarification in relation to the matter.

In this regard, first, §106 of the Open Meetings Law pertains to minutes and subdivision (1) states that minutes of an open meeting must consist, at a minimum, "of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon." The only decision of which I am aware that may be pertinent to the matter is Mitzner v. Goshen Central School District Board of Education [Supreme Court, Orange County, April 15, 1993]. That case involved a series of complaints made by the petitioner that were reviewed by the school board president, and the minutes of the board meeting stated that "the Board hereby ratifies the action of the President in signing and issuing eight Determinations in regard to complaints received from Mr. Bernard Mitzner." The court held that "these bare-bones resolutions do not qualify as a record or summary of the final determination as required" by §106 of the Open Meetings Law. As such, the court found that the failure to indicate the nature of the determination of the complaints was inadequate. In the context of your inquiry, I believe that, in order to comply with the Open Meetings Law and to be consistent with the thrust of the holding in Mitzner, minutes must be more descriptive than referencing a motion merely as an intent to "discuss a personnel matter."

Second, in my view, while minutes of meetings need not be expansive, they must be accurate and, in this instance, sufficiently detailed to enable the public to know whether there was a proper basis for entry into executive session.

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

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

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

Even when §105(1)(f) may be validly asserted, 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 would have the ability to know that there is or was 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 have been considered behind closed doors.

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

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

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

In consideration of the foregoing, I believe that minutes of a meeting referencing a motion to enter into executive session in relation to §105(1)(f) or any other ground for entry into executive session should include sufficient detail to enable the public to ascertain whether the subject or subjects could properly have been discussed behind closed doors.

Lastly, the Open Meetings Law does not include direction concerning the identity or title of the person designated to prepare minutes.

I hope that I have been of assistance.

RJF:tt

cc: Bethlehem Public Library Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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June 15, 2004

E-MAIL

TO: Klaus Gaebel <klaus@hvc.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 facts presented in your correspondence.

Dear Mr. Gaebel:

As you are aware, I have received your correspondence.

You have raised a series of questions all of which relate to the process by which the then eight members of the Saugerties Board of Education, upon which you serve, voted to elect a ninth member in order to fill a vacancy.

In short, it is my view, based on the language of the Freedom of Information Law, that the only instance in which a record was required to have been prepared involved the final vote in which a candidate received five votes. It is also clear, however, that there is no "privacy" accorded to Board members when a final action is taken.

Specifically, §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, such as a board of education, a record must be prepared that indicates the manner in which each member who voted cast his or her vote. 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)]. I note, too, that it has been specifically held that the final vote involving the election of officers of a public body cannot be accomplished by secret ballot [Wallace v. City University of New York, Supreme Court, New York County, NYLJ, July 7, 2000].

I hope that I have been of assistance.

RJF:tt

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June 16, 2004

Mr. Brian Kovalchik
[redacted]

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. Kovalchik:

I have received your letter in which you sought my comments concerning "the procedure and activities" of the Altmar-Parish-Williamstown Central School District.

One of the areas of your concern relates to executive sessions apparently held to discuss matters involving "positions" rather than the performance of persons who may serve in those positions. In this regard, the Open Meetings Law is based upon a presumption of openness. Stated differently, meetings of public bodies must be conducted open to the public, unless there is a basis for entry into executive session. Moreover, the Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, §105(1) states in relevant part that:

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

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

Second, although it is used frequently, the term "personnel" appears nowhere in the Open Meetings Law. Although one of the grounds for entry into executive session often relates to personnel matters, from my perspective, the term is overused and is frequently cited in a manner that is misleading or causes unnecessary confusion. To be sure, some issues involving "personnel" may be properly considered in an executive session; others, in my view, cannot. Further, certain matters

that have nothing to do with personnel may be discussed in private under the provision that is ordinarily cited to discuss personnel.

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

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

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

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

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

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

When a discussion concerns matters of policy, such as the manner in which public money will be expended or allocated, I do not believe that §105(1)(f) could be asserted, even though the discussion relates to "personnel". For example, if a discussion involves staff reductions or layoffs due to budgetary concerns, the issue in my view would involve matters of policy, and it has been held that when a matter pertains to a position, and not to the performance of a person holding that position, there would be no basis for conducting an executive session [see Gordon v. Village of Monticello, 207 AD 2d 55 (1994)]. Similarly, in the only decision of which I am aware that dealt specifically with the discussion of layoffs, a decision rendered prior to the enactment of the amendment discussed earlier and the renumbering of the Open Meetings Law, 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 [section] 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 [section] 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 6, 1978).

In short, insofar as a public body focuses on a particular person in relation to his or employment history or performance, I believe that an executive session may properly be held. However, to the extent that a discussion involves the needs of a government agency or budgetary matters in relation to the retention or elimination of a position, I do not believe that there is a basis for conducting an executive session.

Next, you referred to the absence of minutes of executive sessions or reference to "public discourse or dialogue" concerning certain issues in the Board's minutes.

Here I point out that the Open Meetings Law contains what might be characterized as minimum requirements concerning the contents of minutes. Section 106 of that 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 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. ..."

In consideration of the foregoing, it is clear that minutes of meetings need not be a verbatim account of all that is verbalized during a meeting. Moreover, minutes of executive session must be prepared only when action is taken during an executive session. Since boards of education, according to judicial decisions, ordinarily cannot take action during executive sessions, minutes of executive sessions held by those boards rarely are required.

To reiterate a point offered in an opinion addressed to you in February, 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.

Lastly, §104 of the Open Meetings Law pertains to notice of meetings and provides that:

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

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

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

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

"Moreover, given the short notice provided by respondents, it should have been apparent that the posting of a single notice in the School District offices would hardly serve to apprise the public that an executive session was being called...

"In White v. Battaglia, 79 A.D. 2d 880, 881, 434 N.Y.S.ed 637, lv. to app. den. 53 N.Y.2d 603, 439 N.Y.S.2d 1027, 421 N.E.2d 854, the Court condemned an almost identical method of notice as one at bar:

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt
cc: Board of Education

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June 16, 2004

E-MAIL

TO: Margaret A. Feml <[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. Feml:

As you are aware, I have received your letter in which you questioned the propriety of certain activities of the Board of Fire Commissioners of the Cairo Fire District.

In brief, at a Board meeting held on March 21 "Commissioner X handed in his official notice of resignation." At a meeting held on April 5, three Commissioners and Commissioner X were present, and the Chairman indicated that X "was rescinding his resignation and the Board was accepting it." The public questioned "how this could have been done without a vote taken", an agreement ensued, and "Commissioner Y" resigned and walked out. You wrote that "At this point there was the Chairman, a remaining Board member and Commissioner X", and you asked whether that could have been "a legal meeting."

After more debate, the Chairman announced that an executive session would be held. Forty-five minutes later, those who attended the executive session returned and the Chairman, according to your letter, said that there had not been a meeting, but rather "a discussion" during which "all four had come to an agreement...that the Chairman would step down and another Commissioner would take over the chair position." Both X and Y agreed to "stay" on the Board.

In this regard, it is emphasized that the Committee on Open Government and its staff are authorized to provide advice concerning the Open Meetings Law. We cannot advise as to the validity of a resignation or the status of a member of a public body who purportedly resigned. Consequently, the following comments will focus on the application of the Open Meetings Law.

First, based on relatively recent legislation, I believe that voting and action by a public body may be carried out only at a meeting during which a quorum has physically convened, or during a

meeting held by videoconference. It is noted that the Open Meetings Law pertains to public bodies, and §102(2) defines the phrase "public body" to mean:

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

Since a board of fire commissioners is the governing body of a public corporation, I believe that it clearly constitutes a public body.

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

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

In view of that definition and others, I believe that a meeting, i.e., the "convening" of a public body, involves the physical coming together of at least a majority of the total membership of such a body, i.e., the Board of 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."

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, 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 a "meeting" 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.

Third, 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 Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

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

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

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

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

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

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

Assuming that a quorum was present, I believe that the gathering begun as an executive session but later characterized as "a discussion" was a meeting. Further, I believe that the meeting should have been conducted in public, for none of the grounds for entry into executive session delineated in paragraphs (a) through (h) of §105 (1) of the Open Meetings Law would apparently have applied.

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

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

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

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

pertaining to the 'final determination' of any action, and 'the date and vote thereon'" (id., 646). The court stated that:

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

Therefore, if the Board reached a "consensus" that is reflective of its final determination of an issue, I believe that minutes must be prepared that indicate its action, as well as the manner in which each member voted. I note, too, that §87(3)(a) of the Freedom of Information Law states that: "Each agency shall maintain...a record of the final vote of each member in every agency proceeding in which the member votes." As such, members of public bodies cannot take action by secret ballot.

In an effort to enhance compliance with and understanding of the open government laws, copies of this opinion will be sent to the Board.

I hope that I have been of assistance.

RJF:tt

cc: Board of Fire Commissioners

STATE OF NEW YORK
DEPARTMENT OF STATE
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June 16, 2004

E-MAIL

TO: Mr. Steve Picard <[redacted]

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Mr. Picard:

As you are aware, I have received your letter in which you raised a question relating to the Open Meetings Law. You asked whether a meeting of a public body may "be recessed to a specific date and time, provided that the date, time and place is [sic] announced at a regularly scheduled meeting of the public body."

In my view, the second gathering would constitute a separate meeting. For that reason, I believe that the kind of announcement that you described would be insufficient to comply with the Open Meetings Law.

Section 104 of the Open Meetings Law pertains to notice of meetings of public bodies and states that:

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

> 4. If videoconferencing is used to conduct a meeting, the public notice for the meeting shall inform the public that videoconferencing will be used, identify the locations for the meeting, and state that the public has the right to attend the meeting at any of the locations."

The provision quoted above imposes a dual requirement, for notice must be posted in one or more conspicuous, public locations, and in addition, must be given to the news media. Even if a member of the news media was present during the announcement, the law would also require that notice be posted. If no member of the news media was present, to comply with law, I believe that notice must be given to the news media and posted.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14711
OML-AO-3821

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

June 16, 2004

E-MAIL

TO: Katy Cashen <[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. Cashen:

As you are aware, I have received your letter concerning the propriety of certain actions purportedly taken by the Town of Claverack.

The matter involves the creation of a water district and the site of a water tower. As indicated during a phone conversation, the jurisdiction of the Committee on Open Government involves the ability to offer advice and opinions relating to the Open Meetings and Freedom of Information Laws. Consequently, the following remarks will relate to issues concerning those statutes.

You wrote that during a recent meeting of the Town Board, "it was revealed that a decision had been made as to the location of the Tower." Although the decision was apparently made based on an engineer's recommendation, you indicated that "no formal vote" was taken "by the full board." You added that Town officials informed residents that no report containing the engineer's recommendations exists.

In this regard, I offer the following comments.

First, by way of background, 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 Town Board 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.

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.

In sum, I do not believe that the Town Board could validly have taken action, except at a meeting during which a quorum convened and in which a majority of the Board's total membership voted in favor of the proposed action.

Second, while I am unaware of whether any report or similar document relates to the siting of the water tower, I note that the Freedom of Information Law is expansive in the scope, for it pertains to all records kept by or prepared for an agency, such as a town. Section 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, any documentation maintained by or for the Town, irrespective of its origin or physical location, would constitute a "record" subject to rights conferred by the Freedom of Information law.

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.

I hope that I have been of assistance.

RJF:tt

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14750
OML-AO-3822

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June 18, 2004

Hon. Al Cardamone
Supervisor, Town of Greenville
P.O. Box 38
Greenville, NY 12083

Mr. J. Theodore Hilscher
Hilscher & Hilscher
327 Main Street
Catskill, NY 12414

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 Supervisor Cardamone and Town Attorney Hilscher:

I have received correspondence from both of you concerning public access to a certain tape recording. The Supervisor has asked whether he is prohibited from disclosing the recording to the public; the Town Attorney asked whether the tape is subject to the Freedom of Information Law and whether it should be released to the public.

It is noted that several individuals have contacted me to discuss the matter, and based on those conversations and the written materials sent to me, the facts as I understand them, are as follows.

By way of background, the Supervisor wrote that "we", presumably the Town Board, began to record meetings several weeks ago with the intention of enabling those who cannot attend meetings of Town bodies to see and hear events occurring at those meetings. In this instance, the meeting of the Zoning Board of Appeals was taped. Although a motion to adjourn was adopted, signifying the end of the meeting, Board members remained and discussed the merits of a person being considered for appointment to the Board. It was apparently unknown to the members or others that the recording continued and captured the discussion on tape.

A variety of issues may be pertinent in relation to the foregoing, and I offer the ensuing brief comments.

First, there is nothing in the Open Meetings Law or any other statute concerning the recording of meetings of a public body, such as a town board, a planning board or a zoning board of appeals. Nevertheless, judicial decisions indicate that any person may audio record or video record an open meeting of a public body, so long as the use of the recording equipment is neither disruptive nor obtrusive [see e.g., Mitchell v. Board of Education of the Garden City Union Free School District, 113 AD2d 924 (1985); Csorny v. Shoreham-Wading River Central School District, 759 NYS2d 513, 305 AD2d 83 (2003)]. Therefore, I believe that the Town Board, a member thereof, or any member of the public may record a meeting, so long as that entity or person does so without disruption.

Second, I believe that the discussion that occurred after the adjournment of the meeting of the Zoning Board was subject to and should have been held in accordance with the Open Meetings Law. That statute is applicable to meetings of public bodies and the term "meeting" [see Open Meetings Law §102(1)] has been construed expansively by the courts. In a case decided more than twenty-five years ago, it was held that any gathering of a majority of a public body for the purpose of conducting public business constitutes a "meeting", even if there is no intent to take action, and regardless of its characterization as "informal" or as a "workshop" or "work session" [see Orange County Publications v. Council of the City of Newburgh 60 AD 2d 409, affm'd, 45 NY2d 947 (1978)]. In short, I believe that the discussion that occurred following the approval of the motion to adjourn constituted a "meeting."

Third, if the Open Meetings Law had been given effect, it appears that some or perhaps the entirety of the discussion could have occurred during an executive session.

I note for purposes of ensuring understanding 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. That being so, an executive session is not separate from an open meeting, but rather is a part of an open meeting. Further, the Open Meetings Law requires that a procedure be accomplished during an open meeting before an executive session can be held. 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..."

Thereafter, paragraphs (a) through (h) specify and limit the subjects that may properly be considered in executive session.

Of likely relevance in this circumstance would have been §105(1)(f), which permits a public body to enter into executive session to discuss:

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

> employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation."

Insofar as the discussion involved a matter leading to the appointment of a particular person, it appears that the Board could validly have conducted an executive session if it had complied with the Open Meetings Law.

In consideration of the foregoing and assuming its factual accuracy, a tape recording was made of a discussion which, perhaps in part, could have been held during an executive session.

With respect to the tape, I believe that it falls within the coverage of the Freedom of Information Law. That statute pertains to all agency records, such as those of a town, 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."

Since the tape was prepared for the Town, apparently by the Town Board or the Supervisor, in my opinion, it constitutes a "record" subject to rights of access.

Although the Supervisor wrote that a copy of the tape was given to me, I have neither heard the tape nor do I have a copy. Moreover, because I am not a judge and the Committee on Open Government is not a court, neither myself nor the Committee would have the right to determine rights of access to the tape.

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

It is possible that some remarks might have involved personal or intimate information pertaining to an individual under consideration for appointment. To that extent, those portions of the tape might be withheld on the ground that disclosure would constitute "an unwarranted invasion o f personal privacy" [see Freedom of Information Law, §87(2)(b)].

Additionally, since the recording involves exchanges among Board members, it would consists of intra-agency material subject to §87(2)(g). That provision 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.

Again, if my assumptions are accurate, portions of the tape could be withheld under the Freedom of Information Law.

Lastly, and notwithstanding the foregoing, there is nothing in the Freedom of Information Law, in my view, that would prohibit the Supervisor from disclosing the tape. Section 87(2) provides that an agency *may* withhold records or portions of records based on the exceptions to rights of access. However, the state's highest court has held that the exceptions are permissive. While an agency may choose to deny access in proper circumstances, it is not required to do so [see Capital Newspapers v. Burns, 109 AD2d 92, aff'd 67 NY2d 562, 567 (1986)]. Therefore, in response to the Supervisor's question, I know of no provision of law that would prohibit him or any other person from disclosing the tape.

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

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June 18, 2004

Hon. Julia Guerrieri
Geneva Town Clerk
3750 County Road 6 (PreEmption Rd.)
Geneva, NY 14456

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

Dear Ms. Guerrieri:

As you are aware, I have received your correspondence in which you questioned the propriety of an effort by the Geneva Town Board to conduct an executive session to discuss a certain memorandum.

You prepared the memorandum and addressed it to the Supervisor, with copies to other Town Board members and the Town Attorney. You referred to your statutory responsibilities as Town Clerk, and your desire to comply with law and the opinions rendered by the State Comptroller. You focused particularly on the preparation of abstracts and the custody of claims and quoted from several statutes found in the Town Law. In conclusion, you suggested that if the Town did not follow applicable law and opinions of the State Comptroller, "our checks and balances will be eroded." You sought guidance in relation to the foregoing, and the Board "wanted to go into executive session" to discuss the memorandum. You indicated to me by phone that the Board contended that the discussion would constitute a "personnel matter."

The issue raised in your memorandum pertains to the Town's compliance with law, and from my perspective, there would be no basis for conducting an executive session. In this regard, I offer the following comments.

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

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

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

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. In my view, 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, the creation or elimination of positions, or, as in this instance, the statutory responsibilities of a town clerk, I do not believe that §105(1)(f) could be asserted. In the circumstance that you described, the issue would not have focused on any "particular person", nor would it have involved the subjects relating to a particular person delineated in §105 (1)(f). Rather, I believe that it involved the functions of the town clerk and other town officials, irrespective of who may be in office. In short, in order to enter into an executive session pursuant to §105(1)(f), I believe that the discussion must focus on a particular person (or persons) in relation to a topic listed in that provision. As stated judicially, "it would seem that under the statute matters related to personnel generally or to personnel policy should be discussed in public for such matters do not deal with any particular person" (Doolittle v. Board of Education, Supreme Court, Chemung County, October 20, 1981).

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

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

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

see, Matter of Orange County Publs., Div. of Ottaway Newspapers v County of Orange, 120 AD2d 596, lv dismissed 68 NY 2d 807).

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board

OML-AO-3824

From: Robert Freeman
To: RBeshaw@nystar.state.ny.us
Date: 6/18/2004 4:35:19 PM
Subject: I have received your inquiry in which you asked what the notice requirements are in relation to the

I have received your inquiry in which you asked what the notice requirements are in relation to the cancellation of a meeting.

In short, there is nothing in the Open Meetings Law or any other statute of which I am aware that refers to or offers guidance concerning the cancellation of a meeting. It has been advised, however, that notice of a cancellation should be posted at the location or locations where notice of upcoming meetings is placed. Additionally, it has been suggested that the news media outlets that received the original notice should be informed of the cancellation in a manner (i.e., phone, fax or email) that is likely to reach or be heard by those who would be interested in attending.

I hope that I have been of assistance.

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

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June 22, 2004

E-MAIL

TO: Herbert A. Kline <herbkline@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 facts presented in your correspondence.

Dear Mr. Kline:

I have received your letter in which you wrote that you were asked whether "if a Board which is in a duly noticed work session meeting can go directly into executive session."

In my view, the answer is clearly in the affirmative, for there is no legal distinction between a work session and a meeting subject to the Open Meetings Law.

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

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

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

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

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

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

Based upon the direction given by the courts, if a majority of 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 worksession 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 I have been of assistance.

RJF:tt

STATE OF NEW YORK
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June 22, 2004

E-MAIL

TO: Jahne <[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 Jahne:

I have received your communication in which you wrote that your school board adopted a new policy requiring that certain actions must be subject to two readings. Although it was stated that the policy was discussed "several times over several months", you indicated that "Board minutes dating back to 2004 have no mention of the policy."

In reference to the foregoing, you raised the following questions:

> "...if they did discuss it other than at a public meeting are they in violation of the Open Meetings Law? Also, is there any requirement dealing with the number of times a policy is to be ready prior to action on it?"

In this regard, I offer the following comments.

First, the absence of reference to discussion of a policy in minutes of meetings would not necessarily lead to a conclusion that the issue was discussed in private. In point out that the Open Meetings Law contains what might be viewed 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 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 discussion at a meeting or that they include reference to each subject that was discussed. In short, a subject might be discussed at several meetings without an obligation to refer to such discussions in minutes of the meetings.

Second, based on the terms of the Open Meetings Law and its construction by the courts, any gathering of a majority of a public body for the purpose of conducting business constitutes a "meeting" that falls within the coverage of the Open Meetings Law, even if there is no intent to take action [see e.g., Orange County Publication v. Council of the City of Newburgh, 60 AD2d 409, aff'd 45 NY2d 947 (1978)]. Therefore, in any instance in which a majority of the Board gathered and discussed the issue of your interest, I believe that such gathering would have been a meeting subject to the Open Meetings Law. I point out, too, that there would be no basis, in my view, for discussion of the issue by the Board in private.

Lastly, there is nothing in the Open Meetings Law or any other provision applicable to a board of education of which I am aware that deals with the number of times a proposal must be read prior to its adoption.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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June 22, 2004

Ms. Sue Ellen Dodell
General Counsel
NYC Campaign Finance Board
40 Rector Street
New York, NY 10006

The staff of the Committee on 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. Dodell:

I have received your letter and appreciate your interest in complying with the Open Meetings Law. You have requested an advisory opinion in your capacity as General Counsel to the New York City Campaign Finance Board ("the Board") concerning the propriety of the Board's "deliberations outside of public session."

By way of background, the Board consists of five members and was created by law to administer New York City's campaign finance reform program. In addition to other functions, you wrote that:

> "...the Board makes determinations (i) whether a candidate for elective office in New York City is eligible to receive public matching funds from the New York City treasurer pursuant to the requirements of the Act, (ii) whether a candidate has violated the Act, and (iii) whether to assess a penalty against a candidate who has violated the Act. These determinations are made by vote in the public session of a Board meeting.
>
> "Prior to the Board's consideration at a meeting of a possible violation and penalty, the Board's Legal Unit issues a notice to the candidate...explaining the alleged violation, the recommended penalty, and the procedures for responding to the notice. Prior to the Board meeting at which the violation and penalty will be considered, the Board's legal staff prepares a memorandum for the Board,

> containing background on the alleged violation and the Board staff's recommendation for appropriate action...At the Board meeting, if the candidate appears, a Board staff attorney and the candidate each make presentations to the Board in public session and respond to any Board questions.
>
> "Following the presentations, the Board, by vote after a motion, leaves the public session to deliberate...Both attorney and non-attorney members of the staff of the Board routinely are present during these deliberations and may be consulted by members of the Board. Following these deliberations, the Board reconvenes in public session to vote on the matter and announce the result. Penalties assessed by the Board are generally assessed jointly and severally against the candidate, his or her treasurer, and the political committee authorized by the candidate for his or her election campaign.
>
> "When considering public funds eligibility, candidates are not routinely given an opportunity to appear before the Board prior to a Board determination. Rather, the Board commences its deliberations in executive session without the public present, based on memoranda received from Board staff concerning payment eligibility which may, but does not always, include memoranda from legal staff concerning possible criminal investigations or other confidential matters regarding candidates' non-compliance with the eligibility provisions of the Act...Following the deliberations, the Board, in public session, votes on payments to candidates."

In this regard, I offer the following comments.

First, because it is a creation of law and carries out certain powers and duties collectively, as a body, I believe that the Board clearly constitutes a "public body" subject to the Open Meetings law [see definition of "public body" subject to the Open Meetings Law [see definition of "public body", §102(2)].

Second, as you are aware, there are two vehicles that may authorize a public body to discuss public business in private. One involves entry into an executive session. 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. In short, prior to conducting an executive session, a motion must be made that includes reference to the subject or subjects to be discussed, and it must be carried by majority vote of a public body's membership.

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

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

In my view, two of the exemptions may be pertinent in the context of the Board's proceedings.

Insofar as the Board seeks legal advice and its attorneys offer legal advice, 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, when 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 when there may be no basis for conducting an executive session pursuant to §105 of the Open Meetings Law, a private discussion might validly be held based on the proper assertion of the attorney-client privilege pursuant to §108. For example, legal advice may be requested even

though litigation or possible litigation is not an issue. In that case, while the litigation exception for entry into executive session would not apply, there may be a proper assertion of the attorney-client privilege.

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

Also of significance 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. 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)].

Aside from the possibility that the assertion of attorney-client privilege might exempt portions of meetings from the Open Meetings Law, it appears that the Board's deliberations concerning alleged violations and the imposition of a penalty would be quasi-judicial and, therefore, exempt from the Open Meetings Law. Although the attorney-client privilege might also exempt some elements of the Board's meetings from the Open Meetings Law when considering public funds eligibility, as I understand the matter, that aspect of the Board's functions could not be characterized as quasi-judicial.

Lastly, notwithstanding the foregoing, in addition to and perhaps overlapping deliberations that may be exempt from the Open Meetings Law under §108(1) and/or (3), is the possibility that one or more grounds for entry into executive session, the other vehicle under which a meeting might be closed, may be asserted.

As indicated earlier, an "executive session" is 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.

I agree with your contention that consideration by the Board of allegations of violations of law or the imposition of penalties against candidates would fall within the scope of §105(1)(f). That provision permits a public body to enter into executive session to discuss:

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

That provision might also apply insofar as the Board considers candidates' non-compliance with the eligibility provisions of the Act. In both instances, the discussion would appear to relate to "a matter leading to the discipline...of a particular person."

Since you also referred to "possible criminal investigations", §105(1)(c) may also be pertinent, for it authorizes a public body to conduct an executive session to discuss:

> "...information relating to current or future investigation or prosecution of a criminal offense which would imperil effective law enforcement if disclosed..."

In sum, I believe that the Board, as suggested in the preceding remarks, may, as appropriate, deliberate in private when the attorney-client privilege may properly be asserted, when its deliberations may be characterized as quasi-judicial, and/or when paragraphs (c) or (f) of §105(1) authorize the Board to enter into 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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June 22, 2004

Mr. Melvyn Meer
[redacted]

The staff of the Committee on 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:

I have received your letter concerning meetings of School Leadership Teams ("SLT's") and school based management teams operating in New York City.

