STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3916

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January 3, 2005

Mr. Roland A. Baroni, Jr.
Stephens, Baroni, Reilly & Lewis, LLP
North Court Building
175 Main Street
White Plains, NY 10801

The staff of the Committee on 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. Baroni:

I have received your letter in which you requested an advisory opinion concerning a resident's questioning of the propriety of an executive session held by the North Castle Town Board.

It is my understanding that the Board approved a motion to enter into executive session to discuss "personnel matters", and the issue involved "extending 100% health benefits to the particular employees holding the specific positions named in the resolution." You wrote that "in deliberating whether or not to extend a given benefit to a particular employee, that employee's job performance obviously is and was part of that deliberation and that performance review is a proper subject for executive session."

To the extent that the executive session involved consideration of the performance of a particular employee or employees, I believe that an executive session could validly have been conducted. 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. 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, stating 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 use 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, I would agree that discussion of the performance of a particular employee or employees would qualify for consideration in executive session. An issue of that nature in my opinion would of necessity involve the employment history of a particular person. If, however, the issue involved health insurance benefits for employees across the board or as a group, or if it involved positions, irrespective of who may occupy them, I do not believe that an executive session could properly be held, for issues of that kind would not focus on a "particular person" or persons.

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

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

OML-AO-3917

From: Robert Freeman
To: Carl Zatz - Town of Gardiner
Date: 1/5/2005 9:00:12 AM
Subject: Re: question

Good morning - -

It seems that you are dealing with a difficult situation. If the debate involved matters of public policy or Town business, I do not believe that an executive session could validly have been held. In short, it does not appear that any of the eight grounds for entry into executive session could properly have been asserted.

In short, any gathering of a majority of the Board for the purpose of conducting or discussing public business constitutes a "meeting" that falls within the coverage of the Open Meetings Law, even if there is no intent to take action, and irrespective of the manner in which the gathering may be characterized.

If, on the other hand, there is a clash of personalities, and the members would like to gather solely for the purpose of getting to know one another better, to discuss their feelings or to communicate more effectively and without hostility, that kind of gathering in my opinion would not constitute a "meeting", for the members would not have convened to conduct public business.

This kind of issue has arisen in relation to the status of "retreats" under the Open Meetings Law, and I will separately transmit an opinion or two dealing with the dividing line between discussions involving public business, as opposed to those involving board members getting along better.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
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[redacted]

STATE OF NEW YORK
DEPARTMENT OF STATE
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OML-AO-3917A

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January 6, 2005

E-Mail

TO: Joe Bello

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. Bello:

I have received your inquiry in which you asked "what the law is for someone who wants to attend non-for-profit's executive committee meeting."

In this regard, the statute within the advisory jurisdiction of this office, the Open Meetings Law, is applicable to meetings of public bodies. The phrase "public body" is defined in §102(2) of that law to mean:

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

Based on the foregoing, the Open Meetings Law applies to governmental entities, such as city councils, town boards, boards of education and the like. It does not generally apply to meetings of not-for-profit or other private organizations.

I know of no law that provides a right to attend the kinds of meetings to which you referred. In some instances, the by-laws of an organization refer to attendance at meetings, and it suggested that you seek to review the by-laws of the entity of your interest.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
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January 6, 2005

E-Mail

TO: Joachim F. Van Ells

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. Van Ells:

As you know, I have received your inquiry concerning the Open Meetings Law. You asked whether a board of education is required to notify an employee of a school district that he or she will be the subject of a discussion in an executive session.

In short, there is nothing in the Open Meetings Law that in any way requires a public body, such as a board of education, to notify an individual that he or she will be or is the subject of a discussion in an executive session. Further, in situations in which the employee may know that he or she will be the subject of such a discussion, that person has neither control over whether an executive session will be held nor a right to attend the executive session. According to §105(2) of the Open Meetings Law, the only people who have the right to attend an executive session are the members of the public body (i.e., the board of education). An employee who is being discussed may be invited to attend, but he or she has no right to do so.

I hope that I have been of assistance.

RJF:jm

OMA-AO-3919

State of New York
COMMITTEE ON OPEN GOVERNMENT
MEMORANDUM

TO: Town Board, Town of Newport

January 6, 2005

FROM: Robert J. Freeman, Executive Director RJF

SUBJECT: Open Meetings Law

I have received an unsigned, anonymous letter from people merely characterized as "citizens" of the Town of Newport. They have alleged that executive sessions have been conducted at recent meetings of the Town Board with no reason given, no motion made, and no vote to do so. They also wrote that the Supervisor has in some instances offered "having a lot to discuss tonight" or the "potential for a lawsuit" as reasons for entry into executive sessions. Additionally, they alleged that the Zoning Board of Appeals has decided controversial issues with no public deliberation.