By way of background, in 2003 you questioned the status of the entities in question under the Open Meetings Law, and I prepared an advisory opinion in response. An element of the opinion suggested that the time of the meetings of your interest, 7:20 a.m., conflicted with the judicial construction of the Open Meetings Law. Based upon that advice, you initiated a grievance with the New York City Board of Education and received the following response from the Office of Counsel:

> "The Open Meetings Law states that 'public business be performed in an open and public manner.' Section 2590-h15(b-1)(ii) of the Education Law has been amended to require that the school leadership teams hold their monthly meetings at a time that is convenient for the parent representatives. Thus, if the parents on the SLT have agreed that their meeting will be held at 7:30 a.m this is consistent with law. If other people wish to attend it is their obligation to make themselves available at the time the team has chosen to meet."

From my perspective, while participation by parent members of school based management teams is clearly a consideration, the ability of others to attend is also relevant.

As indicated in the opinion addressed to you on December 29, 2003, the entities at issue are, in my view, "public bodies" required to comply with the Open Meetings Law. They are creations of law, and it is my understanding that they are the New York City entities that carry out the shared

decision making functions required to be accomplished pursuant to §100.11 of the regulations promulgated by the NYS Commissioner of Education.

The provision cited by the Office of Counsel does not, in my opinion, affect the obligation of an SLT or a school based management team to comply with the Open Meetings Law. Section 2590-h(15)(b)(ii) requires that school board management teams shall:

> "hold at least one meeting per month during the school year. Each monthly meeting shall be held at a time that is convenient for the parent representatives."

As the foregoing relates to the Open Meetings Law, I believe every statute, including the Open Meetings Law, must be implemented in a manner that gives reasonable effect to its intent. In the only decision that dealt with meetings held as early as those held by the body of your interest, the court found that the entity at issue failed to comply with the Open Meetings Law. To reiterate a point offered in last year's opinion, 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."

In short, 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.

Further, in the decision to which reference was made involving meetings 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..." (Matter of Goetchius v. Board of Education, Supreme Court, Westchester County, New York Law Journal, August 8, 1996).

While meetings held at 7:20 a.m. may be convenient for parent members of an SLT or school based management team, many others interested in attending may be unable to do so 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. In consideration of those persons and the holding by the court, I continue to believe that it would be unreasonable and inconsistent with law for an SLT or school based management team to conduct meetings at or near 7:20 a.m.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Susan W. Holtzman

OML-AO-3829

From: Robert Freeman
To: barneyg@olm.com
Date: 7/6/2004 9:50:28 AM
Subject: Dear Ms. Glasgow:

Dear Ms. Glasgow:

I have received your note in which you raised two questions.

The first pertains to the ability of a town board to amend minutes that have already been approved if it is later discovered that the minutes contain an error. In short, I know of no law that focuses on the situation. In my view, implicit in §106 of the Open Meetings Law concerning is the requirement that minutes be accurate. That being so, if indeed an error has been found, there would be nothing to prohibit a public body from making the appropriate correction through an amendment of the minutes.

The second involves whether a town board can ignore or fail to follow a resolution that it has approved. Since the advisory jurisdiction of the Committee on Open Government pertains to the Freedom of Information and Open Meetings Law, I do not have the authority to address that issue.

Nevertheless, I hope that I have been of assistance.

Robert J. Freeman
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July 8, 2004

Mr. Daniel J. Harmony
[redacted]

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. Harmony:

I have received your letter and apologize for the delay in responding to you.

You have sought an opinion concerning a disclosure by Francis Hoefer, a member of the Board of Education of the City School District of Oswego, of "a document from an employee disciplinary hearing and publishing it on a commercial website that he owns." You wrote that you met with the Board in executive session in January, at which time you read a prepared statement "detailing some specific issues in [your] life." Just over a month later, Mr. Hoefer published the text of your statement on his website. You expressed the view that the Board could properly have met with you in executive session pursuant to §105(1)(f) of the Open Meetings Law and that "publication of the text of [your] remarks constitute a violation of §87(2)(b) of the Public Officers Law in that his action, taken by him as a member of the board, constituted 'an unwarranted invasion of personal privacy' by him and the board." You asked for a "determination" concerning a "violation" of §87(2)(b).

In this regard, it is noted at the outset that neither the Committee on Open Government nor myself has the authority to render a "determination" that is binding. Rather the Committee and its staff are authorized to prepare advisory opinions, and it is suggested that the following remarks be considered as advisory in nature.

From my perspective, although I agree with your contention that the Board clearly had a basis for conducting an executive session and for withholding a record containing intimate personal and medical information, I do not believe that the Freedom of Information Law, the Open Meetings Law, or any other statute would have prohibited the Board or one of its members from disclosing the prepared statement or divulging what transpired during the executive session. This is not to suggest that such disclosures would be fair, ethical or appropriate. That is not the question; the question is whether disclosure would constitute a violation of law.

By way of background, as you may be aware, both the Open Meetings Law and the Freedom of Information Law are based on a presumption of openness. In brief, the former requires that meetings of public bodies, such as boards of education, be conducted open to the public, except when an executive session may properly be held under §105(1) or when a matter is exempt from its coverage; the latter requires that agency records be made available to the public, except to the extent that one or more grounds for denial access appearing in §87(2) may properly be asserted. The first ground for denial in the Freedom of Information Law, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." Similarly, §108(3) of the Open Meetings Law refers to matters made confidential by state or federal law as "exempt" from the provisions of that statute.

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

> "Although we have never held that a State statute must expressly state it is intended to establish a FOIL exemption, we have required a showing of clear legislative intent to establish and preserve that confidentiality which one resisting disclosure claims a 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, with or without identifying details, if it so chooses" (Capital Newspapers v. Burns, supra, 567).

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

The same analysis is applicable in the context of the Open Meetings Law. While that statute authorizes public bodies to conduct executive sessions in circumstances described in paragraphs (a) through (h) of §105(1), there is no requirement that an executive session be held even though a public body has the right to do so. The introductory language of §105(1), which prescribes a procedure that must be accomplished before an executive session may be held, clearly indicates that a public body "may" conduct an executive session only after having completed that procedure. If, for example, a motion is made to conduct an executive session for a valid reason, and the motion is not carried, the public body could either discuss the issue in public or table the matter for discussion in the future.

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

By means of example, if a discussion by a board of education concerns a record pertaining to a particular student (i.e., in the case of consideration of disciplinary action, an educational program, an award, etc.), the discussion would have to occur in private and the record would have to be withheld insofar as public discussion or disclosure would identify the student. As you may be aware, the Family Educational Rights and Privacy Act (20 USC §1232g) generally prohibits an educational agency from disclosing education records or information derived from those records that are identifiable to a student, unless the parents of the student consent to disclosure. In the context of the Open Meetings Law, a discussion concerning a student would constitute a matter made confidential by federal law and would be exempted from the coverage of that statute [see Open Meetings Law, §108(3)]. In the context of the Freedom of Information Law, an education record would be specifically exempted from disclosure by statute in accordance with §87(2)(a). In both contexts, I believe that a board of education, its members and school district employees would be prohibited from disclosing, because a statute requires confidentiality.

In a case in which the issue was whether discussions occurring during an executive session held by a school board could be considered "privileged", it was held that "there is no statutory provision that describes the matter dealt with at such a session as confidential or which in any way restricts the participants from disclosing what took place" (Runyon v. Board of Education, West Hempstead Union Free School District No. 27, Supreme Court, Nassau County, January 29, 1987). In the context of most of the duties of most municipal boards, councils or similar bodies, there is no statute that *forbids* disclosure or requires confidentiality. Again, the Freedom of Information Law states that an agency *may* withhold records in certain circumstances; it has discretion to grant or deny access. The only instances in which records may be characterized as "confidential" would, based on judicial interpretations, involve those situations in which a statute prohibits disclosure and leaves no discretion to a person or body.

In short, 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

cc: Board of Education
Francis Hoefer

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July 12, 2004

Mr. John J. Cahill
[redacted]

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. Cahill:

I have received your letters, as well as the materials attached to them. You have raised a variety of issues in relation to the creation of a position by the Penn Yan Central School District and its Board of Education. In consideration of those issues, I offer the following comments.

First, with respect to minutes of executive sessions, §106 of the Open Meetings Law pertains to minutes of meetings and states that:

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

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

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

In my view, the issues considered by the Board as you described them would not have been among the few instances in which it could have taken action in executive session. Again, assuming that no action was taken in executive session, there would have been no obligation to prepare minutes.

In a related vein, I note that the Freedom of Information Law pertains to existing records and that §89(3) of that statute provides in part that an agency is not required to create a record in response to a request. Therefore, if, for example, there is no record containing an analysis of or rationale for a proposal or an action, there would be no obligation on the part of the District to prepare such a record on your behalf.

With respect to a delay in determining to grant or deny access to records, the Freedom of Information Law 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. 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, while I agree with your contention that there would be no basis for discussing the creation of a position during an executive session, the materials suggest that that issue may have been intertwined with another, which is characterized in a memorandum prepared by a Board member as the "deficiencies in [the] performance" of a principal. In this regard, as you are likely aware, the Open Meetings Law is based upon a presumption of openness. Stated differently, meetings of public bodies must be conducted open to the public, unless there is a basis for entry into executive session. Moreover, the Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, §105(1) states in relevant part that:

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

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

The language of the so-called "personnel" exception, §105(1)(f) of the Open Meetings Law, is limited and precise, for it 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 presence of the term "particular" in §105(1)(f), I believe that a discussion of "personnel" may be considered in an executive session only when the subject involves a particular person or persons, and only when at least one of the topics listed in §105(1)(f) is considered.

When a discussion concerns matters of policy, such as the manner in which public money will be expended or allocated, the functions of a department, the creation or elimination of positions, or matters relating to the budget, I do not believe that §105(1)(f) could be asserted, even though the discussion may relate to "personnel". For example, if a discussion of possible layoffs relates to positions and whether those positions should be retained or abolished, the discussion would involve the means by which public monies would be allocated. In short, in order to enter into an executive session pursuant to §105(1)(f), I believe that the discussion must focus on a particular person (or persons) in relation to a topic listed in that provision. As stated judicially, "it would seem that under the statute matters related to personnel generally or to personnel policy should be discussed in public for such matters do not deal with any particular person" (Doolittle v. Board of Education, Supreme Court, Chemung County, October 20, 1981). On the other hand, insofar as a discussion involves the performance of a particular person, as in the case of consideration of the deficiencies of a particular employee, I believe that an executive session may properly be held. In the situation you described, the issue would have involved the employment history of a particular person or perhaps a matter leading to the discipline or removal of a particular person. In short, it appears that the matter of creating a position may have been overlapped or been intertwined with the performance of the principal. Insofar as consideration of creating a position may have been separate from the performance of the principal, I do not believe that there would have been a basis for entry to executive session. However, insofar as the two issues could not be segregated or discussed separately, I believe that §105(1)(f) would have validly served as a means of entering into executive session.

Next, an element of your correspondence involves a request for records that apparently may be withheld under §87(2)(g) of the Freedom of Information Law. That provision pertains to internal governmental communications, and those portions of such communications consisting of opinions, advice, recommendations and the like need not be disclosed. As I understand one of the memoranda attached to your correspondence, it has been contended that opinions expressed in writing or during executive sessions "must be kept confidential in order to comply with Section 805-a of the General Municipal Law." That statute states in subdivision (1)(b) that "no municipal officer or employee shall...disclose confidential information acquired by him in the course of his official duties or use such information to further his personal interests." From my perspective, the term "confidential" has a narrow and precise technical meaning. For records or information to be validly characterized as confidential, I believe that such a claim must be based upon a statute that specifically confers or requires confidentiality. Stated differently, an act of Congress of the State Legislature must forbid disclosure in order to characterize information as confidential.

While a variety of subjects may properly be discussed during executive sessions and numerous records or portions thereof may validly be withheld under the Freedom of Information Law, the ability to exclude the public from a meeting or withhold records does not necessarily represent or signify a requirement of confidentiality. I note that both the Open Meetings Law and the Freedom of Information Law are permissive. Under §105 of the former, a public body may enter into executive session to discuss one or more of the subjects appearing in paragraphs (a) through (h) of subdivision (1); there is no requirement that those subjects be discussed in executive session. Moreover, as you are aware, in order to conduct an executive session, a motion to do so must be made and carried by a majority vote of the total membership of a public body. If such a motion does

not carry, even though a public body might have the authority to discuss an issue in executive session, it would not have the obligation to do so. Similarly, under the Freedom of Information Law, §87(2) provides that an agency may withhold records in accordance with the grounds for denial of access that follow. The State's highest court has found that an agency may choose to disclose records even though it has the ability to deny access [see Capital Newspapers v. Burns, 67 NY 2d 562 (1986)].

In short, as a general rule, even though discussions by a public body may in appropriate circumstances be conducted in private and certain records may justifiably be withheld, the matters considered might not be "confidential", but rather beyond the scope of public rights of access. In a case in which the issue was whether discussions occurring during an executive session held by a school board could be considered "privileged", it was held that "there is no statutory provision that describes the matter dealt with at such a session as confidential or which in any way restricts the participants from disclosing what took place" (Runyon v. Board of Education, West Hempstead Union Free School District No. 27, Supreme Court, Nassau County, January 29, 1987). While §805-a of the General Municipal Law may be useful for providing guidance, for the reasons described above, I do not believe that the use of the term "confidential" is entirely clear.

I am unaware of any statute that would prohibit a Board member from disclosing the kind of information to which you referred, even though information might have been obtained during an executive session properly held or from records marked "confidential" or that need not be disclosed.

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 could be withheld, the foregoing is not intended to suggest such disclosures would be uniformly appropriate or ethical. Obviously, the purpose of an executive session is to enable members of public bodies to deliberate, to speak freely and to develop strategies in situations in which some degree of secrecy is permitted. Similarly, the grounds for withholding records under the Freedom of Information Law relate in most instances to the ability to prevent some sort of harm. In both cases, inappropriate disclosures could work against the interests of a public body as a whole and the public generally. Further, a unilateral disclosure by a member of a public

body might serve to defeat or circumvent the principles under which those bodies are intended to operate.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Education
Gene Spanneut

STATE OF NEW YORK
DEPARTMENT OF STATE
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July 12, 2004

Mr. Keith Millspaugh
[redacted]

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. Millspaugh:

I have received your letter in which you raised a variety of questions and issues relating to meetings and hearings conducted by the Board of Trustees of the Village of Walden. In an attempt to address those matters, I offer the following comments.

First, as you are likely aware, the Open Meetings Law is based on a presumption of openness. Stated differently, meetings of public bodies must be conducted open to the public, except to the extent that an executive session may properly be conducted in accordance with paragraphs (a) through (h) of §105(1). Consequently, a public body, such as a village board of trustees, cannot enter into an executive session to discuss the subject of its choice. From my perspective, the grounds for entry into executive session are based on the need to avoid some sort of harm that would arise by means of public discussion, and that is so with respect to the only ground for entry into executive session that appears to be relevant in relation to the matter that you described.

Since much of your commentary relates to the purchase of real property, pertinent is §105(1)(h) of the Open Meetings Law which 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 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.

Second, when action is taken, whether it involves approval of a motion to enter into executive session or perhaps to purchase real property, the action must be memorialized in minutes of a meeting. Section 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.

It is noted, too, that minutes of executive sessions need not include information that may be withheld under the Freedom of Information Law. If, for example, a public body votes to authorize its representative to offer up to a certain figure to purchase a parcel, I do not believe that minutes would be required to include that figure. One of the grounds for denial of access in the Freedom of Information Law, §87(2)(c), permits an agency, such as a village, to withhold records to the extent that disclosure "would impair present or imminent contract awards...." The state's highest court sustained a denial of access on the basis of that provision in relation to appraisals of property owned by a government agency that were sought prior to the consummation of transactions involving the sale of those parcels [see Murray v. Troy Urban Renewal Agency,56 NY2d 888 (1982)]. In short, if it is known how much an agency is willing to offer to buy a parcel or how low a price it may be willing to accept when selling a parcel, premature disclosure would likely "impair" the government's ability to reach an optimal price on behalf of taxpayers.

In consideration of the foregoing, the proper assertion of both §105(1)(h) of the Open Meetings Law and §87(2)(c) of the Freedom of Information Law is dependent on factual circumstances and the effects of disclosure.

Third, I believe that a subcommittee of a public body consisting solely of the members of a public body is itself a public body required to comply with the Open Meetings Law. 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 Trustees, 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 seven, a quorum would be four. If that body designates a committee of three, a quorum of the committee would be two.

With respect to public participation at meetings, while individuals may have the right to express themselves and to speak, I do not believe that they necessarily have the right to do so at meetings of public bodies. It is noted that there is no constitutional right to attend meetings of public bodies. That right is conferred by statute, i.e., by legislative action, in laws enacted in each of the fifty states. In the absence of a statutory grant of authority to attend such meetings, the public would not have the right to attend. Although the Open Meetings Law clearly provides the public with the right "to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy" (see Open Meetings Law, §100), that statute is silent with respect to the issue of public participation. Consequently, if a public body does not want to answer questions or permit the public to speak or otherwise participate at its meetings, I do not believe that it would be obliged to do so. Nevertheless, a public body may choose to answer questions and permit public participation, and many do so. When a public body does permit the public to speak, it has been advised that it should do so based upon rules that treat members of the public equally.

Lastly, with regard to the enforcement of the Open Meetings Law, §107(1) of the Law states in part that:

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

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

In addition, subdivision (2) of §107 authorizes a court to award attorney's fees to the successful party.

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
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July 13, 2004

Mr. Richard Sussman
[redacted]

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. Sussman:

As you are aware, I have received your correspondence. You have requested an advisory opinion concerning a certain meeting under the Open Meetings Law.

According to your initial letter:

> "The meeting was titled as a 'Community Advisory Committee' meeting and later called a 'superintendent's task force.' At the meeting, seated at the front table were the superintendent, assistant superintendent for business, and the three members of the school board budget committee. Two other board members for a total of 5 out of seven school board members were present at the meeting.
>
> "The opening remarks of the meeting were made by the chair of the budget committee and throughout the evening various school board members called on members of the audience to ask questions and the board members along with the administration present answered them."

In response to my request for clarification, you indicated that:

> "The School Board Budget Committee consists of three members, all who sat at the front table together with the superintendent and assistant superintendent for business. Everybody else sat in the audience including the other two school board members."

From my perspective, based on your description of the matter, the gathering in question constituted a meeting of the School Board Budget Committee ("the Committee") subject to the requirements imposed by the Open Meetings Law. 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 a board of education, I believe that the Open Meetings Law is applicable.

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

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

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

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

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

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

In view of the amendments to the definition of "public body", I believe that any entity consisting of two or more members of a public body, such as a committee, a subcommittee or "similar body" consisting of members of the Board of the Education, 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 seven, a quorum would be four. If that body designates a committee of three, a quorum of the committee would be two.

Third, the term "meeting" is defined in §102(1) of the Open Meetings Law to mean "the official convening of a public body for the purpose of conducting public business." Inherent in the definition is the notion of intent, and a key issue often involves whether there is an intent on the part of a public body to convene for the purpose of conducting public business collectively, as a body. Based on the facts that you offered, although members of the Board of Education other than members of the Committee attended the gathering in question, there does not appear to have been an intent on the part of the Board to gather as the Board.

In my view, the presence of two Board members in the audience who are not members of the Committee would not have transformed a Committee meeting into a meeting of the Board.

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".

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Education, Port Washington Union Free School District

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July 15, 2004

Ms. Heloise Gruneberg, President
Dr. Philip Truscott
Brooklyn Vision
535 Dean Street, #410
Brooklyn, NY 11217

Dear Ms. Gruneberg and Dr. Truscott:

I have received your letters and apologize for the delay in responding. You have requested an advisory opinion relating to the conduct of certain public hearings. In brief, certain persons were permitted to speak for lengthy periods, while others were limited to three minutes in one instance and two in the other. Moreover, by the time several speakers were authorized to express their views, "most of the spectators" and members of the committee conducting the hearing had departed.

First, from my perspective, a meeting is different from 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 often 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 posed. Further, there is no requirement that a newspaper, for example, publish a notice given regarding a meeting to be held under the Open Meetings Law. I note, too, that a meeting of a public body held in accordance with the Open Meetings Law can only occur with the presence of a quorum. A hearing, on the other hand, can be conducted without a quorum present.

While I know of no judicial decisions concerning the ability of those to speak at either meetings or hearings, I believe that the principles pertinent to that issue would be the same. In short, I believe that an entity has the authority to adopt rules or procedures to govern its own proceedings. Those rules or procedures, however, must in my opinion be reasonable. In my opinion, it would be unreasonable, for example, to authorize those with one point of view to speak for ten minutes or perhaps without limitation, while permitting those with a different view to speak for three minutes or not at all.

If it is contended that a hearing was not conducted reasonably, the potential remedies, if they can be characterized as such, would involve offering complaints to those who conducted the hearing

or the initiation of a judicial proceeding with Article 78 of the Civil Practice Law and Rules. In an Article 78 proceeding, a petitioner (a member of the public) must demonstrate that a public officer or governmental entity acted unreasonably, or that such person or entity failed to give effect to a legal requirement. If, for instance, a provision of law requires that a public hearing be held and that members of the public be given an opportunity to be heard, and if that opportunity is not reasonably granted, a court could find that a public officer or governmental entity failed to comply with law. In that event, I believe that court could issue an order designed to guarantee compliance with law and/or reasonableness.

As you requested, copies of this response will be forwarded to the officials that you identified.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Hon. Amanda Burden
Hon. Gifford Miller
Hon. James Sanders

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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July 15, 2004

Ms. Lavonia Scaggs
Concerned Parents to Save
the Charter Schools
P.O. Box 372
Calverton, NY 11933

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. Scaggs:

I have received your letter and apologize for the delay in responding. You offered a series of allegations concerning "the persistent abuse of executive power" by the Board of Trustees of the Riverhead Charter School and its president.

Specifically, you referred to "work sessions", closed sessions held without an indication of the purpose or a vote to do, the absence of minutes, meetings held without notice, failures to reply to requests made under the Freedom of Information Law, and a prohibition against speaking at meetings, "unless the board approves the content." You added that comments by the public are limited to three minutes per month, unless they are "positive in nature", in which case there is no time limit on the length of the comments.

In this regard, as you are likely aware, §2854(1)(e)of the Education Law specifies that charter schools are subject to the Open Meetings and Freedom of Information Laws. The former is applicable to "public bodies", the latter pertains to "agencies", and those terms will be used for purposes of the following remarks.

First, the Open Meetings Law is applicable to meetings of public bodies, and it was held more than twenty-five years ago that any gathering of a majority of a public body for the purpose of conducting a public business is a meeting that falls within the coverage of the Open Meetings Law, even if there is no intent to take action and irrespective of its characterization [Orange County Publications v. Council of the City of Newburgh, 60 AD2d 409, aff'd 45 NY2d 947 (1978)]. The decision focuses specifically on "work sessions" held solely for the purpose of discussion, and it was concluded that work sessions are meetings subject to the Open Meetings Law.

Second, §104 of the Open Meetings Law requires that notice be posted and given to the news media prior to every meeting of a public body. That provision states that:

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

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

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.

Third, 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.

Fourth, the Open Meetings Law includes direction concerning the minimum contents of minutes and the time within which they must be prepared. Specifically, §106 states that:

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

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

Based upon the foregoing, it is clear that minutes must be prepared and made available within two weeks, but that they need not consist of a verbatim account of all that is expressed at a meeting. I note, too, that if no action is taken during an executive session, minutes of the executive session need not be prepared.

It might also be important to 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 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.

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

Although public bodies have the right to adopt rules to govern their own proceedings (see e.g., Education Law, §1709), the courts have found in a variety of contexts that such rules must be reasonable. For example, although a board of education may "adopt by laws and rules for its government and operations", in a case in which a board's rule prohibited the use of tape recorders at its meetings, the Appellate Division found that the rule was unreasonable, stating that the authority

to adopt rules "is not unbridled" and that "unreasonable rules will not be sanctioned" [see Mitchell v. Garden City Union Free School District, 113 AD 2d 924, 925 (1985)]. Similarly, if by rule, a public body chose to permit certain citizens to address it for ten minutes while permitting others to address it for three, or not at all, such a rule, in my view, would be unreasonable.

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

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

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

Lastly, 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. Additionally, that statute provides direction concerning the time and manner in which an agency must respond to a request. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written

> acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

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

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

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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July 20, 2004

Mr. Frank Vescera
[redacted]

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. Vescera:

I have received your correspondence in which you asked that I offer my "thoughts" pertaining to a letter sent to you by a member of the Common Council of the City of Utica concerning your use of a video camera during a meeting. Councilmember Testa wrote as follows:

> "We would appreciate it if you would keep your camera stationery on a tripod in one of the corners of the room, as does Adelphia while filming the Common Council Meeting. While I know that last week was short notice and we allowed you to stand near the doorway, I am now asking that you bring a tripod. We have no problem with you filming the meeting, however, to avoid disruption and confusion, we reserve the right to control the process and conduct of the meeting in a professional manner."

From my perspective, which is based on the holdings in judicial determinations, any person may audio or video record an open meeting of a public body, such as a city council, so long as the use of the recording device is not disruptive or obtrusive. In this regard, I offer the following comments.

It is noted at the outset that there is nothing in the Open Meetings Law that pertains to the ability to record meetings, and until 1978, there had been but one judicial determination regarding the use of the recording devices at meetings of public bodies. The only case on the subject was Davidson v. Common Council of the City of White Plains, 244 NYS 2d 385, which was decided in 1963. In short, the court in Davidson found that the presence of a tape recorder, which at that time was a large, conspicuous machine, might detract from the deliberative process. Therefore, it was held that a public body could adopt rules generally prohibiting the use of tape recorders at open meetings.

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

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

> "was decided in 1963, some fifteen (15) years before the legislative passage of the 'Open Meetings Law', and before the *widespread use of hand held cassette recorders which can be operated by individuals without interference with public proceedings or the legislative process.* While this court has had the advantage of hindsight, it would have required great foresight on the part of the court in Davidson to foresee the opening of many legislative halls and courtrooms to television cameras and the news media, in general. Much has happened over the past two decades to alter the manner in which governments and their agencies conduct their public business. The need today appears to be truth in government and the restoration of public confidence and not 'to prevent star chamber proceedings'...In the wake of Watergate and its aftermath, the prevention of star chamber proceedings does not appear to be lofty enough an ideal for a legislative body; and the legislature seems to have recognized as much when it passed the Open Meetings Law, embodying principles which in 1963 was the dream of a few, and unthinkable by the majority"(id., 509-510; emphasis mine).

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

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

> recording goal of a fully informed citizenry, we accordingly affirm the judgement annulling the resolution of the respondent board of education" (id. at 925).

In consideration of the "obtrusiveness" or distraction caused by the presence of a tape recorder, it was determined by the Court that " the unsupervised recording of public comment by portable , hand-held tape recorders is not obtrusive, and will not distract from the true deliberative process" (id., 925). Further, the Court found that the comments of members of the public, as well as public officials, may be recorded. As stated in Mitchell:

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

In short, the nature and use of the equipment were the factors considered by the Court in determining whether its presence affected the deliberative process, not the privacy or sensibilities of those who chose to speak.

In view of the judicial determination rendered by the Appellate Division, a member of the public may tape record open meetings of public bodies, so long as tape recording is carried out unobtrusively and in a manner that does not detract from the deliberative process. While Mitchell pertained to the use of audio tape recorders, I believe that the same points as those offered by the Court would be applicable in the context of the use of video recorders. Just as the words of members of the public can be heard at open meetings, those persons can also been seen by anyone who attends.

In Peloquin v. Arsenault, 616 NYS 2d 716 (1994), the court focused primarily on the manner in which camera equipment is physically used and found that the unobtrusive use of cameras at open meetings could not be prohibited by means of a "blanket ban." The Court expansively discussed the notion of what may be "obtrusive" and referred to the Mitchell holding and quoted from an opinion rendered by this office as follows:

> "On August 26, 1986 the Executive Director of the Committee on Open Government opined (OML-AO-1317, p.3) with respect to *video* recording as follows:
>
> > 'If the equipment is large, if special *lighting* is needed, and if it is obtrusive and distracting, I believe that a rule prohibiting its use under those circumstances would be reasonable. However, if advances in technology permit video equipment to be used without special lighting, in a stationary location and in an unobtrusive manner, it is questionable in my view whether a prohibition under those circumstances would be reasonable.'

On April 1, 1994, Mr. Freeman further opined (OML-AO-2324) that a county legislature's resolution limiting hand held camcorders to the spectator area in the rear of the legislative chamber was not per se unreasonable but rather, as challenged, it depended for its legitimacy on whether or not the camcorders could actually record the proceedings from that location.

Blanket prohibition of audio recording is not permissible, and it is likely that the appellate courts would find that also to be the case with blanket prohibitions of video recording. However, what might be reasonable in one physical setting - a village board restricting camcording to the rear area of *its* meeting room - might not be in another - the larger chambers of a county legislature (OML-AO-1317, supra). It might well be reasonable in a village or other space-restricted setting to restrict the number of camcorders to one, as the court system may with its pooling requirement for video coverage of trials (22 NYCRR Parts 22 and 131). Such a requirement might be viewed as unreasonable in a large county legislative chamber or where a local board of education is conducting a meeting in a school auditorium.

As Mr. Freeman observed with respect to video recording (OML-AO-1317, supra), if it is 'obtrusive and distracting', a ban on it is not unreasonable. It is here claimed to be distracting. Tupper Lake Village Board members and some segment of the public aver that they are distracted from the business at hand because they do not wish to appear on television - the sole justification offered in defense of the policy.

Mitchell, supra, held that fear of public airing of one's comments at a public meeting is insufficient to sustain a ban on audio recording.

Is Mr. Peloquin's (or anyone's else's) video recording of a village board proceedings obtrusive?...

"...Hand held audio recorders *are* unobtrusive (*Mitchell*, supra); camcorders may or may not be depending, as we have seen, on the circumstances. Suffice it to say, however, in the face of *Mitchell*, the Committee on Open Government's (Robert Freeman's) well-reasoned opinions supra and the court system's pooled video coverage rules/options, a blanket ban on all cameras and camcorders when the sole justification is a distaste for appearing on public access cable television is unreasonable. While "distraction" and "unobtrusive" are subjective terms, in the face of the virtual presumption of openness contained in Article 7 of the Public Officers law and the insufficient justification offered by the Village, the 'Recording Policy' in issue here must fall" (id., 717, 718; emphasis added by the court).

I note that the foregoing as it pertains to the use of a video recorder was cited favorably in a more recent decision of the Appellate Division, Csorny v. Shoreham-Wading River Central School District, 305 AD2d 83 (2003).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Hon. Mello J. Testa

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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July 20, 2004

Mr. Kenneth Bartholomew
[redacted]

Dear Mr. Bartholomew:

I have received your letter in which you referred to action taken by the Mayor of the Village of Whitehall to change the dates of meetings previously scheduled and asked whether she may do so without approval by the Board of Trustees.

In this regard, as you may be aware, the advisory jurisdiction of the Committee on Open Government pertains to the Freedom of Information and Open Meetings Laws. Neither of those statutes offers direction or includes any provision dealing with the authority of a particular public official to schedule or reschedule a meeting. That being so, I cannot offer specific guidance or an opinion that focuses on the issue.

It is noted, however, that the Open meetings Law requires that notice be posted and given to the news media prior to every meeting of a public body, such as a 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 point out, too, that the judicial interpretation of the Open Meetings Law suggests that the propriety of scheduling a meeting less than a week in advance is dependent upon the actual need to do so. As stated in Previdi v. Hirsch:

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Trustees

STATE OF NEW YORK
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July 26, 2004

Ms. Carolyn Clark
President, Snug Harbor Alliance
[redacted]

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. Clark:

I have received your letter in which you requested an advisory opinion concerning "the rights of the public to attend board meetings of Snug Harbor Cultural Center, Inc. (SHCC), of Staten Island." You expressed the belief that "[b]ecause public funding and oversight by public agencies is involved", SHCC and other not-for-profit organizations "are bound by the New York Open Meetings Law."

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

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

From my perspective, the receipt of government funding does not render an entity a public body. Similarly, oversight by the government in my view would not necessarily bring an entity within the coverage of the Open Meetings Law. Private educational institutions, for example, are chartered by the Board of Regents and are, to some extent, overseen by the Board and the State Education Department. Nevertheless, the governing bodies of private educational institutions are not obliged to give effect to the Open Meetings Law, for they do not conduct public business, nor do they perform a governmental function.

In an effort to learn more about SHCC, I reviewed material on its website, which was insufficient to enable me to offer advice. Thereafter, I contacted officials at the New York City Department of Cultural Affairs. Although it was confirmed that the SHCC receives funding from the City and the City serves as landlord, I was informed that SHCC is a private entity and largely independent. I was also informed that the Mayor of New York City and the Commissioner of Cultural Affairs are *ex officio* members of the SHCC Board of Directors, but that they cannot vote. Further, since they consist of only two members within a much larger body, City Officials constitute far less than a majority of the Board's membership.

In short, based on my understanding of the functioning of the SHCC and its relationship with the government of New York City, its board of directors does not constitute a public body and, therefore, is not required to comply with 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

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July 27, 2004

Ms. Bonnie Barkley
[redacted]

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:

I have received your letter in which you made a variety of allegations concerning officials of the Penn Yan Central School District, which you serve as a member of the Board of Education, and raised questions relating to the Open Meetings Law. The ensuing comments will deal solely with issues involving the law.

Your initial question is whether the Board may "hold an executive session meeting prior to a regular BOE meeting." 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. The Law also contains a procedure that must be accomplished during an open meeting before an executive session may be held. Specifically, §105(1) states in relevant part that:

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

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

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

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

For the reasons expressed in the preceding commentary, a public body cannot in my view schedule 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, it cannot be known in advance of that vote that the motion will indeed be approved.

Notwithstanding the foregoing, since it appears that you may be involved in proceedings against the District, I note that the Open Meetings Law provides two vehicles under which the public, in appropriate circumstances, may be excluded from meetings of public bodies. One, as indicated above, is an executive session, a portion of an open meeting during which the public may be excluded. I point out, too, that §105(2) states that members of a public body have the right to attend executive sessions of the body.

The other vehicle that authorizes private discussion arises under §108 of the Open Meetings Law. Section 108 contains three "exemptions", and if a matter is "exempted" from the Open Meetings Law, that statute is not applicable.

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

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

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

In terms of background, it has long been held that a municipal board may establish a privileged relationship with its attorney [People ex rel. Updyke v. Gilon, 9 NYS 243 (1989); Pennock v. Lane, 231 NYS 2d 897, 898 (1962)]. However, such a relationship is in my opinion operable only when a municipal board or official seeks the legal advice of an attorney acting in his or her capacity as an attorney, and where there is no waiver of the privilege by the client.

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

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

Therefore, insofar as the Board seeks legal advice from its attorney and the attorney offers legal advice, the communications between the Board and the attorney would, in my opinion, be confidential and outside the coverage of the Open Meetings Law.

When a member of a public body has initiated legal proceedings against that body and is its legal adversary, I believe he or she could validly be excluded from a gathering between the other members and their attorney in which the attorney-client privilege is properly invoked. The member-adversary in that instance would not be the client. In that situation, the gathering would be exempted from the Open Meetings Law insofar as the attorney-client privilege applies. However, if a member of a public body is not an adversary party in litigation (but perhaps a dissenter or person with a minority view), that person would have the right under §105(2) of the Open Meetings Law to attend an executive session.

Lastly, you asked whether the Board may hold meetings at 7 a.m. Although the Open Meetings Law does not specify when meetings must be held, §103(a) of the Law states in part that "Every meeting of a public body shall be open to the general public..." Further, the intent of the Open Meetings Law is clearly stated in §100 as follows:

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

> control over those who are their public servants. It is the only climate under which the commonweal will prosper and enable the governmental process to operate for the benefit of those who created it."

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

In my opinion, every provision of law, including the Open Meetings Law, should be implemented in a manner that gives reasonable effect to its intent, and 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).

Based on the foregoing, the reasonableness of conducting meetings at 7 a.m. is, in my view, doubtful.

As you requested, enclosed is a copy of the Open Meetings Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Education

Enc.

STATE OF NEW YORK
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July 28, 2004

E-MAIL

TO: Franklin Ramos [redacted]

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Mr. Ramos:

As you are aware, I have received your letter in which you raised a variety of questions relating to the Open Meetings Law and its implementation by the Brentwood School District Board of Education.

Your first expression of concern involves notice of meetings, and §104 of the Open Meetings Law provides direction to public bodies, such as boards of education, stating 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 or due to an "emergency" 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.

As suggested above, it is emphasized that §104 imposes a dual requirement, for notice must be posted in one or more conspicuous, public locations, and in addition, notice must be given to the news media. Again, the law requires that notice of a meeting be "conspicuously posted"in one or more "designated" locations. The term "designated" in my opinion involves a requirement that a public body, by resolution or through the adoption of policy or a directive, must select one or more specific locations where notice of meetings will consistently and regularly be posted. If, for instance, a bulletin board located at the entrance of a school district's administrative offices has been designated as a location for posting notices of meetings, the public has the ability to know where to ascertain whether and when meetings of a school board will be held.

In my opinion, 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.

Second, you referred to an action taken by means of a vote of "a majority of those present" and asked "[w]hat is the required minimum number of votes and or attendance for a resolution to carry." In this regard, §41 of the General Construction Law, entitled "Quorum and majority", has long indicated that a quorum is a majority of the total membership of a public body, notwithstanding absences or vacancies. A meeting of a public body cannot validly be held unless a quorum is present. That statute also states that an affirmative vote by a majority of the total membership is needed for a public body to take action or to carry out its powers or duties. Therefore, if, for example, a board consists of seven members and five are present, a vote of three to two would not carry; in a board that has seven members, four affirmative votes would be needed to take action or approve a resolution.

Third, you asked what "the required time frame [is] for minutes of the school board meetings to be made available to the public." Section 106 of the Open Meetings Law provides direction concerning the contents of minutes and the time within which they must be prepared and disclosed. Specifically, that provision states that:

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

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

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

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

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 Board takes action, a record must be prepared specifying the manner in which each member cast his or her vote. Typically, the record of votes appears in minutes of meetings.

Lastly, you questioned whether there is "an appeal or protest process through which the public can challenge or petition for nullification of a school board vote." As in this instance, any person may seek an advisory opinion from this office. While opinions rendered by the Committee on Open Government are not binding, it is our hope that they are educational and persuasive. Additionally, any "aggrieved person" has the right to attempt to enforce the Open Meetings Law through the initiation of a judicial proceeding. Section 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". Subdivision (2) of §102 authorizes a court to award attorney's fees to the successful party in an action brought under the Open Meetings Law.

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

I hope that I have been of assistance.

RJF:tt

cc: Board of Education

From: Robert Freeman
To: Village of Schuylerville
Date: 7/28/2004 10:08:30 AM
Subject: Re: Good Morning!

Good morning - -

As you have described it, the special board is, in my opinion, subject to the Open Meetings Law.

Section 7-722 of the Village Law, which is relatively new, pertains to village comprehensive plans, and subdivision (2)(c) defines the phrase "special board" to mean: "a board consisting of one more members the planning board and such other members as are appointed by the village board of trustees to prepare a proposed comprehensive plan and/or an amendment thereto."

If the entity to which you referred is a creation of law, a "special board" created pursuant to the statutory authority conferred by §7-722, I believe that it constitutes a "public body" required to comply with the Open Meetings Law. Assuming that it is a public body, it would be required to provide notice and abide by the Open Meetings Law in the same manner as the Village Board of Trustees.

There is nothing in the law that specifies who must provide notice of meetings or prepare minutes. From my perspective, direction of that nature should be provided by the Board of Trustees. It could designate you to perform those functions, or perhaps a secretary for the special board or its chair.

It might be worthwhile to review §7-722.

If you have additional questions, you know where I am.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
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July 28, 2004

E-MAIL

TO: Denise Markowitz <[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. Markowitz:

As you are aware, I have received your letter in which you wrote that the Open Meetings Law was "disregarded." You referred to a proposed housing development that will have a significant impact upon the village in which you live, and an incident in which you and others were "ordered off the property by the owner in the presence of a quorum of [y]our village planning board, prior to a walking site inspection regarding an environmentally sensitive issue."

Based on judicial interpretations, it is possible that the Open Meetings Law would not have been applicable.

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

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

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

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

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

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

As inferred earlier, there is case law, however, dealing with might be characterized as a field trip or site visit. In the first decision, the members of a public body were in a van, and it was held that "the Open Meetings Law was not violated" [City of New Rochelle v. Public Service Commission, 450 AD 2d 441 (1989)]. In that case, members of the Public Service Commission toured the proposed route of a power line in order to acquire a greater understanding of evidence previously presented. More recently, in Riverkeeper v. The Planning Board of the Town of Somers (Supreme Court, Westchester County, June 14, 2002), it was concluded that a site visit by a Planning Board does not constitute a meeting subject to the Open Meetings Law so long as its purpose is not "for anything other than to 'observe and acquire information.'" The court in that decision cited and apparently relied on advisory opinion rendered by this office in which it was suggested that:

> "...site visits or tours by public bodies should be conducted solely for the purpose of observation and acquiring information, and...any discussions or deliberations regarding such observations should occur in public during meetings conducted in accordance with the Open Meetings Law."

In consideration of the decisions cited above, when a public body tours or observes a site and does not engage in discussions or deliberations during the site visit, the Open Meetings Law does not apply. To comply with that statute, I believe that any discussions or deliberations relating to a

public body's observations made during a site visit should occur after that event, during a meeting held open to the public in accordance with the Open Meetings Law.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

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July 28, 2004

Ms. Diane Cirillo
[redacted]

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. Cirillo:

I have received your letter of June 4, which reached this office on June 15. You have raised a series of issues concerning a special meeting of the Seaford School District Board of Education held on June 1.

By way of background, the District's budget was rejected by the voters, and the Board prepared a revised budget that was to be the subject of a vote on June 15. Because the revised budget included the elimination of the position of athletic director, some parents expressed dissatisfaction, and the Board, according to your letter, "agreed to meet with certain parents" on June 1, two days prior to the public hearing on the revised budget. The meeting was, according to your letter, "an executive session only" and "[n]o open meeting was conducted and no minutes were taken." During that meeting, "a few positions, one of which was the position of Athletic Director", were added to the revised budget. As I understand your remarks, although a hearing was held on June 3 and a vote taken by the Board to accept the revised budget, with the addition of those positions, no mention of those positions was made either during the hearing or in documentation available prior to the hearing.

In this regard, since the advisory jurisdiction of the Committee on Open Government relates to the Open Meetings Law, the ensuing comments will focus on issues pertaining to that statute. This office does not have the authority to advise with respect to other matters, such as the absence of reference to positions in the documentation made available to the public before the public vote on the revised budget.

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 cannot conduct or schedule 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 holding or scheduling executive sessions prior to meetings, it was held that:

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

For the reasons expressed in the preceding commentary, a public body cannot in my view conduct an executive session separate from an open 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, an executive session cannot be held until after an open meeting has been convened.

I point out, too, that every meeting must be preceded by notice of the time and place. Section 104 of the Open Meetings Law requires that:

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

Second, I do not believe that the Board had a basis for conducting an executive session to discuss the addition or elimination of positions. Paragraphs (a) through (h) of §105(1) of the Open Meetings Law specify and limit the grounds for entry into executive session. While the issue might be characterized as a "personnel matter", I note that the term "peronnel" appears nowhere in the Open Meetings Law, and the language of the so-called "personnel" exception, paragraph (f) is 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, addition 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. Since the discussion to which you referred pertained to positions and financial concerns, I do not believe that the matter should have been considered in private.

Lastly, when action is taken, whether it may be approval of a motion to enter into executive session or perhaps to create a position, the action taken must be memorialized in minutes. Section 106 of the Open Meetings Law pertains to minutes and states that:

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

I emphasize that only in rare instances may a board of education take action during an executive session. As a general rule, a public body may take action during a properly convened executive session [see Open Meetings Law, §105(1)]. In the case of most public bodies, if action is taken during an executive session, minutes reflective of the action, the date and the vote must be recorded in minutes pursuant to §106(2) of the Law. If no action is taken, there is no requirement that minutes of the executive session be prepared. Various interpretations of the Education Law,

§1708(3), however, indicate that, except in situations in which action during a closed session is permitted or required by statute, a school board cannot take action during an executive session [see United Teachers of Northport v. Northport Union Free School District, 50 AD 2d 897 (1975); Kursch et al. v. Board of Education, Union Free School District #1, Town of North Hempstead, Nassau County, 7 AD 2d 922 (1959); Sanna v. Lindenhurst, 107 Misc. 2d 267, modified 85 AD 2d 157, aff'd 58 NY 2d 626 (1982)]. Stated differently, based upon judicial interpretations of the Education Law, a school board generally cannot vote during an executive session, except in those unusual circumstances in which a statute permits or requires such a vote. Those circumstances would not have been present in the situation as you described it.

In short, based on the information that you provided, I believe that the meeting should have been preceded by notice and conducted open to the public, and that minutes should have been prepared indicating the nature of any action taken and the vote of the members of the Board.

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: Julie Oliva, President, Board of Education
George Duffy, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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July 29, 2004

Mr. James E. Konstanty
Otsego County Attorney
County Office Building
197 Main Street
Cooperstown, NY 13326-1129

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. Konstanty:

I have received your letter in which you referred to an opinion addressed to two members of the Otsego County Board of Representatives on May 27. In short, based on information provided to this office by those persons, it was advised that the Board's Public Administration Committee could not conduct a valid meeting or take action by means of a telephone conference call or a series of phone calls. It was suggested in the opinion that the action taken by the Committee may have been significant, for if that action was invalid, a matter considered by the Board could not, in the words of one of the members, been "brought forth...in the manner that it was..."

You sent a more expansive version of the situation, and referred to the following scenario as described in minutes of a Board meeting:

> "Prior to February 13, 2004, the Administration Committee made a decision by telephone to sponsor a resolution appointing Mike Swiderski. On February 18, 2004, Resolution No. 81-2004, appointing Mike Swiderski, was presented at the County Board meeting. The resolution lost because it only had 7 ayes. On February 23, 2004, the Administration Committee held its regular committee meeting, which had proper notice to the public. At that meeting the committee discussed the vacancy on the County Board and voted to have Resolution No. 81-2004 available for reintroduction at a special County Board meeting. On February 24, 2004 Chairman Higgins called for a special County Board meeting to be held on February 28,2004 for the purpose of discussing and taking action on the vacancy on the County Board. Proper notice was given for this meeting. At the meeting on February 28, 2004, a

> motion was made to reconsider Resolution No. 81-2004. Votes occurred on the motion and on the resolution with both being adopted...."

In this regard, it is emphasized that I am unfamiliar with the internal rules or procedures applicable to the Board or its committees. Nevertheless, the essence of the opinion remains unchanged, that I do not believe that a public body, such as a committee of a county legislature, can validly conduct a meeting or take action via use of the telephone. However, based on the minutes, it appears that the Administration Committee took action at a meeting properly held ten days after its effort to take action by phone. Since I do not have any knowledge of the Board's rules or procedures, I cannot comment with respect to the validity of action taken later by the Board.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

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August 2, 2004

Ms. Edie Keasbey
[redacted]

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. Keasbey:

I have received your letter and the materials attached to it. You have sought my views concerning a proposal by the Town of Patterson regulating the use of signs at meetings and hearings of boards and committees that function within Town government.

Section 1.2 of the proposal states that:

> "Signs shall not be carried, held or otherwise displayed by the general public within any room in which a meeting is being held, or about to be held by the Town Board, or other officially designated Board or Committee of the Town of Patterson."

Section 1.4 would, if enacted, provide that:

> "For the purpose of these rules of procedure a sign shall be considered as any object with a single surface area larger than seventy (70) square inches, held or carried by one or more individuals which is intended to convey a message. Messages on shirts shall not be considered a sign."

In this regard, there is no state law of which I am aware that focuses on the issue. 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 in accordance with rules adopted by that body. In the context of your correspondence, §63 of the Town Law authorizes the Town Board to adopt such rules.

Although public bodies have the right to adopt rules to govern their own proceedings, the courts have found in a variety of contexts that such rules must be reasonable. In my view, the issue in this instance involves the reasonableness of the rules and the extent to which disruption or distraction may occur when those who attend meetings seek to express their views through the presence of signs. In a decision rendered in 1963 concerning the use of tape recorders, it was found that the presence of a tape recorder, which then was a large and obtrusive device, would detract from the deliberative process and that, therefore, a policy prohibiting its use was reasonable [Davidson v. Common Council, 40 Misc.2d 1053]. However, when changes in technology enabled the public to use portable, hand-held tape recorders, it was found that their use would not detract from the deliberative process, because those devices were unobtrusive. Consequently, it was also found that rules adopted by public bodies prohibiting their use were unreasonable [People v. Ystueta, 99 Misc.2d 1105 (1979); Mitchell v. Board of Education of the Garden City Union Free School District, 113 AD 2d 924 (1985). Specifically, in Mitchell, it was held that: "While Education Law §1709(1) authorizes a board of Education to adopt by laws and rules for its government and operations, this authority is not unbridled. Irrational and unreasonable rules will not be sanctioned." Similarly, it has been held that a general ban on the use of video recording devices is unreasonable, and that the use of those devices must be permitted if such use is not disruptive [see Peloquin v. Arsenault, 616 NYS 2d 716 (1994)].

Based on the foregoing, I believe that the Board could clearly adopt rules pursuant to §63 of the Town Law to prevent verbal interruptions, shouting or other outbursts, as well as slanderous or obscene language; similarly, I believe that the Board could regulate movement in order to preclude interference with meetings that would otherwise prevent those in attendance from observing or hearing the deliberative process.

From my perspective, the primary consideration should involve whether or the extent to which a sign may be obtrusive or disruptive in some manner. If the presence of a sign blocks a person in attendance at a meeting from observing the proceedings, I believe that a rule requiring that the sign be moved or perhaps, due to size, removed. If a sign includes obscene language, I believe that a rule could validly prohibit its presence at a meeting. In this instance, the proposal prohibits the presence of any sign at a meeting that is larger than seventy square inches, irrespective of its content. Messages on shirts are sometimes larger than seventy square inches. Despite their size and the possibility that messages on them may be offensive to some, there is no prohibition applicable to shirts. That being so, while I know of no judicial decision that deals with the issue, as written, it is questionable in my view whether a court would find each aspect of the proposal to be reasonable.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
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August 2, 2004

Ms. Renee Nostrand
[redacted]

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. Nostrand:

I have received your letter and apologize for the delay in responding. You have sought guidance concerning the propriety of a situation in which the Taghkanic Town Board voted during an executive session to appoint a person to fill a vacancy in an unexpired term on the Board.

In this regard, first, the Open Meetings Law generally permits a public body, such as a town board, to take action during an executive session that is properly held. As you may be aware, 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 provided, however, that no action by formal vote shall be taken to appropriate public monies..."

The inference in the last clause of the passage quoted above is that action may be taken during an executive session, unless the action is to appropriate public monies.

That conclusion is confirmed in §106 of the Open Meetings Law concerning minutes, for subdivision (2) focuses on 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."

Second, for purposes of clarification of your understanding, you referred to "expending public funds" during an executive session. In my view, if monies have been budgeted, and a board acts to spend those monies, its action is not an "appropriation." I believe that an appropriation would involve the expenditure of monies not already budgeted or available to be spent. If my belief is accurate, the Board would not have made an "appropriation" during an executive session.