In an effort to offer clarification and to enhance compliance with and understanding of the Open Meetings Law, I offer the following comments.

First, as you may be aware, the Open Meetings Law requires that a procedure be accomplished, during an open meeting, before a public body, such as a town board or a zoning board of appeals, 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.

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

> "The purpose of paragraph d is 'to enable a public body to discuss pending litigation privately, without baring its strategy to its adversary through mandatory public meetings' (Matter of Concerned

> Citizens to Review Jefferson Val. Mall v. Town Bd. Of Town of Yorktown, 83 AD 2d 612, 613, 441 NYS 2d 292). The belief of the town's attorney that a decision adverse to petitioner 'would almost certainly lead to litigation' does not justify the conducting of this public business in an executive session. To accept this argument would be to accept the view that any public body could bar the public from its meetings simply be expressing the fear that litigation may result from actions taken therein. Such a view would be contrary to both the letter and the spirit of the exception" [Weatherwax v. Town of Stony Point, 97 AD 2d 840, 841 (1983)].

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

In my view, only to the extent that the Board discusses its litigation strategy 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].

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

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

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

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

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

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

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

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

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

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

> remain within the exceptions enumerated in the statute (see generally, Matter of Plattsburgh Publ. Co., Div. of Ottaway Newspapers v City of Plattsburgh, 185 AD2d §18), and these exceptions, in turn, 'must be narrowly scrutinized, lest the article's clear mandate be thwarted by thinly veiled references to the areas delineated thereunder' (Weatherwax v Town of Stony Point, 97 AD2d 840, 841, quoting Daily Gazette Co. v Town Bd., Town of Cobleskill, supra, at 304; see, Matter of Orange County Publs., Div. of Ottaway Newspapers v County of Orange, 120 AD2d 596, lv dismissed 68 NY 2d 807).
>
> "Applying these principles to the matter before us, it is apparent that the Board's stated purpose for entering into executive session, to wit, the discussion of a 'personnel issue', does not satisfy the requirements of Public Officers Law § 105 (1) (f). The statute itself requires, with respect to personnel matters, that the discussion involve the 'employment history of a particular person" (id. [emphasis supplied]). Although this does not mandate that the individual in question be identified by name, it does require that any motion to enter into executive session describe with some detail the nature of the proposed discussion (see, State Comm on Open Govt Adv Opn dated Apr. 6, 1993), and we reject respondents' assertion that the Board's reference to a 'personnel issue' is the functional equivalent of identifying 'a particular person'" [Gordon v. Village of Monticello, 620 NY 2d 573, 575; 207AD 2d 55, 58 (1994)]

Lastly, with respect to the Zoning Board of Appeals, by way of background, I point out that numerous problems and conflicting interpretations arose under the Open Meetings Law as originally enacted with respect to the deliberations of zoning boards of appeals. In §108(1), the Law had exempted from its coverage "quasi-judicial proceedings". When a zoning board of appeals deliberated toward a decision, its deliberations were often considered "quasi-judicial" and, therefore, outside the requirements of the Open Meetings Law. As such, those deliberations could be conducted in private. Nevertheless, in 1983, the Open Meetings Law was amended. In short, the amendment to the Law indicates that the exemption regarding quasi-judicial proceedings may not be asserted by a zoning board of appeals. As a consequence, zoning boards of appeals are required to conduct their meetings pursuant to the same requirements as other public bodies subject to the Open Meetings Law. Stated differently, due to the amendment, a zoning board of appeals must deliberate in public, except to the extent that a topic may justifiably be considered during an executive session or in conjunction with an exemption other than §108(1).

If there are questions or a need for further guidance or explanation, please feel free to contact me.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15106
OML-AO-3920

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January 7, 2005

E-MAIL

TO: William G. Terry

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. Terry:

As you are aware, I have received your inquiry concerning the Open Meetings Law. If a town board conducts an executive session, you asked whether board members are "allowed to discuss what went on in the meeting..." You wrote that, as a member of a town board, you "were under the thought that when we were in executive session, we were sworn to the utmost secrecy."

From my perspective, unless there is a statute enacted by the State Legislature or Congress that prohibits disclosure of information acquired during an executive session, the is nothing that would preclude a member from discussing that information.

By way of background, both the Open Meetings Law and the Freedom of Information Law are permissive. While the Open Meetings Law authorizes public bodies to conduct executive sessions in circumstances described in paragraphs (a) through (h) of §105(1), there is no requirement that an executive session be held even though a public body has right to do so. Further, the introductory language of §105(1), which prescribes a procedure that must be accomplished before an executive session may be held, clearly indicates that a public body "may" conduct an executive session only after having completed that procedure. If, for example, a motion is made to conduct an executive session for a valid reason, and the motion is not carried, the public body could either discuss the issue in public, or table the matter for discussion in the future. Similarly, although the Freedom of Information Law permits an agency to withhold records in accordance with the grounds for denial, it has been held by the state's highest court, 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 Education, West Hempstead Union Free School District No. 27, Supreme Court, Nassau County, January 29, 1987).