Third, based on the judicial interpretation of the Open Meetings Law, it is questionable whether the Board could validly have held an executive session. The only provision that might have justified the holding of an executive session is §105(1)(f) of the Open Meetings Law, which permits a public body to enter into an executive session to discuss:

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

Under the language quoted above, it would appear that a discussion focusing on the individual candidates could validly be considered in an executive session, for it would involve a matter leading to the appointment of a particular person. Nevertheless, in the only decision of which I am aware that dealt directly with the propriety of holding an executive to discuss filling a vacancy in an elective office, the court found that there was no basis for entry into executive session. Specifically, 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:tt

cc: Town Board

STATE OF NEW YORK
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August 2, 2004

E-MAIL

TO: Nina Gustafson <gusfam@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 facts presented in your correspondence.

Dear Ms. Gustafson:

As you are aware, I have received your letter. In your capacity as a member of the Gerry Town Board, you objected to a notice of a meeting indicating that "a body will be adjourning into executive session before the meeting takes place" and wrote that the Board "could not go into an executive session to discuss a 'personnel matter.'" You also allege that the Town Supervisor "violated some one's privacy and reason for the session because the Clerk was told what is going to happen."

You have sought "help in stopping this", and in this regard, I offer the following comments.

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

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

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. Often there is an intent to be considerate to the public, and by indicating that an executive session is likely to be held (rather than *scheduled*), the public can implicitly be informed that there may be no overriding reason for arriving at the beginning of a meeting.

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

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

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

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

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

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

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

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

It has been advised that a motion describing the subject to be discussed as "personnel" 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; 207 AD 2d 55 (1994)].

Lastly, if I understand your remark accurately, it appears to be your belief that a disclosure of the nature of a matter relating to a particular person that will be discussed in executive session would result in a violation concerning one's privacy. In short, I know of no provision of law indicating that such a disclosure would result in a violation of law.

I hope that I have been of assistance.

RJF:tt

cc: Town Board
Hon. Janet I. Wilcox

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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August 3, 2004

Mr. George Hoffman
Chief of Staff
Town of Brookhaven
One Independence Hill
Farmingville, NY 11738

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. Hoffman:

I have received your letter in which you sought "guidance on how to handle a request from a member of the public seeking to videotape Work Session meetings of the Town Board." You indicated that the "problem...is that [the] Work Session room is small and the camera and equipment is large, requiring a tripod and a large trunk-like container, which the resident uses for carrying paraphernalia." In addition, "this particular member of the public wants to stand where she pleases and move the camera back and forth on the tripod as Town Board members and staff make presentations."

In this regard, as you are likely aware, neither the Open Meetings Law nor any other statute focuses on or makes reference to the use of recording devices at meetings of public bodies, such as town boards. However, there are several judicial decisions which offer guidance.

In my opinion, those decisions consistently apply certain principles. One is that a public body has the ability to adopt reasonable rules concerning its proceedings. The other involves whether the use of the equipment would be disruptive.

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

If the equipment used by the person in question is so large that its presence would detract from the Board's deliberative process, as in Davidson, it is likely in my view that a rule prohibiting the presence of large equipment (i.e., the "trunk-like container, particularly if the operator periodically retrieves or replaces various items in the container) would be found by a court to be reasonable.

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

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

> "was decided in 1963, some fifteen (15) years before the legislative passage of the 'Open Meetings Law', and before the *widespread use of hand held cassette recorders which can be operated by individuals without interference with public proceedings or the legislative process.* While this court has had the advantage of hindsight, it would have required great foresight on the part of the court in Davidson to foresee the opening of many legislative halls and courtrooms to television cameras and the news media, in general. Much has happened over the past two decades to alter the manner in which governments and their agencies conduct their public business. The need today appears to be truth in government and the restoration of public confidence and not 'to prevent star chamber proceedings'...In the wake of Watergate and its aftermath, the prevention of star chamber proceedings does not appear to be lofty enough an ideal for a legislative body; and the legislature seems to have recognized as much when it passed the Open Meetings Law, embodying principles which in 1963 was the dream of a few, and unthinkable by the majority"(id., 509-510; emphasis mine).

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

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

In consideration of the "obtrusiveness" or distraction caused by the presence of a tape recorder, it was determined by the Court that " the unsupervised recording of public comment by portable , hand-held tape recorders is not obtrusive, and will not distract from the true deliberative process" (id., 925). Further, the Court found that the comments of members of the public, as well as public officials, may be recorded. As stated in Mitchell:

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

In short, the nature and use of the equipment were the factors considered by the Court in determining whether its presence affected the deliberative process, not the privacy or sensibilities of those who chose to speak.

In view of the judicial determination rendered by the Appellate Division, a member of the public may tape record open meetings of public bodies, so long as tape recording is carried out unobtrusively and in a manner that does not detract from the deliberative process. While Mitchell pertained to the use of audio tape recorders, I believe that the same points as those offered by the Court would be applicable in the context of the use of video recorders. Just as the words of members of the public can be heard at open meetings, those persons can also be seen by anyone who attends.

In the first decision concerning the use of video equipment, Peloquin v. Arsenault [616 NYS2d 716 (1994)], the court focused primarily on the manner in which camera equipment is physically used and found that the unobtrusive use of cameras at open meetings could not be prohibited by means of a "blanket ban." The Court expansively discussed the notion of what may be "obtrusive" and referred to the Mitchell holding and quoted from an opinion rendered by this office as follows:

> "On August 26, 1986 the Executive Director of the Committee on Open Government opined (OML-AO-1317, p.3) with respect to *video* recording as follows:

> 'If the equipment is large, if special *lighting* is needed, and if it is obtrusive and distracting, I believe that a rule prohibiting its use under those circumstances would be reasonable. However, if advances in technology permit video equipment to be used without special lighting, in a stationary location and in an unobtrusive manner, it is questionable in my view whether a prohibition under those circumstances would be reasonable.'

On April 1, 1994, Mr. Freeman further opined (OML-AO-2324) that a county legislature's resolution limiting hand held camcorders to the spectator area in the rear of the legislative chamber was not per se unreasonable but rather, as challenged, it depended for its legitimacy on whether or not the camcorders could actually record the proceedings from that location.

Blanket prohibition of audio recording is not permissible, and it is likely that the appellate courts would find that also to be the case with blanket prohibitions of video recording. However, what might be reasonable in one physical setting - a village board restricting camcording to the rear area of *its* meeting room - might not be in another - the larger chambers of a county legislature (OML-AO-1317, supra). It might well be reasonable in a village or other space-restricted setting to restrict the number of camcorders to one, as the court system may with its pooling requirement for video coverage of trials (22 NYCRR Parts 22 and 131). Such a requirement might be viewed as unreasonable in a large county legislative chamber or where a local board of education is conducting a meeting in a school auditorium.

As Mr. Freeman observed with respect to video recording (OML-AO-1317, supra), if it is 'obtrusive and distracting', a ban on it is not unreasonable. It is here claimed to be distracting. Tupper Lake Village Board members and some segment of the public aver that they are distracted from the business at hand because they do not wish to appear on television - the sole justification offered in defense of the policy.

Mitchell, supra, held that fear of public airing of one's comments at a public meeting is insufficient to sustain a ban on audio recording.

Is Mr. Peloquin's (or anyone's else's) video recording of a village board proceedings obtrusive?...

"...Hand held audio recorders *are* unobtrusive (*Mitchell*, supra); camcorders may or may not be depending, as we have seen, on the circumstances. Suffice it to say, however, in the face of *Mitchell*, the Committee on Open Government's (Robert Freeman's) well-reasoned opinions supra and the court system's pooled video coverage rules/options, a blanket ban on all cameras and camcorders when the sole justification is a distaste for appearing on public access cable television is unreasonable. While "distraction" and "unobtrusive" are subjective terms, in the face of the virtual presumption of openness contained in Article 7 of the Public

Officers law and the insufficient justification offered by the Village, the 'Recording Policy' in issue here must fall" (id., 717, 718; emphasis added by the court).

In consideration of the foregoing, I believe that the Town Board has the authority to adopt a rule involving the location within the room in which the equipment could be used. Similarly, it could in my opinion establish a rule concerning movement of the equipment during a meeting. Both of those kinds of restrictions or limitations would be designed to achieve the goal of preventing distraction, disruption and the obtrusive use of the equipment. If reasonably drafted, I believe that rules of that nature would be found to be valid.

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-3849

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

August 4, 2004

E-MAIL

TO: Hon. Monica Harris <richfield-clerk@stny.rr.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 Ms. Harris:

I have received your letter in which you sought a clarification of an advisory opinion rendered in 1996, OML-AO-2616 concerning the "alteration" of minutes of meetings. You wrote that two members of the Town Board "expect [you] to change the minutes of a meeting if they do not agree with what [you] wrote." You added that one Board member has informed you that the Association of Towns has advised her that "board members can have anything taken out that they don't want, and anything in that they do want."

It is doubtful, in my opinion, that the interpretation by the Board member of the advice offered by the Association of Towns represents an accurate rendition of the advice. Further, I do not believe that members of the Town Board have the authority to include or exclude language as they desire. Under §30 of the Town Law, you, as Town Clerk, have the statutory authority and obligation to prepare minutes of Town Board meetings. From my perspective, so long as minutes are accurate and include the items required by §106 of the Open Meetings Law, the circumstances under which minutes might justifiably be altered or amended would be rare. As suggested in the advisory opinion to which you referred:

> "...it is my view that you, in your position as clerk, have the responsibility and the authority to prepare minutes and to ensure their accuracy. While the Board and/or the Supervisor may have other areas of authority, I do not believe that they could validly require the amendment of minutes as they see fit. Moreover, so long as the minutes you prepare are accurate and, again, presented reasonably, fairly and in a manner consistent with the contents of minutes as required by the Open Meetings Law, I believe that you would be acting appropriately."

Enclosed is a copy of the opinion in its entirety, and I hope that this response and that opinion will serve to clarify the matter.

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

RJF:tt

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14842
OML-AO-3850

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August 4, 2004

Mr. William Huston
[redacted]

The staff of the Committee on 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. Huston:

As you are aware, I have received your letter in which you asked whether WSKG, a public radio station in Binghamton, is subject to the Open Meetings and Freedom of Information Laws. You wrote that the entity that operates WSKG is a not-for-profit corporation that was chartered by the Board of Regents.

Both of those statutes ordinarily apply to governmental entities, and in my view, WSKG is subject to neither. In this regard, I offer the following comments.

First, I note that all educational and similar institutions in New York are chartered by the Board of Regents, including private schools, colleges and universities. The grant of a charter would not signify that an entity is governmental in nature. Further, having performed research concerning WSKG and public radio stations generally, although licensed by the government, they are not operated or largely funded by the government. It is my understanding that the operating costs are funded primarily through payment of membership fees, contributions and underwriting by corporate organizations.

Second, the Open Meetings Law is applicable to meetings of public bodies. Section 102(2) of that law defines the phrase "public body" to include:

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

Based upon my understanding of the organization, it would not constitute a public body, for it does not perform a governmental function for the state or any particular group of municipalities or other governmental entities.

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."

Again, since WSKG is not a "governmental entity", it is not in my opinion an "agency", and rights conferred by the Freedom of Information Law would not extend to the WSKG.

Lastly, you referred to "business matters from and to politicians." If, for example, there are written communications between WSKG and state, county or other municipal officials, and if copies of those communications are maintained by state or municipal agencies, those communications would constitute agency records. In that circumstance, while WSKG would not be required to give effect to a request made under the Freedom of Information Law, that statute would apply to records maintained by those agencies and would be subject to rights of access.

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

OMC-AO-3851

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August 5, 2004

E-MAIL

TO: Theresa Grafflin <tgrafflin@ccsnys.org>

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Ms. Grafflin:

As you are aware, I have received your letter. In brief, you referred to a change in the time scheduled for a meeting held by the Gloversville City Council, apparently with no notification of the change given to the public or the news media.

In this regard, the Open Meetings Law requires that notice be posted and given to the news media prior to every meeting of a public body, such as a city council. 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, emergency or rescheduled meetings, if, for example, there is a need to convene quickly or change the time of a meeting, the notice requirements can generally be met by telephoning the local news media and by posting notice in one or more designated locations.

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

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

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

In an effort to enhance compliance with and understanding of the Open Meetings Law, a copy of this response will be sent to the City Council. Neither your name nor any other identifier appear in that copy.

I hope that I have been of assistance.

RJF:tt

cc: City Council

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3852

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August 6, 2004

Mr. Carlton Kearns Brownell
Town Attorney
Town of Geneva
3750 County Road 6
Geneva, NY 14456

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

Dear Mr. Brownell:

I have received your letter in which you referred to an advisory opinion that I prepared on June 18 at the request of Julia Guerrieri, Geneva Town Clerk. In your capacity as Town Attorney, you have provided information relating to the subject of that opinion for consideration. In short, you indicated that the purpose of an executive session held by the Town Board involved the "job performance" of the Town Clerk and an account clerk employed by the Town.

Based on information provided by the Town Clerk, it was advised in the opinion of June 18 that there appeared to have been no basis for conducting an executive session, for the discussion, as I understood the matter, involved "the functions of the town clerk and other town officials, irrespective of whom may be in office." It was also advised that "in order to enter into an executive session pursuant to §105(1)(f)... the discussion must focus on a particular person (or persons) in relation to a topic listed in that provision."

The cited provision authorizes a public body, such as a town board, to enter into executive session to discuss:

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

To the extent that a public body discusses or seeks to discuss the "job performance" of a "particular person" or persons, I believe that §105(1)(f) could properly be asserted. In that

circumstance, the discussion in my view would involve "the employment history" of a particular individual and would qualify for consideration in executive session. Therefore, insofar as the Town Board discussed or intends to discuss the job performance of the Town Clerk, the account clerk, or any other particular person, an executive session, in my opinion, may properly be or have been held.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Julia Guerrieri

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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August 17, 2004

E-MAIL

TO: Claire Quadri <[redacted]>

FROM: Robert J. Freeman, Executive Director RJF

Dear Ms. Quadri:

As you aware, I have received your inquiry concerning the public's right to attend meetings of NYSERDA, the New York State Energy Research and Development Authority. Additionally, having requested minutes of a meeting held in June, you were informed that they would not be available until approved.

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

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

Section 1852 of the Public Authorities Law specifies that NYSERDA is "a body corporate and politic, constituting a public benefit corporation." Since a public benefit corporation is a kind of public corporation [see General Construction Law, §66(1)], it is clear in my view that the governing body of NYSERDA is a public body required to comply with the Open Meetings 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, 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.

RJF:tt

cc: Tom Collins, NYSERDA

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 3854

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August 18, 2004

E-Mail

TO: Hon. Joy Canfield <[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. Canfield:

As you are aware, I have received your letter in which you sought clarification concerning one of the grounds for entry into executive session, specifically, §105(1)(f) of the Open Meetings Law. You questioned whether that provision can be asserted when an issue involves an elected official. It is apparently your view that it does not apply, because an elected official is not an employee.

In my view, that the subject of a discussion is not an employee is not determinative of the application of §105(1)(f). That provision authorizes a public body to enter into executive session to discuss:

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

The language quoted above merely refers to certain matters as they pertain to a "particular person or corporation"; there is nothing in that provision that limits the ability to conduct executive sessions to matters relating to employees.

In some instances, the ability to assert §105(1)(f) may be dependent on the authority of the public body considering an issue. In the context of the situations that you described, I believe that were distinctions in the authority of the Town Board. The first involved an executive session held by the Board to "reprimand [you] for not supporting a board's position or policy". I know of no provision that gives a town board the authority to "reprimand" one of its own members, and

consequently, it was advised that none of the terms within §105(1)(f) would have justified an executive session. The second, as you described it, involved an elected official, an assessor, who was appointed by the Town Board as chair of a body consisting of three elected assessors. In that situation, since the Board had the authority to appoint, it would also have the authority to remove. While the matter might not have involved the employment history of the assessor, it appears to have constituted a matter potentially leading to the "removal of a particular person" from his or her position as chair of the assessment body.

Pertinent facts and, again, in some cases, the authority of a public body, may be significant in considering whether §105(1)(f) of the Open Meetings Law may properly be asserted as a basis for conducting an executive session.

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

RJF:jm

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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August 19, 2004

Mr. Lee G. Austin
Ms. Nancy B. Reynolds
[redacted]

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

Dear Mr. Austin and Ms. Reynolds:

I have received your letter and appreciate your kind words. You have asked whether a motion to enter into executive session must indicate the reason.

In this regard, by way of background, the Open Meetings Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. 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..."

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

From my perspective, a motion for entry into executive session must be sufficiently detailed to enable the members of a public body, as well as others attending a meeting, to ascertain whether the issue may properly be discussed in private. For instance, it has been held 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) [see Gordon v. Village of Monticello, 207 AD2d 55 (1995)]. That provision permits a public body to enter into executive session to discuss:

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

A proper motion relative to §105(1)(f) might be: "I move to enter into an executive session to discuss the employment history of a particular person." By means of the kind of motion suggested above, members of a public body and others in attendance would have the ability to know that there is a proper basis for entry into an executive session. Absent such detail, neither the members nor others may be able to determine whether the subject may properly be considered behind closed doors.

I 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

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August 20, 2004

E-Mail

TO: Mr. Carl A. Falk <cfalk@twcny.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 Mr. Falk:

As you are aware, I have received your letter in which you raised a series of questions concerning the Town Board of the Town of Richland and the Zoning Board of Appeals.

In brief, you indicated that the Town Board and Planning Board members disagree with respect to a certain requirement, and the Town Supervisor "wants to ask the ZBA for their 'opinion' on the matter." To do so, you asked whether the board "would have to take some sort of vote." Similarly, you asked whether you are "wrong in thinking that all action taken by the ZBA should require a Document of Decision and a public hearing."

In this regard, §63 of the Town Law states in relevant part that "[e]very act, motion or resolution shall require for its adoption the affirmative vote of a majority of all the members of the town board." If the request for an opinion constituted an "act", §63 would require that a vote be taken by the Board. However, since I am not an expert relative to the Town Law and the powers of town boards, it is suggested that you seek clarification from the town attorney or the Association of Towns.

With respect to the Zoning Board of Appeals, although the Board must in some instances conduct a public hearing before taking action, I do not believe that every action taken by the Board must be preceded by a public hearing. Again, I recommend that you seek guidance from those with greater expertise. In any instance in which action is taken, minutes must be prepared in accordance with §106 of the Open Meetings Law. That provision states that:

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

Lastly, "[i]f a Town Board keeps having 'executive session' meetings and fails to state why or gives the generic 'legal matters or personnel matters' to conduct business which should have been done in open session", you asked "[w]hat can be done to put an end to this" and whether "there is some form [of] higher regulating authority."

There is no entity that has the authority to compel compliance with the Open Meetings Law other than a court. This office, however, has the statutory authority to offer advisory opinions pertaining to that statute. In an effort to enhance compliance with and understanding of the Open Meetings Law, copies of this opinion will be sent to Town officials.

In consideration of your questions, as you know, 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. 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 a public body 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].

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 <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. Matters of policy that affect personnel, consideration of the budget or the creation or elimination of positions, for example, typically cannot validly be considered in executive session.

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

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

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

> "...the public body must identify the subject matter to be discussed (See, Public Officers Law § 105 [1]), and it is apparent that this must be accomplished with some degree of particularity, i.e., merely reciting the statutory language is insufficient (see, Daily Gazette Co. v Town Bd., Town of Cobleskill, 111 Misc 2d 303, 304-305). Additionally, the topics discussed during the executive session must remain within the exceptions enumerated in the statute (see generally, Matter of Plattsburgh Publ. Co., Div. of Ottaway Newspapers v City of Plattsburgh, 185 AD2d §18), and these exceptions, in turn, 'must be narrowly scrutinized, lest the article's clear mandate be thwarted by thinly veiled references to the areas delineated thereunder' (Weatherwax v Town of Stony Point, 97 AD2d 840, 841, quoting Daily Gazette Co. v Town Bd., Town of Cobleskill, supra, at 304; see, Matter of Orange County Publs., Div. of Ottaway Newspapers v County of Orange, 120 AD2d 596, lv dismissed 68 NY 2d 807).
>
> "Applying these principles to the matter before us, it is apparent that the Board's stated purpose for entering into executive session, to wit, the discussion of a 'personnel issue', does not satisfy the requirements of Public Officers Law § 105 (1) (f). The statute itself requires, with respect to personnel matters, that the discussion involve the 'employment history of a particular person" (id. [emphasis supplied]). Although this does not mandate that the individual in question be identified by name, it does require that any motion to enter into executive session describe with some detail the nature of the proposed discussion (see, State Comm on Open Govt Adv Opn dated Apr. 6, 1993), and we reject respondents' assertion that the Board's reference to a 'personnel issue' is the functional equivalent of identifying 'a particular person'" [Gordon v. Village of Monticello, 620 NY 2d 573, 575; 207AD 2d 55, 58 (1994)]

I hope that I have been of assistance.

RJF:jm
cc: Town Board
Zoning Board of Appeals

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3857

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August 25, 2004

E-MAIL

TO: Shawn Morse <smorse@nycap.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 facts presented in your correspondence.

Dear Mr./Ms. Morse:

I have received your inquiry in which you raised the following question: "what if a council member has a concern about the actions of a fire chief...can members of the safety committee meet with the chief in a closed door meeting...is personnel meeting open or closed"?

In this regard, one of the grounds for entry into executive session, §105(1)(f), authorizes a public body to enter into executive session to discuss:

> "the medical, financial, credit or employment 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."

Assuming that the discussion involves the employment history of a particular person or perhaps a matter leading to the discipline of a particular person, I believe that an executive session could validly be conducted.

I note, too, that §105(2) states that: "Attendance at an executive session shall be permitted to any member of the public body and any other persons authorized by the public body." Therefore, the members of a public body, i.e., the committee, have the right to attend an executive session held by the committee, and the committee may authorize the fire chief to attend the executive session.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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August 26, 2004

E-Mail

TO: Hon. Carl Zatz, Supervisor in the Town of Gardiner

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 Zatz:

I have received your letter in which you referred to a conversation we had several months ago in which it was advised that an advisory committee designated by the Town Board to prepare proposed revisions to the Town's zoning law is not, according to judicial decisions, required to comply with the Open Meetings Law. You wrote that the committee has been meeting without notice, and in some instances, outside of the Town, and you added that "the appearance of secret meetings has caused many to approach you." You have asked that I "shed some legal light on this" and questioned whether the Town Board can "vote to compel" the committee conduct open meetings.

In this regard, by way of background, 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 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 entity 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.). I note, too, that the decision concerning the Town of Milan cited above involved the status of a "Zoning Revision Committee" designated by the Town Board to recommend changes in the zoning ordinance.

In the context of your inquiry, assuming that the committee has no authority to take any final and binding action for or on behalf of the Town, I do not believe that it constitutes a public body or, therefore, is obliged to comply with the Open Meetings Law.

Second, however, 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.

Further, I believe that the Town Board, the governing body, has the authority to direct that a committee that it has created must give effect to the Open Meetings Law. As you are likely aware, §64 of the Town Law confers general powers upon town boards, and subdivision (23), which is entitled "General powers", states that a board "Shall have and exercise all the powers conferred upon the town and such additional powers as shall necessarily be implied therefrom." In my view, since the Board has the power to create the committee, it is implicit that it has the power to require that

the committee function in a certain way, in this instance, in accordance with the Open Meetings Law.

Lastly, §110 of the Open Meetings Law entitled "Construction with other laws" provides in subdivision (1) that any local enactment that is "more restrictive with respect to public access...shall be deemed superseded" by the Open Meetings Law to the extent that it grants lesser access than that statute. However, subdivision (2) provides that any such enactment or "rule" that is "less restrictive with respect to public access...shall not be deemed superseded..." That being so, I believe that the Town Board could by local law or rule require the committee to grant public access to its meetings in a manner consistent with the Open Meetings Law.

I hope that I have been of assistance.

RJF:jm

From: Robert Freeman
To: Sheriffpvb@aol.com
Date: 8/27/2004 3:26:27 PM
Subject: Dear Councilman Van Blarcum:

Dear Councilman Van Blarcum:

I have received your inquiry and know of no provision that limits or restricts the scope of a special meeting of a town board or that requires that notice of a special meeting specify the subjects to be considered.

Section 62(2) of the Town Law as it pertains to special meetings of town boards states that: "The supervisor of any town may, and upon written request of two members of the board shall within ten days, call a special meeting of the town board by giving at least two days notice in writing to members of the board of the time when and the place where the meeting is to be held." No reference is made to the subject matter to be considered.

While notice must be given to the public by means of posting and to the news media prior to a meeting to comply with the Open Meetings Law, the notice must merely include the time and place of the meeting. Again, there need not be reference to the subjects to be discussed.

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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STATE OF NEW YORK
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September 1, 2004

Ms. Colleen Formisano
[redacted]

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. Formisano:

As you are aware, I have received your letter concerning the "understanding or misunderstanding" of the Open Meetings Law by the Port Jervis Board of Education.

Based on your letter and our telephone conversation, the Board met "behind closed doors" an hour prior to its scheduled meeting on July 13 to discuss its contingency budget. You added that it is your belief that expenditures relating to the transportation of students represented a key element of the discussion due to its impact on the contingency budget. When the open meeting began and the discussion involved the same issue, the Board entered into an executive session. When I asked you what the basis for the executive session might have been, you indicated that it was held in order to offer clarification of the matter involving the transportation of children in relation to the contingency budget.

From my perspective, the gathering held prior to the meeting should have been conducted open to the public, and there appears to have been no valid basis for conducting the executive session. In this regard, I offer the following comments.

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

I point out that the decision rendered by the Court of Appeals was precipitated by contentions made by public bodies that so-called "work sessions" and similar gatherings held for the purpose of discussion, but without an intent to take action, fell outside the scope of the Open

Meetings Law. In discussing the issue, the Appellate Division, whose determination was unanimously affirmed by the Court of Appeals, stated that:

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

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

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

Based upon the direction given by the courts, if a majority of 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. In this instance, I believe that the gathering held an hour prior to the meeting was itself a meeting that should have been preceded by notice and conducted open to the public as required by the Open Meetings Law.

Second, the phrase "executive session" is defined by §102(3) of the Open Meetings Law to mean a portion of an open meeting during which the public may be excluded. That being so, an executive session is not separate from an open meeting, but rather is a portion of an open meeting.

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.

If your contention is accurate, that the private discussion and the executive session involved consideration of the budget or the impact on the budget relative to the transportation of students, I believe that those closed sessions should have been conducted in public. Often a discussion concerning the budget has an impact on personnel. Nevertheless, and despite its frequent use, the term "personnel" appears nowhere in the Open Meetings Law. It is true that one of the grounds for entry into executive session often relates to personnel matters. From my perspective, however, the term is overused and is frequently cited in a manner that is misleading or causes unnecessary confusion. To be sure, some issues involving "personnel" may be properly considered in an executive session; others, in my view, cannot. Further, certain matters that have nothing to do with personnel may be discussed in private under the provision that is ordinarily cited to discuss personnel.

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

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

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

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

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

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

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

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

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

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

Daily Gazette Co. v Town Bd., Town of Cobleskill, supra, at 304; see, Matter of Orange County Publs., Div. of Ottaway Newspapers v County of Orange, 120 AD2d 596, lv dismissed 68 NY 2d 807).

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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September 2, 2004

Hon. Daniel Rosen
Town of Springfield
[redacted]

Hon. James Willsey
Town of Springfield
[redacted]

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

Dear Board Members Rosen and Willsey:

I have received your letter in which you, members of the Springfield Town Board, described a variety of instances in which records have not been made available to the Town Clerk. You added that "[t]he Town Supervisor and the Planning Board do not allow the Town Clerk in executive sessions or assigns anyone to take minutes" and that "[a]s a result, decisions are not made available to the public."

From my perspective, several provisions of law are pertinent to the matter. In this regard, I offer the following comments.

First, §30(1) of the Town Law provides in relevant part that a town clerk "Shall have the custody of all the records, books and papers of the town." As I understand that provision, the clerk is the legal custodian of all town records, irrespective of where or by whom the records are kept.

Second, in a related vein, the Freedom of Information Law is expansive in its scope, for it pertains to all agency records and defines the term "record" 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."

In view of the foregoing, any record maintained by or for a town constitutes a town record that falls within the coverage of the Freedom of Information Law.

Third, with respect to the implementation of the Freedom of Information Law, §89(1) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural implementation of that statute (21 NYCRR Part 1401). In turn, §87(1) requires the governing body of a public corporation to adopt rules and regulations consistent those promulgated by the Committee and with the Freedom of Information Law. Further, §1401.2 of the regulations provides in relevant part that:

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

As such, the Town Board has the duty to promulgate rules and ensure compliance.

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

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

Based on provisions quoted above, the records access officer must "coordinate" an agency's response to requests. As part of that coordination, I believe that other Town officials and employees

are required to cooperate with the records access officer in an effort to enable him or her to carry out his or her official duties.

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

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

Further, §57.25 of the Arts and Cultural Affairs Law states in relevant part that:

> "1. It shall be the responsibility of every local officer to maintain records to adequately document the transaction of public business and the services and programs for which such officer is responsible; to retain and have custody of such records for so long as the records are needed for the conduct of the business of the office; to adequately protect such records; to cooperate with the local government's records management officer on programs for the orderly and efficient management of records including identification and management of inactive records and identification and preservation of records of enduring value; to dispose of records in accordance with legal requirements; and to pass on to his successor records needed for the continuing conduct of business of the office..."

While others may have physical possession of town records, it is reiterated that §30(1) of the Town Law indicates that the clerk is the legal custodian of all town records. Consistent with that provision is §57.19 of the Arts and Cultural Affairs Law, which states in part that a town clerk is the "records management officer" for a town.

A failure to share the records or to inform the Clerk of their existence may effectively preclude the clerk from carrying out her duties as records management officer, or if she or someone else is so designated as records access officer for purposes of responding to requests under the Freedom of Information Law. In short, if the records access officer does not know the existence or location of Town records, or cannot obtain them, that person may not have the ability to grant or deny access to records in a manner consistent with the requirements of the Freedom of Information Law.

Lastly, in addition to a town clerk's role as the legal custodian of town records, §30(1) of the Town Law also states that the 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." The direction given in the Town Law is clear, as is §106 of the Open Meetings Law, which requires 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 a situation in which the Town Board might want to take action during an executive session, §105(2) of the Open Meetings Law permits the Board to enable the Town Clerk to be present during an executive session. However, there is no right to attend, because the Clerk is not a member of the Board.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Hon. Jeannette Armstrong

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14880
OML-AO-3862

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September 2, 2004

Ms. Sally A. Barlow
[redacted]

The staff of the Committee on 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. Barlow:

As you are aware, I have received your letter in which you sought advice concerning your efforts in obtaining minutes of meetings of the Town of Milford Planning Board. You indicated that a request for the minutes was made to the Secretary of the Planning Board and that you were told that the Town Attorney is in possession of the minutes.

In this regard, first, irrespective of where or by whom the minutes are kept, I believe they constitute Town records subject to rights of access. The Freedom of Information Law is expansive in its coverage, for it pertains to all agency records, such as those of a town, and defines the term "record" 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."

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.

Lastly, while the Town Attorney may have physical possession of the minutes, §30(1) of the Town Law provides that the Town Clerk is the custodian of all Town records. Further, pursuant to the regulations promulgated by the Committee on Open Government, which have the force of law (see 21 NYCRR Part 1401), each agency must designate one or more persons as "records access officer." The records access officer has the duty to coordinate an agency's response to requests, and requests should ordinarily be made to that person.

In the majority of towns, the town clerk is the records is the records access officer. While I believe that the person in receipt of your request should have responded directly to you in a manner consistent with law or forwarded the request to the records access officer, if you still have not received the minutes, it is suggested that you contact the Town Clerk. If he/she is the records access officer, the Clerk would have the authority to direct the person in possession of the records to make them available to you.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Sandra Currie
Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3863

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September 3, 2004

Ms. Susan Marino
[redacted]

The staff of the Committee on 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. Marino:

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

In a letter addressed to members of the Board of Education of the Spencerport School District, it was stated that you were designated by a group of parents of "Special Education students" to ask to arrange a private meeting with the Board. It was indicated in the letter that in discussing a variety of issues with the Board, "private student records will need to be presented." It was noted that each of the parents represented "has experienced difficulties to the degree [that they] feel anonymity is a necessary safeguard prior to presenting [their] concerns." In response to the letter, an attorney representing the District wrote that "pursuant to the New York Open Meetings Law (Public Officers Law) it would be improper for the Board to convene an executive session of the purpose set forth in your letter. Under that law, except for specified exceptional circumstances, the Board is required to conduct its meetings in public."

While I agree that there may be no basis upon which the Board could conduct an executive session to consider the issues raised with you or other parents and that the attorney's response may be technically correct, I believe that there is a legal means of enabling you or other parents to meet with the Board in private to discuss concerns that identify students.

In this regard, I point out that there are two vehicles that may authorize a public body, such as a board of education, to discuss public business in private. One involves entry into an executive session. 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. 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:

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

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

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

In consideration of FERPA, if the Board discusses an issue involving personally identifiable information derived from a record concerning a student, I believe that the discussion would deal with a matter made confidential by federal law that would be exempt from the Open Meetings Law. That being so, I believe that the Board could legally meet with a parent or parents in private, outside the coverage of the Open Meetings Law, to discuss special education students, individual educational programs or other matters identifiable to students, so long as parents of students consent to disclosure.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Jay C. Pletcher

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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September 7, 2004

Mr. Kenneth L. Dresser, Jr.
[redacted]

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

Dear Mr. Dresser:

I have received your letter in which you indicated that you sent an email to this office several weeks ago in which you raised questions concerning the implementation of the Open Meetings Law by the Lodi Town Board. A review of our files and email indicates that your initial communication was never received.

Your questions relate to executive sessions held by the Town Board, and whether a motion must be made and approved to authorize the attendance of a person other than a Board member to attend an executive session. You referred to executive sessions during which the Town Clerk and the Supervisor-elect were permitted to attend. In this regard, I offer the following comments.

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

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

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.

Second, subdivision (1) of §106 of the Open Meetings Law pertains to minutes of open meetings and states that:

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

Based on the foregoing, if a motion is made to enter into executive session, I believe that the motion must be memorialized in the minutes. Further, as indicated above, any such motion must indicate the reason or reasons, and those reasons, in my opinion, must be referenced in the minutes.

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

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

I note that in a recent judicial decision, Jae v. Board of Education of Pelham Union Free School District (Supreme Court, Westchester County, July 28, 2004), it was held that there is no requirement that a motion be made to authorize the presence of persons other than members of a public body at an executive session. The decision states that:

> "..the Petitioners' contention that the Board of Education must specifically identify any individuals invited to attend executive sessions of the Board, is not supported by law. The Public Officers Law specifically prescribes the manner and method by as well as the purposes for which a public body may enter executive session. The requirements include a motion on the public record; '...identifying the general area or areas of the subject or subjects to be considered,...' (Public Officers Law §105[1]). This section of the law specifically does not require that any individuals invited to attend the meeting be set forth in the motion to go into executive session. The language set forth above is also in sharp contrast to the language describing who may attend executive sessions which simply states: '[a]ttendance at an executive session shall be permitted to any member of the public

> body and any other persons authorized by the public body.' (Public Officers Law §105[2]). If the legislature had intended that the identities of those attending executive sessions be memorialized in the public records of the public body's meetings, the legislature wuld [sic] have included the necessary language in sub-section 1 of the statute or sub-section 2 of the statute would have included language similar to that contained in sub-section1. Therefore, the Court agrees with the Respondents that they are not obligated to include the identities of all individuals attending executive sessions of the Board of Education in the motion authorizing the executive session."

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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September 7, 2004

E-MAIL

TO: Ann Horsham <[redacted]>

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Ms. Horsham:

As you are aware, I have received your letter. You wrote that you serve as a member of the Port Jervis Board of Education, and you asked whether "proper notice" was given prior to a meeting "to discuss board goals."

The meeting to consider Board goals was discussed and scheduled during a meeting of the Board, and you wrote that the District's attorney expressed the view that, since the time and place of that upcoming meeting, which was characterized as a "workshop", would be aired on a local television station, the notice requirements imposed by the Open Meetings Law were met.

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

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

> 4. If videoconferencing is used to conduct a meeting, the public notice for the meeting shall inform the public that videoconferencing will be used, identify the locations for the meeting, and state that the public has the right to attend the meeting at any of the locations."

Section104 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.

Having discussed the matter with Ms. Debbie Lasch, President of the Board, she indicated that a reporter was present when the Board scheduled the workshop meeting. If that is so, I believe that notice would have effectively have been given to the news media. Ms. Lasch was unsure of whether notice was posted as required by §104. If notice of the time and place of the workshop were not posted in at least one designated, conspicuous public location prior to the meeting, the Board, in my view, would have failed to have fully complied with the Open Meetings Law. Due to the specific language and direction provided in that statute, I do not believe that a public discussion indicating notice of the workshop that is aired on television would constitute the "posting" of notice in a manner envisioned or required by the Open Meetings Law.

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

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

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

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

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

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

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

I hope that I have been of assistance.

RJF:tt

cc: Debbie Lasch

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14890
OML-AO-3866

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September 10, 2004

Ms. Paulette Glasgow
[redacted]

The staff of the Committee on 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. Glasgow:

As you are aware, I have received your letter in which you raised questions pertaining to the Open Meetings Law.

By way of background, you wrote as follows:

> "...three members of a town board, their legal counsel and the mayor of the incorporated village within the township were seen entering and existing [sic] the same building at the same time."

You asked whether the foregoing "consisted [of] a quorum for a meeting." You also wrote:

> "I have submitted questions to the town board seeking answers to questions. I wasn't seeking to access records but answers. I have been told by town counsel I must fill out a FOIL in order to receive my answers."

You questioned whether "this [is] a correct interpretation of FOIL."

In this regard, absent additional information, I cannot ascertain or advise whether the situation that you described involved a quorum or a meeting subject to the Open Meetings Law.

A quorum, according to §41 of the General Construction Law, is a majority of the total membership of a public body, such as a town board or village board of trustees. 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". I point out 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, I do not believe that the Open Meetings Law would be applicable. In the same decision as that referenced above, the Court specified that "not every assembling of the members of a public body was intended to be included within the definition", indicating that social events or chance meetings do not fall within the Open Meetings Law (id., 416).

In the situation that you described, a gathering of three of five members of the Town Board would constitute a quorum. However, it is unclear whether the three gathered for the purpose of conducting public business as a body. If they did so, the gathering in my opinion would have been a "meeting" that fell within the Open Meetings Law. On the other hand, the members may have been in the same building for a different reason. One member might have been doing paperwork; another might have been reading mail; a third might have been reviewing plans for a new development. In short, if a majority of the Town Board did not convene for the purpose of conducting public business collectively, there would not have been a meeting, and the Open Meetings Law would not have applied. Again, without additional information, it is impossible to ascertain whether the presence of three members of a public body in the same building would have involved a meeting subject to the Open Meetings Law.

With respect to your second question, I note that the title of the Freedom of Information Law may be somewhat misleading. That statute does not deal with information per se; rather, it pertains to requests for and rights of access to existing records maintained by a government agency. Further, §89(3) provides in part that an agency is not required to create a record in response to a request. While the Freedom of Information Law requires an agency to grant or deny access to existing records in accordance with its provisions, it does not require that an agency provide information or answers in response to questions. An agency may choose to do so, but again, it is not required to do so. Rather than attempting to obtain information by raising questions, it is suggested that, in the future, you request existing records.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board

OML-AO-3867

From: Robert Freeman
To: [redacted]
Date: 9/13/2004 8:15:11 AM
Subject: Re: Fwd: Minutes

Dear Ms. Schoettle:

If your question is whether the Friends Group is subject to the Open Meetings, I do not believe that it is. In short, that statute applies to "public bodies" and a public body is generally a governmental entity. While the Friends Group may have been created to assist a governmental entity, it is not itself government, and its meetings would fall beyond the coverage of the Open Meetings Law.

As for the last paragraph, although recipients of the minutes can be asked to keep the contents confidential, I know of no law that would require confidentiality. Once that kind of communication is in your possession, I believe that you may do with it as you see fit.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
Albany, NY 12231
(518) 474-2518 - Phone
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[redacted]

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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

September 13, 2004

E-Mail

TO: Anthony Cagliostro

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. Cagliostro:

As you are aware, I have received your letter in which you asked whether "home owners associations established pursuant to a Declaration of Condominium to manage the affairs of the Condominium [are] subject to the Open Meetings Law."

In my view, they are not. 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 the foregoing, the Open Meetings Law is applicable to governmental entities; it does not apply to private or non-governmental organizations. I note that a public corporation is typically a unit of local government (i.e., a county, town, village, school district, etc.) or a public authority.

It is suggested that the by-laws of a homeowners association might include provisions concerning the right of members to attend meetings and that you might seek to review them.

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.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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OML-AO-3869

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September 13, 2004

Mrs. Rose Mary Warren
[redacted]

The staff of the Committee on 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. Warren:

I have received your letter and the materials relating to it. As I understand your comments, they involve the contents of minutes of meetings of the Lewiston Town Board and delays by the Town in responding to your requests for records.

In this regard, first, the Open Meetings Law contains what might be viewed as minimum requirements concerning the contents of minutes. Specifically, §106 of the Open Meetings Law states that:

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

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

Second, it is clear in my opinion that minutes of open meetings must be prepared and made available "within two weeks of the date of such meeting." I note, too, that there is nothing in the Open Meetings Law or any other statute of which I am aware that requires that minutes be approved. Nevertheless, as a matter of practice or policy, many public bodies approve minutes of their meetings. In the event that minutes have not been approved, to comply with the Open Meetings Law, it has consistently been advised that minutes be prepared and made available within two weeks, and that if the minutes have not been approved, they may be marked "unapproved", "draft" or "preliminary", for example. By so doing within the requisite time limitations, the public can generally know what transpired at a meeting; concurrently, the public is effectively notified that the minutes are subject to change. If minutes have been prepared within less than two weeks, 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, when records are requested pursuant to the Freedom of Information Law, that law provides direction concerning the time within which an agency musts respond. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

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

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Town Board
Hon. Carol J. Brandon

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3870

41 State Street, Albany, New York 12231
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September 14, 2004

Hon. David R. Townsend, Jr.
Member of the Assembly
P.O. Box 233
Westmoreland, NY 13490

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

Dear Assemblyman Townsend:

Your letter of September 2 addressed to Harry Willis of the Department of State has been forwarded to the Committee on Open Government. The Committee, a unit of the Department, is authorized to provide advice and opinions pertaining to the Open Meetings and Freedom of Information Laws. Although Mr. Willis was able to respond to three of your questions, the remaining questions relate to the Open Meetings Law, and I will address them.

The first is expressed as follows:

> "Meeting notices – where are they posted, do they have to published in the local newspaper, what is the time frame and how many days before the meeting?"

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

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

> 3. The public notice provided for by this section shall not be construed to require publication as a legal notice.
>
> 4. If videoconferencing is used to conduct a meeting, the public notice for the meeting shall inform the public that videoconferencing will be used, identify the locations for the meeting, and state that the public has the right to attend the meeting at any of the locations."

In consideration of the foregoing, first, 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, too, that a public body is required only to provide notice of the time and place of a meeting. There is nothing in the Open Meetings Law that requires that notice of a meeting include reference to the subjects to be discussed. Similarly, there is nothing in that statute that pertains to or requires the preparation of an agenda.

Second, §104 imposes a dual requirement, for notice must be posted in one or more conspicuous, public locations, and in addition, notice must be given to the news media. 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 town hall 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 town 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.

From my perspective, 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.

Your remaining questions are:

> "When a Town Board goes into Executive Session – what is the protocol, do they have to have a reason, when finished do they have to discuss what transpired with the constituents who are at the regular board meeting?"

By way of brief background, 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.

While a town board or other public body may choose to discuss what transpired during an executive session following that session with those present at a meeting, there is no obligation to do so. If, however, action is taken during the executive session, §106 of the Open Meetings Law requires that minutes indicating the nature of the action and the vote of the members 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.

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

OML-AO-3871

From: Robert Freeman
To: Laura@chasrescue.org
Date: 9/28/2004 8:33:57 AM
Subject: http://www.dos.state.ny.us/coog/otext/o3295.txt

http://www.dos.state.ny.us/coog/otext/o3295.txt

Dear Ms. Petit:

Attached is an advisory opinion that may be useful to you. In short, a public body, such as the board of trustees of a municipal library or a committee consisting of two or more members of the board, is required to authorize any member of the public to attend its meetings. However, there is nothing in the Open Meetings Law or any other statute that gives the public the right to speak or otherwise participate at meetings. Therefore, the Board or a committee of the Board may choose to prohibit or limit the ability of non-members to speak at their meetings.

As indicated in the attached opinion, if there is a desire to permit public participation, it is suggested reasonable rules be established, indicating when members of the public may speak and the duration that they may do so.

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

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14918
OML-AO-3872

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

September 28, 2004

Ms. Stephanie Bucalo
[redacted]

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. Bucalo:

I have received your letter in which you raised a series of issues relating to the means by which the Shelter Island Union Free School District and its Board of Education conducted meetings, took certain action, and filled a vacancy on the Board.

More specifically, you wrote that, citing "personnel" as the basis, the Board conducted an executive session during a meeting on July 6 and later announced that it would hire an interim superintendent. Later during the same meeting, a member announced her resignation, and the Board soon after began the process of seeking a new member to be appointed to the vacant position. As I understand your comments, those interested in the vacancy on the Board were interviewed during an executive session and a decision concerning the appointment was apparently made in private and announced later during an open meeting. You also wrote that the names of those interviewed were withheld by the District.

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 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. In the context of your remarks, I believe that consideration of whether to retain an interim superintendent should have been discussed in public; only when the discussion focused on a particular individual or individuals who might be hired would an executive session have been proper.

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

Second, with respect to the process of filling a vacancy in an elective office, the only provision that might justify the holding of an executive session would have been §105(1)(f), which was cited earlier. Under its terms, it would appear that a discussion focusing on individual candidates or interviews could validly have occurred in an executive session, for it would involve a matter leading to the appointment of a particular person. Nevertheless, in the only decision of which I am aware that dealt directly with the propriety of holding an executive to discuss filling a vacancy in an elective office, the court found that there was no basis for entry into executive session. In determining that an executive session could not properly have been held, the court stated that:

> "...respondents' reliance on the portion of Section 105(1)(f) which states that a Board in executive session may discuss the 'appointment...of a particular person...' is misplaced. In this Court's opinion, given the liberality with which the law's requirements of openness are to be interpreted (Holden v. Board of Trustees of Cornell Univ., 80 AD2d 378) and given the obvious importance of protecting the voter's franchise this section should be interpreted as applying only to employees of the municipality and not to appointments to fill the unexpired terms of elected officials. Certainly, the matter of replacing elected officials, should be subject to public input and scrutiny" (Gordon v. Village of Monticello, Supreme Court, Sullivan County, January 7, 1994), modified on other grounds, 207 AD 2d 55 (1994)].

Based on the foregoing, notwithstanding its language, the court in Gordon held that §105(1)(f) could not be asserted to conduct an executive session. I point out that the Appellate Division affirmed the substance of the lower court decision but did not refer to the passage quoted above. Whether other courts would uniformly concur with the finding enunciated in that passage is conjectural. However,

since it is the only decision that has dealt squarely with the issue at hand, I believe that it is appropriate to consider Gordon as an influential precedent.

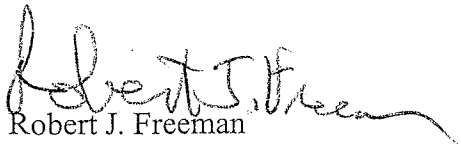
Third, although §89(7) of the Freedom of Information Law states that the name of an applicant for appointment to public employment need not be disclosed, a person interested in filling a vacancy in an elective office would not have applied for employment. That being so, I do not believe that provision could be asserted to withhold the names of those interviewed to fill the vacant position on the Board. On the contrary, in view of the direction offered by the court in Gordon, it is clear in my view that the names of those persons should have been disclosed by the District to comply with the Freedom of Information Law.

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

Those circumstances would arise, for example, when a board initiates charges against a tenured person pursuant to §3020-a of the Education Law, which requires that a vote to do so be taken during an executive session. The other instance would involve a situation in which action in public could identify a student. When information derived from a record that is personally identifiable to a student, the federal Family Educational Rights and Privacy Act (20 USC §1232g) would prohibit disclosure absent consent by a parent of the student. None of those circumstances would appear to relevant in the context of the information that you provided.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3873

41 State Street, Albany, New York 12231
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September 28, 2004

Hon. James E. Jackson
Councilman
Town of Cameron
[redacted]

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. Jackson:

I have received your letter in which you referred to gatherings conducted by members of the Town Board without you. You have questioned the propriety of those gatherings.

In this regard, 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 the Town Board 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 hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3874

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September 29, 2004

Ms. Dorothy M. Borgus
[redacted]

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

Dear Ms. Borgus:

I have received your letter and the material attached to it. Your question, as I understand it, involves the contents of minutes of meetings of the Chili Town Board.

In this regard, the Open Meetings Law contains what might be characterized as minimum requirements concerning the contents of minutes. Specifically, §106 of the Open Meetings Law provides that:

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

Based on the foregoing, minutes need not consist of a verbatim account of everything that was expressed during a meeting or make reference to each item on an agenda. On the contrary, so long as the minutes include the kinds of information described in §106, I believe that they would be appropriate and meet legal requirements.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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September 29, 2004

E-MAIL

TO: Rose F. Mancuso

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. Mancuso:

I have received your letter in which you questioned the status of a "retreat" under the Open Meetings Law.

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

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

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

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

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

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

Based upon the direction given by the courts, when a majority of a public body gathers to discuss public business, in their capacities as members of the body, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law. However, if there is no intent that a majority of a public body will gather for purpose of conducting public business, but rather for the purpose of gaining education, training 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 other than conducting public business, and if the members in fact do not conduct or intend to conduct public business collectively as a body, the activities occurring during that event would not in my view constitute a meeting of a public body subject to the Open Meetings Law.

I hope that I have been of assistance.

RJF:tt

OML-AO-3876

From: Robert Freeman
To: Stacey Romeo
Date: 10/1/2004 8:52:33 AM
Subject: Re: FW: opinion from trown attorney

Hi - -

I believe that the key provision is §105(1)(f) of the Open Meetings Law. Although it is routinely cited to discuss "personnel" matters, the word "personnel" does not appear in its language, and its scope relates not only to an employee, but to a "particular person or corporation."

Specifically, that provision authorizes a public body, including a library board of trustees, 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."

It would appear that the interviews may involve consideration of an entity's employment history and/or a "matter leading to the appointment [or] employment...of a particular...corporation. If that is so, I believe that an executive session could properly be held.

I hope that this helps. If you have further questions, please feel free to get in touch - - You're not "bothering" me.

Bob

OML-AO-3877

From: Robert Freeman
To: Ericsararichards@aol.com
Date: 10/4/2004 8:27:51 AM
Subject: Re: Open Meetings Law Question

Good morning - -

Thanks for remembering me. I hope that you are enjoying your leave.

As for your question, there is nothing in the Open Meetings Law that pertains to agendas. Public bodies may choose to prepare them, but there is no statute that requires that they do so. Similarly, if a public body prepares an agenda, there is no obligation that it be followed. In short, the absence of reference to an issue on an agenda is irrelevant in relation to the Open Meetings Law or the ability to discuss or take action on an issue at a meeting.

Separate from the Open Meetings Law may be a requirement that there be a public hearing. In most instances, public hearings must be preceded by publication of a legal notice. I am unaware of whether a public hearing would be required in the situation that you described. If it is required, there is likely little that your friend can do. If it is not required, he or should contact the Planning Board or proper Town official and suggest that the absence of reference to an item on the agenda does not preclude the Board from acting. If necessary, your friend can suggest that a Town official contact this office to confirm the foregoing. I will be out (doing the annual seminar for state agency staffers) from about 12:30 to 4:15.