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

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

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
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January 12, 2005

E-MAIL

TO: Patricia Francfort

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. Francfort:

As you are aware, I have received your letter concerning a "workshop" conducted by the Islip School District Board of Education.

According to your letter, when the Board entered into executive session, you "were told that [you] had to leave the school (or wait outside in the cold at 11 PM) before the board reopened the meeting to the public." You contended that members of the public in attendance "should be allowed to stay and listen to the rest of the public meeting", but you "were told to leave", and "the building was closed."

In this regard, §102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. That being so, an executive session is not separate from a meeting, but rather is a portion of a meeting.

From my perspective, if there was any possibility that the Board would reconvene after its executive session and continue the meeting in public, I would agree with your contention that members of the public should not have been removed from the building. By being removed, there would be no way of knowing when the Board would end its executive session and continue its meeting open to the public, at which time you and others would have had the opportunity to observe the Board's deliberations and actions.

I note that many public bodies conduct their executive sessions as their final items of business. If that was so in the situation that you described, and if the Board provided assurances that no business or discussion would be conducted following its executive session, it does not appear that there would have been any reason for members of the public to have remained. Nevertheless, until the meeting was adjourned, I believe that the public should have had the option of remaining in the

building, again, because an executive session is a portion of a meeting, and the public has the right to be present until its conclusion.

I hope that I have been of assistance.

RJF:tt

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
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FOIL-AO-3922

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January 13, 2005

E-MAIL

TO: Eileen Haworth Weil

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. Weil:

I have received your letter in which you asked whether an executive session could validly be held to enable a municipal board to seek legal advice from its attorney.

In this regard, there are two vehicles that may authorize a public body to discuss public business in private. One involves entry into an executive session. Section 102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded, and 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.

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

even though litigation or possible litigation is not an issue. In that case, while the litigation exception for entry into executive session would not apply, there may be a proper assertion of the attorney-client privilege.

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

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

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3923

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January 14, 2005

E-MAIL

TO: Tamara O'Bradovich

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. O'Bradovich:

I have received your letter in which you referred to monthly "coordination meetings" held by the Board of Trustees of the Village of Tuckahoe and complained that you cannot hear the Board's discussions and deliberations.

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

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

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

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

I hope that I have been of some assistance.

RJF:tt

cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3924

41 State Street, Albany, New York 12231
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January 18, 2005

Hon. Betty Havel
Trustee, Village of Endicott
1009 East Main Street
Endicott, NY 13760

The staff of the Committee on 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. Havel:

I have received your letter in which, as a member of the Village of Endicott Board of Trustees, you questioned the propriety of an executive session held by the Board.

By way of background, at the end of a meeting, the Board "voted to send out an RFP (request for proposal) for a golf management group." Soon after, a motion was made to enter into an executive session "to discuss a contract." You wrote, however, that the matter did not involve a contract, but rather "a pitch to be the golf course mgm't group." You added that the representative of the management group disclosed what he wanted to pay the Village, but that his presentation was "premature and the final RFP had not been distributed yet."

In this regard, I offer the following comments.

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

A provision that might have justified an executive session in the circumstance described does not refer to contracts. Paragraph (f) of §105(1) states that a public body may enter into executive session to discuss:

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

Based on the language quoted above, an executive session may properly be held to discuss the financial or credit history of a particular person or corporation, or matters leading to the appointment or employment of a particular person or corporation. To the extent that those matters were the subject of the executive session, it might properly have been held.

I note, however, that unless the basis for entry into executive session is expressed clearly and correctly in a motion (i.e., "I move to enter into executive session to discuss the financial or credit history of a particular corporation"), neither Board members nor the public can know whether there is indeed a proper basis for conducting an executive session. A description of the matter as discussion of "a contract" would not, for reasons discussed above, indicate the nature of the matter in a way that offers justification for holding an executive session.

Lastly, I cannot offer guidance concerning the propriety of discussing the matter with a potential contractor in advance of the receipt of responses to the RFP. In short, that issue is beyond the expertise or jurisdiction of this office.

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-15120
OML-AO-3925

41 State Street, Albany, New York 12231
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January 18, 2005

E-MAIL

TO: Guy Hayward

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Mr. Hayward:

As you are aware, I have received your letter in which you questioned the propriety of executive sessions conducted by the Board of Trustees of the Village of Saranac Lake. It is my understanding that the matter relates to a "safe house" for battered women. It is your view that a "private project" would not qualify for consideration in private.