Good luck.
Bob Freeman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3878

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

October 6, 2004

E-MAIL

TO: Carol Waterman

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. Waterman:

I have received your letter in which you raised several questions concerning the powers and duties of a town board and a town supervisor.

In this regard, the advisory jurisdiction of the Committee on Open Government is limited to matters relating to the Freedom of Information and Open Meetings Laws. That being so, I cannot respond to your questions involving the ability or obligation of a board or supervisor to engage in purchasing. It is suggested that you might contact the office of the State Comptroller to seek guidance on those subjects.

One of your questions, however, concerns your right, as a member of the Conquest Town Board, to tape record Board meetings, and conversely, the authority of the Board to adopt a resolution prohibiting you from tape recording the meetings. In short, so long as the use of a recording device, whether audio or video, is neither disruptive nor obtrusive, judicial decisions indicate that a public body, such as a town board, cannot prohibit its use.

By way of background, I note 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.

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

> 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 judicial determinations, I believe that you, as a member of the Town Board, or any person may tape record open meetings of public bodies, so long as recording is carried out unobtrusively and in a manner that does not detract from the deliberative process.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-14937
OMC-AO-3879

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October 6, 2004

E-MAIL

TO: John Springer

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. Springer:

As you are aware, I have received your letter concerning the practices of the Board of Trustees of the Village of Port Jefferson. Specifically, you questioned the propriety of motions for entry into executive session describing the subjects as "litigation", "personnel" or "contracts". Additionally, you asked whether minutes of meetings must indicate "how each member of the public body voted."

In this regard, the Open Meetings Law, §105(1), 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 may an executive session be properly held under §105(1)(d).

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

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)]

Finally in relation to the Open Meetings Law, the only direct reference in the Open Meetings Law to "contracts" 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.

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

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

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

Lastly, with regard to votes by members of the Board, I direct your attention to the Freedom of Information Law. Section 87(3)(a) provides that:

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

Based upon the foregoing, when a final vote is taken by an "agency" subject to the Freedom of Information Law [see §86(3)], such as a municipal board, a record must be prepared that indicates the manner in which each member who voted cast his or her vote. Ordinarily, records of votes will appear in minutes.

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

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

I hope that I have been of assistance.

RJF:tt

cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3880

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October 7, 2004

Mr. Mark Nolan, Editor
The Long Island Advance
P.O. Drawer 780
Patchogue, NY 11772

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. Nolan:

I have received your letter in which you sought an advisory opinion concerning minutes of meetings of the Patchogue-Medford School District Board of Education. Specifically, you wrote that the Board has refused to disclose minutes until the minutes have been reviewed by its law firm, and that they have not be been made available in some instances for as long as three months. You added that you were informed that the Board "has never kept minutes for executive sessions."

In this regard, I offer the following comments.

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

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

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

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

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

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

Lastly, "if changes are made to minutes before they are adopted by the BOE", you asked whether the Board "is required to note in the minutes that sections have been edited and include what specifically has been edited." In my view, the minutes would not have include reference to material that has been edited. Often minutes are discussed, perhaps altered or corrected based on that discussion, and adopted or approved in accordance with the discussion. In that kind of circumstance, I do not believe that the minutes must include reference to the corrections or alterations. However, if minutes have been adopted and a motion is made thereafter to alter the content, I believe that the motion and action taken would be required to be included in minutes of the meeting during which the motion and action occur.

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-3881

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October 14, 2004

Mr. Edward J. Aluck
Office of General Counsel
Public Employees Federation, AFL-CIO
1168-70 Troy Schenectady Road
P.O. Box 12414
Albany, NY 12212

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. Aluck:

I have received your letter and the materials relating to it and hope that you will accept my apologies for the delay in response.

You have sought an advisory opinion concerning "whether, pursuant to the Open Meetings Law, the New York State Insurance Fund (NYSIF) is required to provide the Public Employees Federation (PEF) with notice of the dates and location of monthly meetings of the NYSIF Board of Commissioners and to allow PEF representatives to attend those meetings."

In this regard, as you may be 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 provisions of the Workers' Compensations Law (WCL), I believe that the commissioners of the State Insurance Fund ("the Fund") constitute a public body that falls within the requirements of the Open Meetings Law. Section 77 of the of the WCL provides that:

> "The state insurance fund shall be administered by the commissioners of the state insurance fund, of whom there shall be eight. The

> commissioner of labor shall, in addition, be a commissioner of such fund by virtue of his or her office. The commissioners shall elect annually from the appointive members a chair and a vice-chair who shall act as chair in the absence of the chair. The commissioner of labor may designate a deputy commissioner to act in his or her place and stead as a commissioner of such fund. The commissioners shall be appointed by the governor, by and with the advice and consent of the senate. They shall be policyholders insured in the state insurance fund. The commissioners shall be appointed for terms of three years each. They shall serve until their successors are appointed and have qualified. Vacancies shall be filled for the unexpired terms. Each commissioner shall before entering upon his or her duties, take and subscribe the constitutional oath of office which shall be filed in the office of the secretary of state."

Section 79 requires that meetings of the commissioners must be held at least once a month, except for the month of August, that minutes must be prepared, and that the minutes must indicate "each matter brought before the commissioners for their consideration together with the vote of each commissioner thereon." Section 82 describes the powers and duties of the commissioners of the State Insurance Fund.

From my perspective, each of the conditions necessary to conclude that the commissioners constitute a public body can be met. There are eight members who conduct public business collectively, through "consideration together", and take action by casting votes. By so doing and carrying out their powers and duties, the commissioners perform a governmental function for the state. While I know of no specific reference to a quorum requirement, a separate statute, §41 of the General Construction Law, requires 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 as a board or similar body", they may carry out their duties only through the presence of a quorum and action taken by majority of the vote the total membership of such entity.

Assuming the accuracy of the foregoing and that the commissioners constitute a public body required to comply with the Open Meetings Law, every meeting of the commissioners must be preceded by notice of the time and place. 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 there is nothing in the Open Meetings Law requiring that a public body provide notice to a particular entity, such as PEF, or person. However, again, it does require that notice be given to the news media and posted in one or more "designated" conspicuous public locations prior to every meeting. Additionally, although the Open Meetings Law is based on a presumption of openness, §105(1) authorizes a public body to enter into closed or executive sessions in specified circumstances.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Terence Morris, Chairman
Kenneth J. Ross

OML-AO-3882

From: Robert Freeman
To: [redacted]
Date: 10/15/2004 3:27:36 PM
Subject: Dear Ms. Grogan:

Dear Ms. Grogan:

I have received your letter in which you described difficulty hearing all that is expressed at meetings of the Seaford Board of Education and wrote that the Board has indicated that it will no longer include reference to public comments in its minutes. You have asked whether you may have rights relative to "reasonable accommodation" under the ADA (Americans with Disabilities Act).

In this regard, it has been advised that the Open Meetings Law, like all other laws, should be implemented in a manner that gives reasonable effect to its intent. It has been advised, for example, that members of a public body, such as a school board, must situate themselves at meetings in a manner in which those in attendance can reasonably observe and hear the members. Similarly, in my opinion, if a microphone is available to Board members and others who speak, it would be unreasonable to choose not to use the microphone if people in attendance can not otherwise hear. There is nothing in the Open Meetings Law, however, that generally deals with the situation that you described, nor is there case law of which I am aware that has focused on an analogous situation. That being so, you might want to contact the federal agency that oversees the ADA to attempt to obtain guidance.

I note, too, that the Open Meetings Law does not require that comments by the public be referenced in minutes of meetings. Under §106 of that statute, minutes must consist minimally of a record or summary of motions, proposals, resolutions action taken and the votes of the members. They may be more expansive, but again, there is no obligation to include additional information, such as public comments, in the minutes.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
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FOIL-AO-3883

From: Robert Freeman
To: [redacted]
Date: 10/18/2004 7:58:26 AM
Subject: Re: Dear Ms. Grogan:

Dear Mr. Grogan:

If your question is whether an executive session may be held to choose the appointees to an advisory committee, I believe that the answer is affirmative. Section 105(1)(f) authorizes a public body to enter into executive session to discuss "matters leading to the appointment...of a particular person..." In my view, discussions focusing those who may be appointed to such a committee would fall within the coverage of the provision cited above.

I hope that I have been of assistance.

Robert J. Freeman
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[redacted]

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3884

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October 26, 2004

E-Mail

TO: Adelaide Camillo

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. Camillo:

I have received your letter in which you referred to a "long and arduous Planning Board Process", and that you are "an adjacent neighbor" concerning the proposal. You wrote that you were:

> "1) Not notified of the proposed subdivision.
>
> 2) Not invited on any site walks taken at my request.
>
> 3) Not invited on any CAC walks taken at my and others' requests, despite the fact that the CAC told me it was more than reasonable for me to ask to be included. When I did ask the Planning Chair, she un-invited me."

In this regard, I believe that there may be provisions that include rights or obligations in relation to those who may reside or own property within a certain distance of the location that is the subject of a planning board proceeding. However, since my area of expertise and jurisdiction pertains to the Open Meetings Law, I do not have the expertise to respond to your first question.

With respect to "site walks" or "site visits", depending on their nature, the Open Meetings Law may or may not have applied.

By way of background, as you may be aware, the definition of "meeting" [see Open Meetings Law, §102(1)] has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that any gathering of a quorum of a public body

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

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

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

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

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

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

There is case law, however, dealing with might have been characterized as a field trip or site visit. In the first decision, the members of a public body were in a van, and it was held that "the Open Meetings Law was not violated" [City of New Rochelle v. Public Service Commission, 450 AD 2d 441 (1989)]. In that case, members of the Public Service Commission toured the proposed route of a power line in order to acquire a greater understanding of evidence previously presented. More recently, in Riverkeeper v. The Planning Board of the Town of Somers (Supreme Court, Westchester County, June 14, 2002), it was concluded that a site visit by a Planning Board does not

constitute a meeting subject to the Open Meetings Law so long as its purpose is not "for anything other than to 'observe and acquire information.'" The court in that decision cited and apparently relied on advisory opinion rendered by this office in which it was suggested that:

> "...site visits or tours by public bodies should be conducted solely for the purpose of observation and acquiring information, and...any discussions or deliberations regarding such observations should occur in public during meetings conducted in accordance with the Open Meetings Law."

On the other hand, if a majority of a public body gathers for the purpose of conducting a site visit, and it discusses and deliberates with respect to its observations during that event, the gathering in my view would likely constitute a "meeting" subject to the Open Meetings Law. In that circumstance, the gathering would have to be preceded by notice of the time and place given to the news media and to the public by means of posting (see Open Meetings Law, §104) and conducted open to the public.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
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October 26, 2004

E-MAIL

TO: Jamie Cooney

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Mr./Ms. Cooney:

As you know, I have received your letter concerning the Open Meetings Law as it may apply to meetings of a not-for-profit ambulance corporation.

In this regard, I am not an expert concerning the Not-for-Profit Corporation Law, and I cannot advise with respect to its application. However, depending on its nature, the meetings of the governing body of an ambulance company formed as a not-for-profit corporation may be subject to the Open Meetings Law.

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

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

In general, the Open Meetings Law does not apply to meetings of the governing bodies of not-for-profit corporations. However, in construing its statutory counterpart, it was found by the state's highest court that a volunteer fire company is an "agency" required to comply with the Freedom of Information Law [see Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575 (1980)]. In addition, more recently it was determined that a volunteer ambulance corporation is also covered by the Freedom of Information Law when it performs its duties solely for an ambulance district and a town [see Ryan v. Mastic Volunteer Ambulance Corp., 622 NYS 2d 795, 212 AD 2d

716 (1995)]. If the ambulance company of your interest is similar in nature, I believe its board of directors would constitute a "public body" required to comply with the Open Meetings Law.

I hope that I have been of assistance.

RJF:tt

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November 1, 2004

E-MAIL

TO: Brian Cahill

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. Cahill:

As you are aware, I have received your letter in which you raised a variety of issues concerning a "special meeting" held by the Ulster Town Board.

You wrote that the meetings was called by the Supervisor, "who gave 24 hours notice to a local newspaper reporter." Notice was apparently not posted. The subject of discussion at the meetings was described as a "personnel matter", and you referred to litigation concerning a conflict of interest and an order that the Town assessor relinquish his position. The outcome of the meeting, according to your letter, involved the adoption of a resolution following an executive session in which the Town Board "accepted, at no cost to the town, a law that will allow the assessor's private attorney to represent them as 'intervenors' in the case." "Them", it is assumed, is intended to mean the Town Board.

You expressed the belief that "this may very well have been an illegal meeting based on the prior notification rules for public meetings thereby rendering any law passed at that meeting null and void." In this regard, I offer the following comments.

First, two statutes may be pertinent in relation to notice that must be given prior to a town board meeting. Section 62 of the Town Law deals with notice of special meetings to members of a town board and states in relevant part that "The supervisor of any town may, and upon written request of two members of the board shall within ten days, call a special meeting of the town board by giving at least two days notice in writing to the members of the board of the time when and the place where the meeting is to be held." Whether the requirements of §62 were met is unclear based on the information that you provided.

Section 104 of the Open Meetings Law deals with notice of meetings that must be given to the news media and to the public by means of posting. Specifically, §104 of that statute provides that:

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

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

It is emphasized that §104 imposes a dual requirement. Not only must notice of the time and place of a meeting be given to the news media; it must also 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.

Second, 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" [524 NYS 2d 643, 645 (1988)].

In consideration of the foregoing, merely providing notice to the news media, but not posting notice, would fail to comply with the Open Meetings Law. Further, absent an emergency or urgency, the Court in Previdi suggested that it would be unreasonable to conduct meetings on short notice, unless there is some necessity to do so.

Third, you wrote that the Board's executive session was held to discuss a "personnel matter." If the executive session involved discussion of the resolution that you described concerning the possibility of enacting a local law, I do not believe that there would have been a basis for conducting an executive session.

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

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

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

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

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

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

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

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

In my view, a discussion held to discuss a local enactment would not fall within the scope of §105(1)(f). In short, consideration of an issue of that nature would apparently not focus on a "particular person" in relation to the topics listed in §105(1)(f).

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

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

> "...the public body must identify the subject matter to be discussed (See, Public Officers Law § 105 [1]), and it is apparent that this must be accomplished with some degree of particularity, i.e., merely reciting the statutory language is insufficient (see, Daily Gazette Co. v Town Bd., Town of Cobleskill, 111 Misc 2d 303, 304-305). Additionally, the topics discussed during the executive session must remain within the exceptions enumerated in the statute (see generally, Matter of Plattsburgh Publ. Co., Div. of Ottaway Newspapers v City of Plattsburgh, 185 AD2d §18), and these exceptions, in turn, 'must be narrowly scrutinized, lest the article's clear mandate be thwarted by thinly veiled references to the areas delineated thereunder' (Weatherwax v Town of Stony Point, 97 AD2d 840, 841, quoting Daily Gazette Co. v Town Bd., Town of Cobleskill, supra, at 304; see, Matter of Orange County Publs., Div. of Ottaway Newspapers v County of Orange, 120 AD2d 596, lv dismissed 68 NY 2d 807).
>
> "Applying these principles to the matter before us, it is apparent that the Board's stated purpose for entering into executive session, to wit,

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

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

Lastly, §107(1) of the Open Meetings Law states in part that:

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

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". I note, however, that the issue of adequacy of the notice given under the Open Meetings Law is separate from compliance with §62 of the Town Law.

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

I hope that I have been of assistance.

RJF:tt
cc: Town Board.

STATE OF NEW YORK
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November 2, 2004

E-MAIL

TO: Paul J. Van Blarcum

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. Van Blarcum:

As you are aware, I have received your letter. In your capacity as a member of the Shandaken Town Board, you wrote that the Board appointed a cell tower committee that is "tasked with forming a cell tower law, that then will be reviewed by all involved agencies and ultimately be voted on by the town board." The committee held its first meeting without giving notice to the public, and the Town Supervisor and two other members of the Board attended. You contend that their presence would have made the gathering a Board meeting and asked whether the cell tower committee meetings must "be announced in the papers as other committees are."

If my understanding of the matter is accurate, the cell tower committee is not required to comply with the Open Meetings Law or provide notice of its meetings. In this regard, I offer the following comments.

By way of background, 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 committee has no authority to take any final and binding action for or on behalf of a government agency, I do not believe that it constitutes a public body or, therefore, is obliged to comply with the Open Meetings Law.

This 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.

With respect to the presence of three members of the Town Board at the meeting of the cell tower committee, if they did not function as the Board but were merely part of the audience as attendees at the meeting, I do not believe their presence could be considered a Board meeting.

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". The definition has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that any gathering of a quorum of a public body for the purpose of

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

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

With respect to chance meetings, it was found that:

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

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

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

I hope that I have been of assistance.

RJF:tt

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November 2, 2004

E-MAIL

TO: Virginia Sanfratello

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 facts presented in your correspondence.

Dear Ms. Sanfratello:

As you are aware, I have received your letter in which you asked whether minutes of a meeting "need to show a person's name and position if they are terminated, or can they refer to the termination as a payroll number."

In this regard, §106 of the Open Meetings Law pertains to minutes, and subdivision (1) states that minutes of an open meeting must consist, at a minimum, "of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon." The only decision of which I am aware that may be pertinent to the matter is Mitzner v. Goshen Central School District Board of Education [Supreme Court, Orange County, April 15, 1993]. That case involved a series of complaints made by the petitioner that were reviewed by the school board president, and the minutes of the board meeting stated that "the Board hereby ratifies the action of the President in signing and issuing eight Determinations in regard to complaints received from Mr. Bernard Mitzner." The court held that "these bare-bones resolutions do not qualify as a record or summary of the final determination as required" by §106 of the Open Meetings Law. As such, the court found that the failure to indicate the nature of the determination of the complaints was inadequate.

In the context of your inquiry, I believe that, in order to comply with the Open Meetings Law and to be consistent with the thrust of the holding in Mitzner, minutes must indicate the identity of the employee.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
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November 3, 2004

Ms. Pamela A. Moore
Attorney and Counselor at Law
25 East Main Street, Suite 500
Rochester, NY 14614-1874

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. Moore:

I have received your letter in which you raised a series of questions relating to the Open Meetings Law and, in some respects, to the Freedom of Information Law. An attempt will be made to address them, but not necessarily in the order in which they are presented.

Your initial question involves "the purpose of the Open Meetings Law." In brief, I believe that the law is intended to enable the public to witness the performance of members of public bodies and to open the deliberative process leading to the making of decisions to public view. As stated in §100, the legislative declaration:

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

Second, soon after the enactment of the Open Meetings Law, the courts dealt with and rejected contentions that "workshops" and similar gatherings fell beyond the coverage of that law. In considering that issue, it is emphasized that the definition of "meeting" [§102(1)] has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be convened open to the public, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

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

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

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

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

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

If no quorum has convened, the Open Meetings Law does not apply. If, for example, two of the five members of a town board meet, the Open Meetings Law would have no application, and I know of no requirement that those two members inform the other members of the fact their meeting or the nature of their discussion. They may choose to do so, but again, I know of no obligation to do so.

Third, the Open Meetings Law requires that notice be given prior to every meeting. Specifically, §104 of that statute provides that:

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

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

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

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

The ensuing provisions, paragraphs (a) through (i), specify and limit the subjects that may properly be considered in executive session.

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.

Certainly a member of the Board may transmit a memo to other Board members suggesting that executive session be held at an upcoming meeting. Nevertheless, the procedure described in §105(1) must be followed to comply with law, and again, an executive session may only be held to discuss one or more of the subjects enumerated in paragraphs (a) through (i) of that provision. That the majority believes that compliance "does not make sense" would not, in my opinion, constitute a valid reason for failing to comply with law.

You focused on a particular ground for entry into executive session and asked, "[w]hat criteria must be met to qualify under the real estate exception." That provision, §§105(1)(h), permits a public body to enter into executive session to discuss:

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

In my opinion, the language quoted above, like the other grounds for entry into executive session, is based on the principle that public business must be discussed in public unless public discussion would in some way be damaging, either to an individual, 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.

Next, you referred to a memorandum being marked "confidential" and asked whether it should be placed in the Town Clerk's "official file" and whether it is subject to the Freedom of Information Law. In this regard, the Freedom of Information Law includes all government agency records within its coverage, for §86(4) defines the term "record" expansively to mean:

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

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

Stamping, marking or asserting that record is "confidential" is all but meaningless. The Court of Appeals held years ago that rights of access and the ability to deny access to records is fixed by the Freedom of Information Law. Only to the extent that records or portions of records fall within the exceptions listed in §87(2) would a denial of access be proper, irrespective of a claim of confidentiality [see e.g., Doolan v. Boces, 48 NY 2d 341, 347 (1979)].

One of the grounds for denial would be pertinent in the context of the situation that you described. Section 87(2)(g) authorizes an agency to deny access to records that:

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

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

As for the Town Clerk's "official file", I do not know the meaning of that phrase. All records are subject to the Freedom of Information Law, whether they are characterized as "official" or otherwise. I note, too, that §30 of the Town Law indicates that a town clerk is the custodian of all town records. In my view, the memorandum to which you referred would be in the legal custody of the clerk, regardless of its physical location.

Lastly, and in a somewhat related vein, you raised the following question:

> "May either the Chair of an advisory board (that operated under the auspices of the Town and whose stenographer is paid by the Town) or the Town Supervisor refuse to provide a Town Board member with meeting minutes and/or correspondence (by e-mail or otherwise) produced by the advisory board?"

In my view, the records prepared by the chair of the board to which you referred are not the property of that person; on the contrary, I believe that they would be in the legal custody of the Town Clerk and would constitute records subject to rights conferred by the Freedom of Information Law. Further, in my opinion, the Town Supervisor would have no greater right of access or control over those records than any other member of the Town Board.

I hope that I have been of assistance. If you would like to discuss the issues considered here or others pertaining to the Open Meetings or Freedom of Information Laws, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
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November 4, 2004

Ms. Patricia S. Francfort
[redacted]

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. Francfort:

I have received your letter and the materials attached to it. You have questioned the manner in which the Islip Board of Education records its votes taken at meetings.

According to the minutes of a meeting, twelve actions and twelve votes were taken by the Board to appoint numerous people to a variety of positions. However, having attended the meeting, you indicated that "in fact, only one vote was taken on the entire agenda h personnel schedule." It is your view that Roberts Rules requires that the minutes accurately represent what occurred, but you were informed by the District Clerk that "the state mandates that we do it this way."

In this regard, Roberts Rules is not law, and in many instances, it is inconsistent with the law of New York. To that extent, Roberts Rules in my view has no validity.

The provisions pertaining to minutes of meetings are found in the Open Meetings Law. Subdivision (1) of §106 concerning minutes of open meetings states that:

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

Implicit in the foregoing in my view is the requirement that minutes accurately indicate what transpired at a meeting. If indeed one vote was taken, the minutes should reflect that to have been so.

The only judicial decision of which I am aware that may be pertinent to the matter, Mitzner v. Goshen Central School District Board of Education [Supreme Court, Orange County, April 15, 1993], involved a series of complaints made by the petitioner that were reviewed by the school board

president, and the minutes of the board meeting stated that "the Board hereby ratifies the action of the President in signing and issuing eight Determinations in regard to complaints received from Mr. Bernard Mitzner." The court held that "these bare-bones resolutions do not qualify as a record or summary of the final determination as required" by §106 of the Open Meetings Law. As such, the court found that the failure to indicate the nature of the determination of the complaints was inadequate.

Assuming that the facts that you described are accurate, I believe that, in order to comply with the Open Meetings Law and to be consistent with the thrust of the holding in Mitzner, minutes must indicate that a single vote was taken, as well as reference to the identities of those appointed and the positions to which they were appointed.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Charles Schlesinger

OML-AO-3891

From: Robert Freeman
To: Supervisor Susan Cockburn
Date: 11/5/2004 1:12:09 PM
Subject: Re: FW: What do you think?

Hi - -

I'm ok and I trust that you are as well.

With respect to the scenario, first, any gathering of a majority of the Board for the purpose of conducting public business constitutes a "meeting" subject to the Open Meetings Law, irrespective of its charactrerization, i.e., as a "workshop" or "work session", and regardless of the absence of an intent to take action. Second, every meeting must be preceded by notice given to the news media and to the public by means of posting. Third, every meeting must be convened as an open meeting. Next, the phrase "executive session" is defined to mean a portion of an open meeting during which the public may be excluded, and a procedure must be accomplished in public, during an open meeting, before an executive session may be held.

In this instance, assuming that the discussion involved the performance of a particular employee and whether he or she merits a pay increase, I believe that an executive could properly be held, but only after following the procedure described above.

I hope that this helps. If you would like to discuss the matter further, please feel free to call.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
Albany, NY 12231
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[redacted]

STATE OF NEW YORK
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November 8, 2004

E-MAIL

TO: Adelaide Camillo

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. Camillo:

I have received your letter in which you questioned the "appropriateness of a closed door session conducted by 6 out of 7 members of the Planning Board of the Town of Washington." Also present were the Town's planning consultant and his business partner, an engineer.

The meeting was preceded by notice given to the local newspaper indicating that it would begin at 7:30. However, "in a last minute shuffle", the meeting was rescheduled to begin fifteen minutes earlier, but when you and others arrived at 7:15, you learned that the Board began its meeting in private before the newly scheduled time for convening and kept those in attendance waiting until 7:50 for the meeting to be open. When you asked later what was discussed, you were told by a member that "they were consulting with their 'technical experts.'"

Nevertheless, you were informed by two other members that the meeting was "held mostly to discuss issues surrounding the safety of a driveway adjacent to [your] property line in [a] proposed subdivision." According to your letter, safety issues relating to the driveway have been a matter of significant public concern for approximately a year, and a variety of deficiencies in the proposal have been discovered. You indicated that at a recent prior meeting, the Board's consultant and engineer stated, for the first time, that they had concerns regarding safety, and that you and others were looking forward to discussions on the matter at the meeting in question. However, following the unannounced closed session, the Town's engineer "had completely reversed his position on the driveway safety in favor of the developer", and you were "confused by this outcome."

Upon further questioning concerning the rationale for conducting the discussion in private and expressing your belief that "closed-door sessions were only held for personnel or litigation matters", you were told that they may also be held for "administrative matters." Following the

closed session, you wrote that the Board was "polled" for members' views concerning the driveway, and that it was stated that action would be taken at a separate meeting on November 10.

From my perspective, based on the assumption that you have accurately described the situation, the Board failed to comply with the Open Meetings Law in several respects. In this regard, I offer the following comments.

First, as suggested in previous correspondence, judicial decisions indicate that any gathering of a public body, such as a planning board, for the purpose of conducting public business constitutes a "meeting" that falls within the requirements of the Open Meetings Law. To reiterate, § 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. In the situation that you described, a gathering of six of the seven members of the Planning Board, for any of the reasons that were related to you, would in my opinion clearly have constituted a " meeting" subject to the Open Meetings Law.

Second, every meeting of a public body must be preceded by notice given in accordance with §104 of the Open Meetings Law, which provides that:

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

Stated differently, if a meeting is scheduled at least a week in advance, notice of the time and place must be given to the news media and to the public by means of posting in one or more designated public locations, not less than seventy-two hours prior to the meeting. If a meeting is scheduled less than a week in advance, again, notice of the time and place must be given to the news media and posted in the same manner as described above, "to the extent practicable", at a reasonable time prior to the meeting. 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. If the Board intended to convene at 6:30, for example, I believe that it should have given notice to that effect to comply with law.

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

In this instance, it is apparent that there was no need that the Board take action immediately or that there was any urgency that would have necessitated starting the meeting earlier than its scheduled time.

Third, in my view, none of the reasons to which you referred would have justified holding an executive session. 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. Issues involving the safety of a driveway or "administrative matters" would not, in my opinion, fall within any of the grounds for entry into executive session.

Next, while the facts are not entirely clear, it appears that the Board might have reached a decision that will merely be ratified at its next meeting. If that is so, if a consensus was reached, it

would constitute a decision of the Board essentially reached in private. In Previdi, supra, the issue involved access to records, i.e., minutes of executive sessions held under the Open Meetings Law. Although it was assumed by the court that the executive sessions were properly held, it was found that "this was no basis for respondents to avoid publication of minutes pertaining to the 'final determination' of any action, and 'the date and vote thereon'" (id., 646). The court stated that:

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

Therefore, if the Board reached a "consensus" that is reflective of its final determination of an issue, I believe that minutes must be prepared that indicate its action, as well as the manner in which each member voted. I note, too, that §87(3)(a) of the Freedom of Information Law states that: "Each agency shall maintain...a record of the final vote of each member in every agency proceeding in which the member votes."

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, an issue may be whether a failure to comply with the notice requirements imposed by the Open Meetings Law was "unintentional". I cannot conjecture as to the motivation of the Board. However if a decision was essentially made in private that should have been made in public, a court has discretionary authority to invalidate the action should a judicial proceeding be commenced.

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

I hope that I have been of assistance.

RJF:tt

cc: Hon. Florence Prisco, Supervisor
Michelle West, Chairperson
John Gifford, Town Attorney
James Bacon

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3893

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December 1, 2004

Hon. John Cesar
Mayor
Village of Brewster
The Larry T. Jewel Municipal Bldg.
208 Main Street
Brewster, NY 10509

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

Dear Mayor Cesar:

As you are aware, I have received your letter. Please accept my apologies for the delay in response.

Your question is, as the Mayor, whether you are "to blame for the village minutes being late." You wrote that the Board of Trustees believes that to be so, and you have sought my views on the matter.

In this regard, first, the Open Meetings Law provides direction concerning the content of minutes and the time in which they must be prepared and made available to the public. Specifically, §106 states that:

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

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

Based upon the foregoing, 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.

The Open Meetings Law does not specify who is responsible for preparing minutes. However, §4-402 of the Village Law states in relevant part that:

> "The clerk of each village shall, subject to the direction and control of the mayor:
>
> ....b. act as clerk of the board of trustees and of each board of village officers and shall keep a record of their proceedings;
>
> c. keep a record of all village resolutions and local laws..."

Based on the foregoing, I believe that the village clerk, subject to your direction as Mayor, has the duty of preparing minutes of meetings in a timely manner consistent with §106 of 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
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December 9, 2004

E-Mail

TO: Richard Landman

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. Landman:

As you are aware, I have received your letter. Please accept my apologies for the delay in response.

You indicated that you serve as a member of a community board in New York City, and you wrote as follows:

> "Recently they started having private strategy sessions not open to the public or media to discuss a rezoning application. Is this legal? When asked, they then switched and said the meeting was from the 'Friends of CB#1, which is a separate legal entity where the officers of the corporation are all community board officers or staff. The address, phone and fax is also the community board's.
>
> "I though the Sunshine laws would make them hold executive sessions where everyone can come, but only listen. Can they hold secret meetings?"

Although the situation that you described is not entirely clear, I offer the following comments.

First, the Open Meetings Law is applicable to public bodies, and the phrase "public body" is defined 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, governing bodies, community boards, and committees and subcommittees consisting of two or more members of those entities constitute "public bodies" required to comply with the Open Meetings Law.

Typically, "friends" groups are organized as not-for-profit corporations. While they often seek to assist governmental entities, they are not ordinarily part of the government. If that is so in the situation that you described, I do not believe that the "Friends of CB#1" would constitute a public body or that its meetings would be subject to the Open Meetings Law.

Second, the application of the Open Meetings Law is triggered when there is a meeting of a public body. A "meeting" is a gathering of a quorum of a public body for the purpose of conducting public business [see Open Meetings Law, §102(1)]. If, for example, a community board consists of fifty-one members, a gathering of a majority, at least twenty-six, for the purpose of discussing board business would constitute a meeting subject to the Open Meetings Law. If the Board designates a committee consisting of nine of its members, that committee would also constitute a public body, and a gathering of five or more members, in their capacities as members of that committee, for the purpose of discussing committee business, would be a meeting of the committee falling within the scope of the Open Meetings Law.

I point out that every meeting of a public body must be preceded by notice given in accordance with §104 of the Open Meetings Law. In brief, notice of the time and place must be given prior to a meeting to the news media and by means of posting in one or more designated, conspicuous public locations.

If a gathering does not include a quorum of a public body, the Open Meetings would not apply. Therefore, if the board of directors of the Friends of CB#1 consists of less than a quorum of the Community Board, or if less than a quorum of the Community Board is present at a Friends meeting, I do not believe that the Open Meetings Law would be applicable. Contrarily, if a meeting of the Friends includes a quorum of the Community Board, and the Board members are present for the purpose of conducting Community Board business, the gathering, in my view, would appear to constitute a meeting of the Board falling within the coverage of the Open Meetings Law.

Lastly, for purposes of clarification, I point out that §102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. Paragraphs (a) through (h) of §105(1) specify and limit the grounds for entry into executive session. Further, while the Open Meetings Law clearly gives the public the right to attend meetings of public bodies, it is silent concerning the ability of the public to speak or otherwise participate during meetings. In short, a public body may but is not required to permit the public to

speak at its meetings. When it chooses to do so, it has been advised that it should do so by means of reasonable rules that treat members of the public equally.

I hope that the foregoing serves to enhance your understanding of the Open Meetings Law and that I have been of assistance. Should any further questions arise, please feel free to contact me.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
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December 9, 2004

Ms. Paulette Glasgow
[redacted]

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. Glasgow:

As you are aware, I have received your letter in which you sought information concerning "executive sessions and citizen[s] having to pay to obtain town board minutes."

You wrote that the Lewiston Town Board "has had over 20 executive sessions", that an executive session was held prior to a meeting and that the Board "merely cite[s] as the reason 'legal' 'personnel' 'contract'." You added that minutes of meetings must be requested "through FOIL" and that citizens "are being charged."

In this regard, I offer the following comments.

First, there is nothing in the Open Meetings Law that limits or restricts the number of executive sessions that may be held by a public body, such as a town board. The issue involves whether or the extent to which executive sessions are validly held.

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

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

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

an open meeting has been convened. The ensuing provisions of §105(1) specify and limit the subjects that may appropriately be considered during an executive session.

Further, it has been held judicially 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)"

In short, it is reiterated that a public body may validly conduct an executive session only to discuss one or more of the subjects listed in §105(1) and that a motion to conduct an executive session must be sufficiently detailed to enable the public to know that there is a proper basis for entry into the closed session.

Third, with respect to subjects cited by the Board in its motion to enter into executive session, I note that there is no provision specifically concerning "legal" matters. Section 105(1)(d), however, authorizes a public body to enter into an executive session to discuss "proposed, pending or current litigation". In construing the language quoted above, it has been held that:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> reference to a 'personnel issue' is the functional equivalent of identifying 'a particular person'" [Gordon v. Village of Monticello, 620 NY 2d 573, 575; 207 AD 2d 55 (1994)].

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

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

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

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

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

Lastly, with respect to minutes, I direct your attention to the Freedom of Information Law. That statute includes all agency records within its coverage, including minutes. Under the law, an agency may not charge for the inspection of accessible records. However, an agency may charge up to twenty-five cents per photocopy for records up to nine by fourteen inches, including minutes of meetings [see Freedom of Information Law, §87(1)(b)(iii)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board

There is not
An OMI. AD-3896

STATE OF NEW YORK
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December 9, 2004

Mr. Carl A. Falk
[redacted]

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. Falk:

As you are aware, I have received your letter in which you raised a series of questions concerning the Town Board of the Town of Richland and the Zoning Board of Appeals.

In brief, you indicated that the Town Board and Planning Board members disagree with respect to a certain requirement, and the Town Supervisor "wants to ask the ZBA for their 'opinion' on the matter." To do so, you asked whether the board "would have to take some sort of vote." Similarly, you asked whether you are "wrong in thinking that all action taken by the ZBA should require a Document of Decision and a public hearing."

In this regard, §63 of the Town Law states in relevant part that "[e]very act, motion or resolution shall require for its adoption the affirmative vote of a majority of all the members of the town board." If the request for an opinion constituted an "act", §63 would require that a vote be taken by the Board. However, since I am not an expert relative to the Town Law and the powers of town boards, it is suggested that you seek clarification from the town attorney or the Association of Towns.

With respect to the Zoning Board of Appeals, although the Board must in some instances conduct a public hearing before taking action, I do not believe that every action taken by the Board must be preceded by a public hearing. Again, I recommend that you seek guidance from those with greater expertise. In any instance in which action is taken, minutes must be prepared in accordance with §106 of the Open Meetings Law. That provision states that:

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

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

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

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, or if the acknowledgement of the receipt of a request fails to include an estimated date for granting or denying access, a request may, in my opinion, be considered to have been constructively denied [see DeCorse v. City of Buffalo, 239 AD2d 949, 950 (1997)]. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

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

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

In an effort to enhance compliance with and understanding of the Freedom of Information Law, copies of this response will be sent to Town officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Hon. Robert L. North, Town Clerk
Town Board

STATE OF NEW YORK
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December 9, 2004

E-MAIL

TO: Kerin Dumphrey

FROM: Robert J. Freeman, Executive Director

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

Dear Mr./Ms. Dumphrey:

As you are aware, I have received your letter in which you raised the following question:

> "May an executive session be called during a meeting to discuss matters including the acquisition of real property and possible litigation?"

In this regard, 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 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.

Relevant to the first aspect of your question is §105(1)(h), which 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 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.

Next, the provision pertaining to litigation, §105(1)(d), permits a public body to enter into executive session to discuss "proposed, pending or current litigation." While the courts have not sought to define the distinction between "proposed" and "pending" or between "pending" and "current" litigation, they have provided direction concerning the scope of the exception in a manner consistent with the description of the general intent of the grounds for entry into executive session suggested in my earlier remarks,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 would an executive session be properly held.

I note, too, that the courts have provided direction with respect to the sufficiency of a motion to discuss litigation, it has been held that:

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

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
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December 9, 2004

E-Mail

TO: Andrea Lella

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. Lella:

As you are aware, I have received several communications from you in which you raised questions, alleged that the Open Meetings Law was violated, and requested an "'investigation' of the matter."

By way of background, you wrote that you serve as President of the Community Education Council (CEC) of District 31 in New York City, and that CEC's consisting of eleven members were "set up to replace the Community School Boards." In a letter signed by six of the eleven members of the CEC of District 31 addressed to Wayne Hawley, Counsel to the New York City Conflicts of Interest Board, it was contended that certain of your activities would create "bias" and "conflict", and they asked that you be restrained from engaging in those activities. When you apparently questioned whether the six members acted in a manner consistent with the Open Meetings Law, you were:

> "...informed by one of the signatory's that the reason that this is not to be considered a violation of the open meetings law is because at no one time were any of the six signatory's in the same place at the same time when signing the letter. They all signed the letter at separate times."

In this regard, the Committee on Open Government has neither the resources nor the authority to conduct an "investigation." Its statutory charge involves the ability to prepare advisory opinions. That being so, I offer the following comments.

From my perspective, voting and action by a public body may be carried out only at a meeting during which a quorum has physically convened, or during a meeting held by videoconference.

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 CEC, or a convening that occurs through videoconferencing.

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

I point out that the definition of the phrase "public body" in §102(2) refers to entities that are required to conduct public business by means of a quorum. The term "quorum" is defined in §41 of the General Construction Law, which has been in effect since 1909. The cited provision, which was also amended to include language concerning videoconferencing, states that:

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

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

Conducting a vote or taking action in that manner or via e-mail or a series of telephone calls, would not, according to case law, constitute a valid meeting. In a decision dealing with a vote taken by phone, 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, by e-mail or by signing a letter at different times.

In short, should there be a judicial challenge to action taken outside of a meeting held with a majority physically present or by means of videoconference as described earlier, I believe that a court would find such action be a nullity and of no effect.

I hope that I have been of assistance.

RJF:jm

cc: CEC #31
Jemina Bernard
Wayne G. Hawley

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

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December 13, 2004

E-MAIL

TO: Adelaide Camillo

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. Camillo:

I have received your letter in which you indicated that minutes of meetings of the Town of Washington Planning Board are generally unavailable to the public until four to six weeks after the meetings to which they pertain.

In this regard, the Open Meetings Law provides direction concerning the contents of minutes and the time in which they must be prepared and made available to the public. 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, it is clear in my opinion that minutes of open meetings must be prepared and made available "within two weeks of the date of such meeting."

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

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

Also, since you asked whether I make public presentations. I am sure that your Town Clerk and perhaps other Town officials have attended presentations that I have given, and I would be pleased to do so in the Town of Washington.

I hope that I have been of assistance.

RJF:tt

cc: Hon. Florence Prisco
Hon. Mary Alex
Planning Board

STATE OF NEW YORK
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December 16, 2004

Mr. James W. Fowler
[redacted]

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

Dear Mr. Fowler:

I have received your letters in which you questioned the propriety of the locations where two meetings were held. One was a meeting of the Town of Saugerties Economic Development Committee that was preceded by a notice indicating that the meeting would be open to the public. The other involved a meeting of the Saugerties Democratic Committee.

Before considering the propriety of the locations of the meetings at issue, whether they were subject to the Open Meetings Law must be considered.

In my view, a meeting of a political party committee would fall beyond the coverage of the Open Meetings Law for two reasons. First, §108(2) of the Open Meetings Law provides that political committees are exempt from the requirements of the Open Meetings Law. And second, the Open Meetings Law is applicable to public bodies, and the phrase "public body" is defined 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 political party committee is not a public body and, therefore, is not required to comply with the Open Meetings Law.

It is unclear whether the Economic Development Committee constitutes a public body falling within the scope of the Open Meetings Law.

If it is consists of members of a governing body (e.g., the Town Board), if it is a creation of law, if it has decision making authority, or if it performs a necessary function in the decision making process, I believe that the Economic Development Committee would constitute a public body subject to the Open Meetings Law. However, 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.

Lastly, when the Open Meetings Law applies, although it 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.

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

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

Based upon the foregoing, there is no obligation upon a public body to construct a new facility or to renovate an existing facility to permit barrier-free access to physically handicapped persons. However, I believe that the Law does impose a responsibility upon a public body to make "all reasonable efforts" to ensure that meetings are held in facilities that permit barrier-free access to physically handicapped persons. Therefore, if, for example, a public body has the capacity to hold its meetings in a room that is accessible to handicapped persons, I believe that the meetings should be held in the room that is most likely to accommodate the needs of those people.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board

STATE OF NEW YORK
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December 21, 2004

E-MAIL

TO: Rob Blair

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. Blair:

As you are aware, I have received your letter. Please accept my apologies for the delay in response. In your letter, you raised the following questions:

> "Can a group move into executive session to discuss non performance of an ELECTED official in the performance of their job duties if the group has a prescribed manner to deal with the elected official in the non-performance of his/her job duties. Doesn't the electorate have a right to know that the official may not be performing his/her duties?"

In this regard, first, the Open Meetings Law is based on a presumption of openness and requires that meetings of public bodies (i.e., municipal boards) be conducted open to the public, except to the extent that there is a basis for entry into an executive session. Paragraphs (a) through (h) of §105(1) specify and limit the grounds for entry into executive session.

Pertinent in the context of your inquiry is paragraph (f), which states that a public body may conduct an executive session to discuss:

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

If, as you indicated, the public body has the ability to discipline or impose sanctions against one of its members, it would appear that a discussion concerning the possibility of doing so could be

conducted during an executive session. Such a discussion would apparently involve a matter leading to the discipline of a particular person.

In a situation in which action is taken to impose some sort sanction or discipline upon a public officer or employee, I believe that the action must be memorialized in minutes prepared in accordance with §106 of the Open Meetings Law. That provision states that:

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

Whether action is taken in public or during an executive session, minutes must be prepared indicating the nature of the action. Further, I believe that the record indicating the nature of such action must be disclosed as required by the Freedom of Information Law.

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

I note that there is nothing in the Freedom of Information Law that deals specifically with personnel records or personnel files. Further, the nature and content of so-called personnel files may differ from one agency to another, and from one employee to another. In any case, neither the characterization of documents as "personnel records" nor their placement in personnel files would necessarily render those documents "confidential" or deniable under the Freedom of Information Law (see Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980). On the contrary, the contents of those documents serve as the relevant factors in determining the extent to which they are available or deniable under the Freedom of Information Law. Two of the grounds for denial are relevant to an analysis of the matter; neither, however, could in my view serve to justify a denial of access.

Perhaps of greatest significance is§87(2)(b), which permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". In addition, §89(2)(b) provides a series of examples of unwarranted invasions of personal privacy.

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

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

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

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

In terms of the judicial interpretation of the Freedom of Information Law, I point out that in situations in which there has been a written reprimand, disciplinary action, or findings that public

offices or employees have failed to carry out their duties or perhaps engaged in misconduct, records reflective of those kinds of determinations have been found to be available, including the names of those who are the subjects of disciplinary action [see Powhida v. City of Albany, 147 AD 2d 236 (1989); also Farrell, Geneva Printing, Scaccia and Sinicropi, supra].

In the context of your inquiry, if indeed there is a determination to impose discipline or a sanction, I believe that the record so indicating would be accessible to the public. Based on the preceding analysis, disclosure would constitute a permissible invasion of privacy. Further, it would reflect a final agency determination accessible under subparagraph (iii) of §87(2)(g).

I hope that I have been of assistance.

RJF:tt

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December 22, 2004

Mr. Michael C. Mahaney
Director
Buffalo & Erie County Public Library
1 Lafayette Square
Buffalo, NY 14203-1887

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. Mahaney:

I have received your letter and the materials attached to it. Please accept my apologies for the delay in response.

You have requested an advisory opinion concerning "whether the Buffalo and Erie County Public Library [hereafter, 'the Library'] is, in fact a 'public body.'" It appears that your question may have been precipitated by another inquiry, whether committees of the Library Board of Trustees are subject to the Open Meetings Law.

As you are aware, the boards of trustees of a variety of entities characterized as "public libraries" are required to give effect to the Open Meetings Law. Some are governmental entities; others are not-for-profit corporations that typically have a relationship with government but which are not governmental entities. The boards of trustees of both the governmental and non-governmental public libraries are required to comply with the Open Meetings Law 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."

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.

But for the enactment of §260-a, the boards of trustees of non-governmental or not-for-profit corporations that head public libraries would not fall within the scope of the Open Meetings Law. However, a board of trustees of a public library that is a governmental entity would fall within the coverage of the Open Meetings Law, even if §260-a of the Education Law had not been enacted, for it would constitute a "public body" subject to that statute.

Section 102(2) of the Open Meetings Law defines the phrase "public body" to mean:

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

Based on the foregoing, the Open Meetings Law clearly applies to the governing bodies of governmental entities, and in addition, the last clause in the definition indicates that committees, subcommittees and similar bodies of a public body are themselves public bodies required to comply with the Open Meetings Law. In contrast, while the board of trustees of a public library that is not a governmental entity is required to conduct its meetings in accordance with the Open Meetings Law, §260-a of the Education Law provides, by implication, that committees and subcommittees of boards of trustees, except those in New York City, are not required to give effect to the Open Meetings Law.

In consideration of the preceding commentary, if the Board of Trustees of the Library is a public body, I believe that committees and subcommittees consisting of two or members of the Board would be required to comply with Open Meetings Law. In my view, the language of that law and the legislation creating the Library, as well as the judicial decisions to which your attorney referred, clearly indicate that the Board of Trustees is a public body and, therefore, that committees consisting of its members are also public bodies required to comply with the Open Meetings Law.

Because it is referenced in several instances, I note that the phrase "public corporation" is defined in the General Construction Law, which deals with the manner in which New York statutes should be construed. Specifically, §66(1) defines "public corporation" to include "a municipal corporation, a district corporation, or a public benefit corporation." Subdivision (4) of §66 defines "public benefit corporation" 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." Public corporations and public benefit corporations in New York are all governmental entities.

The legislation authorizing the creation of the Library, Chapter 768 of the Laws of 1953, includes provisions indicating that it is a governmental entity. Section 1 states that "the board of supervisors or other governing body of any county", such as a county legislature, is "authorized and empowered to establish a free public library", and section 2 states that the governing body of the county appoints the members of the boards of trustees of such libraries. Section 5 provides that the board of trustees of a library established under Chapter 768 "shall submit annually a budget request to the comptroller or other fiscal officer of the county", that the library is subject to auditing by the county and "shall in all respects be subject to and governed by the provisions of the budget or fiscal laws applicable to such county..." Section 15 indicates that employees of the Library are subject to civil service provisions and are public employees. Section 16 states that purchases made from appropriations may by the county's governing body "shall be made under the procedure provided by law for the making of purchases by the said county." In short, a variety of provisions in the series of laws that authorized the creation of the Library indicate there is governmental control (i.e., through the appointment of members of the Board of Trustees by the County Legislature), that there are fiscal responsibilities and oversight applicable only to governmental entities, and that the employees of the Library are government employees subject to the civil service law and rules.

Having read the judicial decisions pertaining to the Library cited by your attorney, I must respectfully disagree with his interpretation of those decisions. He wrote that the Library "is not a governmental entity", relying on a portions of one of the decisions stating that "[T]he Library is not a branch of the county government, but is a distinct and separate corporation" [County of Erie, Plaintiff v. Board of Trustees of the Buffalo and Erie County Public Library et al., Defendants, 62 Misc.2d 396, 400 (1970); aff'd 35 AD2d 782 (1970); motion for leave to appeal denied, 28 NY2d 463 (1971)]. He cited a different decision in which it was found that "the Library is not a County department, but is a distinct and separate corporation..." [Buffalo and Erie County Public Library v. County of Erie, 171 AD2d 369, 372 (1991)]. While both decisions clearly indicate that the Library is an entity separate from the County, they also just as clearly conclude that it is a governmental entity. In the former, the court determined that "the Board is a public benefit corporation" and "[t]he Librarians are public employees of the Board", not of the County (County of Erie, supra). The issue in that case involved the exercise of control over personnel of the Library, and in holding that the Library Board, not the County, possessed such control, the court stated that the Board "may be likened to a Board of Education" that is "beyond control by municipalities and politics" (id.), and that "the Library is the public employer of the Librarians" (id., 401). In the latter, the court determined that "the Library, *as a public corporation*, [must] abide by the same budget and fiscal restraints that are applicable to all counties in the same position as the County of Erie" (Buffalo and Erie County Public Library, supra, 372; emphasis mine).

Again, public corporations are governmental entities, and public benefit corporations constitute a kind of public corporation. Based on those characterizations of the Library by the courts and the terms of the statutes dealing with its establishment, I believe that its Board of Trustees constitutes a public body, and that it would be subject to the Open Meetings Law, even in the absence of the enactment of §260-a of the Education 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

STATE OF NEW YORK
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December 22, 2004

E-MAIL

TO: Donna Bedell

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. Bedell:

I have received your letter in which you asked whether a volunteer department is subject to the Open Meetings and Freedom of Information Laws.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> relationship with the Town of Colonie is solely contractual is a mischaracterization. The municipality clearly has, by law, control over these volunteer organizations which reprovide a public function.
>
> "It should be further noted that the Legislature, in enacting FOIL, intended that it apply in the broadest possible terms. '...[I]t is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (Public Officers Law, section 84).
>
> "This court recognizes the long, distinguished history of volunteer fire companies in New York State, and the vital services they provide to many municipalities. But not to be ignored is that their existence is inextricably linked to, dependent on, and under the control of the municipalities for which they provide an essential public service."

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

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Similarly, the Open Meetings Law requires that meetings be conducted in public, except to the extent that there is a basis for entry in to an executive session. Paragraphs (a) through (h) of §105(1) specify and limit the subjects that may properly be discussed during an executive session.

The text of the Freedom of Information and Open Meetings Laws, as well as "Your Right to Know", which describes both laws, are available on our website.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3905

41 State Street, Albany, New York 12231
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December 23, 2004

Hon. Irene Murphy
Village Clerk-Treasurer
321 Route 59, P.O. Box 578
Airmont, NY 10982

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 in which you raised a series of questions concerning minutes and other records of meetings of the Village Board of Trustees.

First, although a village clerk (or any other person) may tape record meetings of the Board, there is no obligation to do so. Second, in a related vein, if the clerk does tape record a meeting, the records retention schedule promulgated by the State Archives pursuant to Article 57-A of the Arts and Cultural Affairs Law indicates that the tape must be retained for a minimum of four months. At the expiration of that period, the tape may be destroyed or erased and reused.

Third, you asked what should be included in the minutes. In this regard, the Open Meetings Law contains what might be characterized as minimum requirements concerning the contents of minutes. 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 meetings except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

Based on the foregoing, minutes need not consist of a verbatim account of everything that was said; on the contrary, so long as the minutes include the kinds of information described in §106, I believe that they would be appropriate and meet legal requirements. Most importantly, I believe that minutes must be accurate.

Lastly, you asked "[w]hat is typically done if a Trustee wants something included in the minutes" and whether "a Trustee [may] tell the Clerk he or she wants their points of interests or comments included in the minutes." In an opinion issued by the State Comptroller, it was advised that when a member of a board requests that his statement be entered into the minutes, the board must determine, under its rules of procedure, whether to record the statement in writing, which would then be entered as part of the minutes (1980 Op.St.Comp. File #82-181). From my perspective, a village board of trustees, like other public bodies, functions by means of action taken by a majority vote of its total membership. Pertinent is §41 of the General Construction Law, entitled "Quorum and majority", which states that:

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

Based upon the foregoing, a quorum is a majority of the total membership of a public body, notwithstanding absences or vacancies. Further, in order to carry a motion or take action, there must be an affirmative vote of a majority of the total membership of a public body. Therefore, if, for example, the Board consists of five members, three affirmative votes would be required to take action.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15062
OML-AO-3906

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December 23, 2004

E-MAIL

TO: Joy Canfield

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. Canfield:

As you are aware, I have received your correspondence concerning a variety of issues relating to the Town of Broadalbin, which you serve as a member of the Town Board.

The initial issue that you raised involved your attempt to videotape a public hearing conducted by the Planning Board during which you were asked to "shut off" your camera. In this regard, I point out that there is no provision of law that addresses the use of audio or video recorders at meetings. However, there are several judicial decisions involving meetings of public bodies, i.e., town boards or planning boards, indicating, in brief, that a person cannot be prohibited from recording an open meeting, unless the use of the device is obtrusive or disruptive [see e.g., Csorny v. Shoreham-Wading River Central School District, 305 AD2d 83 (2003); Mitchell v. Board of Education, 113 AD2d 924 (1985); Peloquin v. Arsenault 616 NYS2d 716 (1994)].

It is noted that those decisions involved *meetings* of public bodies, not hearings, and that there may be a distinction between a meeting and a hearing. A meeting, according to §102(1) of the Open Meetings Law, is a gathering of a majority of a public body for the purpose of conducting public business, even if there is no intent to take action, and irrespective of the manner in which the gathering may be characterized. A hearing generally involves a situation in which members of the public are given the right to express their views in relation to a certain matter, and there is no general requirement that a majority of a public body be present during a hearing.

I point out the distinction between meetings and hearings because I know of no judicial decision concerning the use of recording devices during public hearings. While a court might reach the same conclusion concerning the use of those devices at public hearing as that reached in relation meetings, the outcome at this juncture is conjectural. However, it is possible that a hearing is also a meeting, if, for example, a majority of a public body is present during the hearing. If your

description of the facts is accurate, that the Planning Board, in addition to conducting a hearing, is, during the same gathering, "discussing business, voting and taking action on land use", I believe that the hearing would also be a meeting, and that you, or any other person, could audio or video record the event. I note, too, that all public bodies are treated in like manner under the Open Meetings Law and that there is no "exemption" from the law concerning planning boards or discussions relating to pending subdivisions.

Next, while a municipal board or official may choose to record open meetings or public hearings, there is no obligation to do so. If, however, a recording is prepared by or for a municipal agency, I believe that it would fall within the coverage of the Freedom of Information Law. That statute pertains to agency records, and §86(4) of the Law defines the term "record" expansively to include:

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

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

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my view, a tape recording of an open meeting is accessible, for any person could have been present, and none of the grounds for denial would apply. Moreover, case law 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].

The fact that any person could have heard the content the record, in my view, constitutes a waiver of the capacity to withhold what has become part of the public domain. As stated in a decision in which the ability to prohibit the use of audio tape recorders at open meetings was rejected, the Appellate Division determined that:

> "[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" [Mitchell v. Board of Education of Garden City School District, 113 AD 2d 924, 925 (1985)].

With respect to the duplication of a tape recording, you asked whether you may do so at your home, and you added that the Town charges a ten dollar "handling fee" when you bring your own equipment to Town Hall and make your own copy of the Town's tape. In my view, the Town is not required to relinquish custody of its records to enable you to copy the tape at your home. Nevertheless, if you use your own equipment to duplicate the tape at Town Hall, I do not believe that a fee can be charged. Pursuant to §87(1)(b)(iii) of the Freedom of Information Law, only an act of the State Legislature, a statute, would in my view permit the assessment of a fee higher than twenty-five cents per photocopy, a fee that exceeds the actual cost of reproducing records that cannot be photocopied, or any other fee, such as a fee for search or "handling." In addition, it has been confirmed judicially that fees inconsistent with the Freedom of Information Law may be validly charged only when the authority to do so is conferred by a statute [see Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)].

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

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

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

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

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

The Freedom of Information Law does not address issues involving the retention and disposal of records. 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...
>
> 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..."

Based on the foregoing, records cannot be destroyed without the consent of the Commissioner of Education, and local officials must "have custody" and "adequately protect" records until the minimum period for the retention of the records has been reached.

Questions regarding the retention of tape recordings of open meetings have been the subject of questions over the course of time, and I believe that the minimum retention period for such records is four months. However, to confirm whether that is so, it is suggested that you contact the State Archives, a unit of the State Education Department. That office may be reached at 474-6928.

Lastly, you raised questions concerning the ability to discuss certain matters pertaining to an elected official during an executive session. Here I point out that the term "personnel" appears nowhere in the Open Meetings Law, and the ability to cite the so-called "personnel exception" for entry into executive session is not restricted to matters involving employees. Section 105(1)(f) authorizes a public body to conduct an executive session to discuss:

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

Insofar as a discussion focuses on a particular person in relation to a topic identified in the language quoted above, I believe that an executive session may be conducted.

I hope that I have been of assistance.

RJF:tt

cc: Town Board
Planning Board
Hon. Sheila C. Perry, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3907

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December 23, 2004

E-MAIL

TO: George B. Eighmie

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. Eighmie:

As you know, I have received your inquiry. You wrote that you were told that you could not tape record open meetings of a volunteer fire department, and you questioned whether such a prohibition is proper.

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

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

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

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

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

Second, 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 hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3908

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December 27, 2004

E-MAIL

TO: Marian Schoettle

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. Schoettle:

As you are aware, I have received your letter. You wrote that minutes of meetings of the Town of Esopus Library no longer include reference to "what was said during public comment time", and you sought my views "about this censorship by omission."

In this regard, I do not believe that the omission to which you referred constitutes censorship or is in any way inconsistent with law. The Open Meetings Law contains what might be characterized as minimum requirements concerning the contents of minutes. Specifically, §106(1) pertains to minutes of open 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."

Based on the foregoing, it is clear that minutes need not consist of a verbatim account of what is said or that the minutes must include reference to comments offered by those who spoke. So long as they include the elements described in the law (i.e., motions, proposals, resolutions, action taken and the votes of the members), I believe that the Library Board would be acting in a manner consistent with law.

I point out as an aside that any person present at a meeting may take notes, and judicial decisions indicate that any person may tape or video record an open meeting, so long as the use of the recording device is neither obtrusive nor disruptive [see e.g., Peloquin v. Arsenault, 616 NYS2d 716 (1994)].

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

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

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

RJF:tt

cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 27, 2004

E-MAIL

TO: David Cole

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. Cole:

As you are aware, I have received your letter in which you requested an opinion concerning the Open Meetings Law.

You wrote that you are a member of the Waywayonda Town Board and that you were informed that a meeting was being held by three members of the Board without notice to you or the public for the purpose of conducting interviews for the Planning Board. When you questioned the propriety of the gathering, you were told that "no official town business is being conducted today." You have asked whether there is "any action that the state can take to assure that this event will not occur again and that all board members are notified of such meetings."

In this regard, first, there is no state agency that is empowered to enforce the Open Meetings Law. However, this office is given authority under §109 of the Public Officers Law to provide advisory opinions concerning that statute. Although the opinions rendered by this office are not binding, it is our hope that they are educational and persuasive, and that they enhance compliance with and understanding of the Open Meetings Law.

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

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

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

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

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

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

Also relevant is §41 of the General Construction Law, entitled "Quorum and majority." In brief, as that statute pertains to the situation that you described, the members of a town board cannot carry out its powers or duties except by means of an affirmative vote of a majority of its total membership taken at a meeting "held upon reasonable notice to all of them." That being so, I do not believe that the Town Board may conduct a valid meeting unless reasonable notice is given to all of the members.

Lastly, I believe that the Board could have conducted the interviews during an executive session [see Open Meetings Law, §105(1)(f)]. Nevertheless, §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, including approval of a motion, prior to entry into executive session. Further, every meeting must

be preceded by notice given to the public and the news media in accordance with §104 of the Open Meetings Law.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 15068
OML-AO - 3910

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December 27, 2004

Mr. Peter Whalen and Mrs. Renee Whalen
[redacted]

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. and Mrs. Whalen:

As you are aware, I have received your letter in which you raised a series of questions relating to the Moriah Central School District, and particularly in relation to your son's educational program.

It is noted at the outset that the advisory authority of the Committee on Open Government pertains to the disclosure of information by government agencies, such as school districts. This office has neither the jurisdiction nor the expertise to address the issues that you raised concerning family relationships among members of the Board of Education and District employees or other matters involving ethics.

As I understand the situation, you are involved in a proceeding concerning your son's education, and you have raised issues questions and issues with the members of the Board and the Committee on Special Education (CSE). You were informed, however, that those persons were directed not to share information or communicate with you concerning matters discussed during an executive session pertaining to your child. The issue was apparently raised with the District's attorney who prepared a letter addressed to the Superintendent on the subject of "Executive Session Discussions – Confidentiality." The attorney focused on information identifiable to students and advised, in brief, that such is information is confidential and cannot be disclosed. I am in general agreement with the attorney. However, I do not believe that the prohibition concerning disclosure would apply to disclosure to the parent of a child who is the subject of the information.

In this regard, by way of background, the Freedom of Information Law pertains to government agency records and generally requires that agency records be disclosed, unless there is a basis for denial appearing in the Law that can be properly asserted. Similarly, the Open Meetings Law generally requires that meetings of public bodies, such as boards of education or committees on special education, be conducted in public, unless there is a basis for closing a meeting. I point out that there are two vehicles that may authorize a public body to discuss public business in private.

One involves entry into an executive session. Section 102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. The other vehicle for excluding the public from a meeting involves "exemptions." Section 108 of the Open Meetings Law contains three exemptions. When an exemption applies, the Open Meetings Law does not, and the requirements that would operate with respect to executive sessions are not applicable.

Pertinent to the issues you raised is §108(3), which exempts from the Open Meetings Law:

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

Relevant with respect to both records and meetings are the federal Family Educational Rights and Privacy Act ("FERPA", 20 USC §1232g) and the regulations promulgated pursuant to FERPA by the U.S. Department of Education (34 CFR Part 99). In brief, FERPA applies to all educational agencies or institutions that participate in grant or loan programs administered by the United States Department of Education. As such, it includes within its scope virtually all public educational institutions and many private educational institutions. The focal point of the Act is the protection of privacy of students. It provides, in general, that any "education record," a term that is broadly defined, that is personally identifiable to a particular student or students is confidential, unless the parents of students under the age of eighteen waive their right to confidentiality, or unless a student eighteen years or over similarly waives his or her right to confidentiality. Concurrently, FERPA provides rights of access to education records to a parent of a student under the age of eighteen.

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

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

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

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

> "to permit access to or the release, transfer, or other communication of education records, or the personally identifiable information

contained in those records, to any party, by any means, including oral, written, or electronic means."

In consideration of FERPA, if the Board or the CSE discusses an issue involving personally identifiable information derived from a record concerning a student, I believe that the discussion would deal with a matter made confidential by federal law that would be exempt from the Open Meetings Law. Nevertheless, when the information discussed by a board of education or CSE relates to a particular student, I do not believe that the prohibition against disclosure would apply to disclosures made to the parent of that student. If that kind of prohibition were to apply, parent-teacher conferences could not occur, and parents would be unable to discuss their children's educational programs with teachers or others involved with the education of their children.

In short, I agree that information identifiable to a student ordinarily cannot be disclosed to a member of the public, unless a parent of the student consents to disclosure. That prohibition, however, cannot sensibly apply in my opinion in a situation in which a parent of a student discusses matters involving his or her child with a member of a board of education or CSE.

It is suggested that you consider clarification of your rights under FERPA as well as the ability of Board members and others to discuss matters involving your child with you by contacting the federal agency that oversees FERPA, which is the Family Policy Compliance Office, Department of Education, 400 Maryland Avenue, S.E., Washington, DC 20202-5901.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Education
Harold Bresett
Edward J. Sarzynski

OML-AO - 3911

From: Robert Freeman
To: Connie Sowards
Date: 12/27/2004 4:16:35 PM
Subject: Re: Another question

Hi - -

Thanks for your kind words. I hope that you had a wonderful Christmas and will have a terrific new year.

If the committee that you described consists of two members of the Board, I believe that it would constitute a "public body" required to comply with the Open Meetings Law; it would have the same requirements in terms of notice, openness and the ability to enter into executive session as the Board of Trustees.

With respect to quorum requirements, by means of example, the state Assembly consists of 150 members, and its quorum is 76. When a committee consisting of 15 of its members is designated, that committee's quorum would be 8, a majority of its total membership. In the situation to which you referred, a quorum (a majority) of a five person board would be three; in the case of a committee consisting of two, two would be a majority.

I hope that the foregoing offers clarification. If you would like to discuss the issue further, please feel free to call.

Again, I wish you a happy new year!

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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STATE OF NEW YORK
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December 27, 2004

Mr. Edward J. Murphy
Attorney at Law
118 Norman Ridge Road
Vermontville, NY 12989

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. Murphy:

I have received your letter and the correspondence relating to it. You have requested an advisory opinion "on whether the times and/or place at which the Franklin County Legislature conducts its official business violate the Open Meetings Law."

By way of background, Franklin County is physically large, consisting of more than 1,600 square miles, and its county seat, Malone, is located at the northern end of the County. You and "roughly 47 percent of the County's population" live in the southern end of the County. The trip from the southern end of the County to Malone involves approximately fifty miles, and travel from your residence to Malone is time consuming and, in consideration of the cost of gasoline, expensive. You wrote that meetings of the County Legislature are "held during the daytime, typically between 10 AM and 2 PM", and that many County residents who may be interested in attending "must take off at least a half-day of work" to do so. You have questioned the legality of the location of meetings of the County Legislature and the time during which the meetings are held.

In this regard, there is nothing in the Open Meetings Law that specifies precisely where or when meetings must be held. Nevertheless, it has been advised in a variety of contexts that every provision of law, including the Open Meetings Law, must be carried out in a manner that gives reasonable effect to its intent. Section 100 of that statute, the legislative declaration, states in part that: "It is essential...that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy." In my opinion, a meeting of the County Legislature, or any municipal body, must be held at a location where members of the public who might want to attend may have a reasonable opportunity to do so.

What is reasonable, in my view, may be dependent on attendant facts and circumstances. As you are aware, there are judicial decisions indicating that meetings held by a board of education

some twenty miles from the district it serves (Goetschius .v Board of Education, Supreme Court, Westchester County, March 8, 1999) and others held at 7:30 a.m. [Goetschius v. Board of Education, 244 AD2d 552 (1997)] effectively precluded many from attending and represented an unreasonable exercise of authority in a manner inconsistent with the Open Meetings Law. In those cases, it appears that a public body's actions were intended to ensure that some individuals, notably the petitioner, a union activist, and other District employees, could not attend. In the context of the facts that you presented, the County is physically much larger than the school district in Goetschius, the meetings of the Legislature are held within the County at the seat of County government, and they are held during regular business hours.

Meetings scheduled at 7:30 a.m. can likely be attended by relatively few; meetings held at 7:30 p.m. by the County Legislature would likely involve driving late at night by many who would be interested in attending. While meetings scheduled during regular business hours might involve a hardship for some, it is an appropriate and reasonable time for others. Further, as indicated by the Chairman of the Legislature, County officials, whose expertise may be needed by the Legislature during meetings, are readily available during business hours to provide guidance to legislators meeting in the seat of County government.

I doubt that there is a perfect time or place for holding meetings that would accommodate the needs of all of those interested in attending. While a substantial percentage of the County's population resides in the southern end of the county, a greater percentage apparently resides closer to Malone. What may be fair to some may be unfair to others. In consideration of the facts associated with the situation that you presented, I do not believe that a court would determine that the time and place of meetings of the County Legislature are unreasonable or constitute a violation of the Open Meetings Law.

With respect to your suggestion that a variety of information and records be made available via the internet, I fully agree. While there is no law that requires that notices of meetings, agendas, minutes, budgets, announcements of employment opportunities, etc. be accessible online, it has become common practice to do so, and this office has encouraged agencies to do so. Further, when records are made available online, the time and effort needed to respond to a traditional request for those records under the Freedom of Information Law can be eliminated.

Lastly, in separate correspondence, you inferred that a County official complained with respect to a request made under the Freedom of Information Law that involved an hour to fulfill. Upon review of the records by the applicant, that person decided that he/she wanted only three photocopies involving a payment of a fee to the County of only seventy-five cents. In this regard, the language of the Freedom of Information Law and the regulations promulgated by the Committee on Open Government indicate that, absent statutory authority, an agency may charge fees only for the reproduction of records. Section 87(1)(b) of the Freedom of Information Law states:

> "Each agency shall promulgate rules and regulations in conformance with this article...and pursuant to such general rules and regulations as may be promulgated by the committee on open government in

> conformity with the provisions of this article, pertaining to the availability of records and procedures to be followed, including, but not limited to...
>
> > (iii) the fees for copies of records which shall not exceed twenty-five cents per photocopy not in excess of nine by fourteen inches, or the actual cost of reproducing any other record, except when a different fee is otherwise prescribed by statute."

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

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

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt
cc: Hon. Earl J. LaVoie, Chairman
James N. Feeley
Ms. Vallone, Clerk of the Legislature

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3913

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December 29, 2004

Ms. Barbara A. Gref
Editor
The Towne Crier
8 Pearl Street
Livingston Manor, NY 12758

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

Dear Ms. Gref:

I have received your letter in which you requested an advisory opinion concerning the Open Meetings Law in relation to a series of events involving the Sullivan County Legislature and its executive committee.

According to your letter, "on November 18, between 8:30 and 9:20 a.m., members of the news media were alerted by fax and by phone that the Sullivan County Legislature's executive committee was to convene in emergency session at 9:30 a.m. that day 'for the purpose of discussing Casino Gaming Issues, and any other issues that may come before the committee.'" You wrote that all nine members of the Legislature attended, as did several members of the news media and the public, "along with representatives of casino interests." Those representing the casinos asked legislators to approve a resolution by noon that day expressing support for their plans and a land claim settlement. They said that there was a need to act quickly to be "on record in time for U.S. Congress to meet and vote on the land claim bill that afternoon."

Following the introduction of the topic by the representatives of the casinos, the Chair of the Legislature indicated that an executive session would likely be necessary, and the County Attorney said that a closed session would involve "potential negotiation." When a motion was made to enter into executive session, the reason given was "negotiations", and you questioned the propriety of that closed session.

In this regard, as you are likely aware, 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 an executive session. Further, paragraphs (a) through (h) of §105(1) of the Law specify and limit the subjects that may appropriately be considered in executive session.

The only provision that includes reference to "negotiations" is §105(1)(e), which permits to entry into executive session to discuss or engage in collective bargaining negotiations under the Taylor Law. That law pertains to the relationship between public employers and public employee unions and would not have been relevant to the matter under consideration.

In some instances, I believe that issues relating to negotiations other than collective bargaining negotiations may be considered in executive session. Section 105(1)(f) permits a public body to enter into executive session to discuss:

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

If, for example, in the course of negotiations involving the engagement of a contractor, a public body considers the financial or credit history of the contractor, to that extent, an executive session could properly be held. Based on the situation in terms of the facts that you presented, whether or the extent to which §105(1)(f) might have been applicable is conjectural. Nevertheless, the reason offered for conducting an executive session, "negotiations", would have been inadequate in my view as a justification or proper reason for entering into executive session.

After the executive session and the preparation of a resolution to be considered by the Legislature, the County Attorney "said there was a need for another closed session, citing the need for an attorney-client discussion." A vote to close the meeting was approved, but when it was "discovered that the two men from the proposed casinos had remained in the closed-door session", a member of the news media "opened the door to express an objection." You wrote, however, that "[t]he door was shoved closed and upon shouts of 'lock it', was locked."

Due to the presence of the representatives of the casinos, I do not believe that a closed session could validly been held based on the assertion of the attorney-client privilege. 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. 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.

With respect to the assertion of the attorney-client privilege, relevant is §108(3), which exempts from the Open Meetings Law:

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

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

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

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

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

Insofar as a public body seeks legal advice from its attorney and the attorney renders legal advice, I believe that the attorney-client privilege may validly be asserted and that communications made within the scope of the privilege would be outside the coverage of the Open Meetings Law. However, in this instance, I believe that the presence of the representatives of the casinos, "strangers" who are not clients, essentially resulted in a waiver of the attorney-client privilege, thereby negating the Legislature's ability to exclude the public from the meeting based on the assertion of the privilege.

Finally, after the meeting was reopened, the Chairman said "that he needed to call an emergency meeting of the full Legislature in order that a formal vote on the resolution be taken." The meeting was convened "within 10 minutes", and although the members of the news media were notified of the meeting by virtue of their presence, you wrote that "the full complement of local media was not present and additional notice was not given to any media not already present, nor was notice posted."

In my opinion, there is no requirement that notice be given to "the full complement of local media"; so long as members of the news media were given notice prior to the meeting, the

Legislature's obligation with respect to that element of the Open Meetings Law was satisfied. However, that statute contains a dual requirement concerning notice of meetings. Specifically, §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. According to your letter, the Legislature failed to post notice, thereby failing to comply with law.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Sullivan County Legislature
Samuel Yasgur, County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3914

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December 29, 2004

E-Mail

TO: Janet Enos

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. Enos:

As you are aware, I have received your letter in which you questioned the sufficiency of a motion for entry into executive session during a meeting of the Board of Trustees of the Village of Seneca Falls.

You referred to a motion to conduct an executive session to discuss the "performance" of a particular employee. When you suggested that you did not believe that a motion of that nature is "legitimate", the Mayor said "that was the motion provided to them" by me. Following the executive session, the Board informed the public that it discussed more than one employee during the executive session.

You have sought my views on the matter, and in this regard, I offer the following comments.

As you know, §105(1) of the Open Meetings Law requires that, prior to entry into an executive session, a motion must be made "identifying the general area or areas of the subject or subjects to be considered..." It has been advised on many occasions that, in order to achieve the intent of that provision, a motion should include information sufficient to enable those in attendance to know with reasonable certainty that an executive session is about to be held for a valid reason. In consideration of the language of paragraph (f) of §105(1), I believe that a motion to discuss the "performance" of a particular employee would constitute compliance with law, even though the term "performance" is not specifically included in that provision.

Section 105(1)(f) authorizes a public body, such as a village board of trustees, to enter into executive session to discuss:

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

From my perspective, the primary intent of the language of quoted above relates to the protection of personal privacy and the need on the part of members of public bodies to express their views honestly in private. While it has not been suggested that a motion for entry into executive session include the term "performance", it has been advised on many occasions that, in my opinion, §105(1)(f) authorizes a public body to discuss the performance of individual employees and how well or poorly those employees are carrying out their duties. I believe that a discussion of that nature focuses on the employment history of a particular person, and in some instances, matters leading to the promotion, demotion, discipline, suspension or removal of a particular person.

The only criticism that I might offer concerning the facts that you presented involves the absence of reference in the motion to more than one person. In my view, the motion should have referred to the "performance" or "employment history" of "particular employees" or "individual employees."

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

RJF:jm

cc: Hon. Diana Smith
Board of Trustees
Connie Sowards

FOIL-AO-15086
OML-AO-3915

From: Robert Freeman
To: bhuston@mu.clarityconnect.net
Date: 12/30/2004 10:41:11 AM
Subject: Dear Mr. Huston:

Dear Mr. Huston:

As you are aware, I have received your letter, and your kind words are much appreciated.

You have asked that I reconsider the opinion addressed to you in August in which it was advised that the WSKG Public Telecommunications Council is not subject to the Freedom of Information or Open Meetings Laws.

Having reviewed the opinions to which you referred and section 236 of the Education Law, I continue to believe that the nexus between WSKG or other public television stations and the government of New York is so significant that it can be concluded that those entities are subject to the state's open government laws.

I note that numerous entities and individuals are licensed, overseen or regulated by the state. Professional licensees, such as physicians and attorneys, cannot practice in New York absent a license conferred by the state. Further, state agencies have the authority to revoke their licenses and their ability to practice. Despite that degree of control, I do not believe that an argument could effectively be made that a law firm or group of physicians fall within the coverage of the state's Freedom of Information or Open Meetings Law. Every educational corporation, whether public or private, receives a charter from the Board of Regents, and private colleges and universities must transmit annual reports to the Board of Regents/State Education Department. Those elements, however, do not bring those private institutions within the coverage of open government laws. Thousands of corporate entities are regulated by state agencies, such as power companies, insurance companies, bank corporations, bus companies, etc. Nevertheless, those entities fall beyond the coverage of those laws.

In short, absent specific statutory or judicial direction, I do not believe that I can advise that the records or meetings of public television stations fall within the scope of the Freedom of Information or Open Meetings Law.

Notwithstanding the foregoing, I wish you a happy and healthy new year.

Robert J. Freeman
Executive Director
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