From my perspective, it appears that executive sessions might properly have been conducted, and I note that there is nothing in the Open Meetings Law that refers to "private projects" or that distinguishes private from public projects. In my view, the ability to enter into executive session relates to the subject matter under consideration and whether it falls within any of the grounds for entry into executive session listed in paragraphs (a) through (h) of §105(1) of that statute.

Although it is rarely cited, I believe that paragraph (a) would have been pertinent in the context of the situation that is the focus of your inquiry. That provision authorizes a public body, such as a village board of trustees, to conduct an executive session to discuss "matters which will imperil the public safety if disclosed." Similar factual situations have arisen in the past, and in consideration the need to provide safety and security to battered, abused or threatened women and their children, a public body may, in my opinion, enter into executive in any instance in which public discussion could place those persons in jeopardy or danger.

In a somewhat related vein, I point out that the analogous provision in the Freedom of Information Law, §87(2)(f), stated for more than two decades that an agency had the authority to deny access to records to the extent that disclosure "would endanger the life or safety of any person." As you may be aware, under that statute, an agency has the burden of defending secrecy and demonstrating that records that have been withheld clearly fall within the scope of one or more

of the grounds for denial [see §89(4)(b)]. However, in cases involving the assertion of §87(2)(f), the standard developed by the courts was somewhat less stringent, for it was found that:

> "This provision of the statute permits nondisclosure of information if it would pose a danger to the life or safety of any person. We reject petitioner's assertion that respondents are required to prove that a danger to a person's life or safety will occur if the information is made public (see, *Matter of Nalo v. Sullivan*, 125 AD2d 311, 312, *lv* denied 69 NY2d 612). Rather, there need only be a possibility that such information would endanger the lives or safety of individuals...."[Stronza v. Hoke, 148 AD2d 900,901 (1989)].

It is noted that the principle enunciated in Stronza has appeared in several other decisions [see Ruberti, Girvin & Ferlazzo v. NYS Division of the State Police, 641 NYS 2d 411, 218 AD2d 494 (1996), Connolly v. New York Guard, 572 NYS 2d 443, 175 AD 2d 372 (1991) and McDermott v. Lippman, Supreme Court, New York County, NYLJ, January 4, 1994]. In short, the courts found that an agency could justify a denial of access to records when there was a reasonable likelihood that disclosure *could* endanger the life or safety of any person. Since those decisions were rendered, the law was amended, replacing "would" with "could." While there are no judicial decisions of which I am aware that focus on §105(1)(a) of the Open Meetings Law, I believe that the standard is similar, that an executive session may properly be held when it can reasonably be contended that public discussion could imperil public safety or endanger the life of any person.

I hope that I have been of assistance.

RJF:tt

cc: Board of Trustees
Kareen Tyler

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3926

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January 20, 2005

E-MAIL

TO: Richard Landman

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. Landman:

As you are aware, I have received your correspondence concerning the status of an entity created by the Chair of Community Board # 1, upon which you serve as a member. The entity consists of five members of the Board and has apparently been referenced by means of several titles, such as the Subcommittee of the Tribeca Committee, the Tribeca Rezoning Subcommittee, the Tribeca Rezoning Committee, the Tribeca Zoning Task Force, and the Tribeca Rezoning Working Group.

From my perspective, since the entity consists of members of the Community Board and was designated by the Chair, it falls within the coverage of 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 community board, I believe that the Open Meetings Law is applicable.

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

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

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

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

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

In view of the amendments to the definition of "public body", I believe that any entity consisting of two or more members of a public body, such as a committee, a subcommittee or "similar body" consisting of members of the Community Board, 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 fifty-one, a quorum would be twenty-six. If that body designates a committee of five, a quorum of the committee would be three.

I hope that I have been of assistance.

RJF:tt

OML-AO-3927

From: Robert Freeman
To: letchpark@adelphia.net
Date: 1/21/2005 9:08:19 AM
Subject: Dear Mr. Hosmer:

Dear Mr. Hosmer:

I have received your inquiry concerning minutes of executive session.

In short, based on the provisions of §106 of the Open Meetings Law, if a public body conducts an executive session and merely discusses matters of public business but takes no action, there is no requirement that minutes of the executive session be prepared. If, however, action is taken, minutes indicating the nature of the taken and the vote of each member must be prepared and made available, 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.

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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Website - www.dos.state.ny.us/coog/coogwww.html

OML-AO-3928

From: Robert Freeman
To: rvogan@adelphia.net
Date: 1/21/2005 3:53:36 PM
Subject: I am in general agreement with your understanding of the use of email in relation to the Open Meetin

I am in general agreement with your understanding of the use of email in relation to the Open Meetings Law.

In one area of your commentary, however, you referred to holding "an 'eMeeting' in a chat room if [you] gave public notice according to the OML...." From my perspective, even with public notice, that kind of communication would be inconsistent with the Open Meetings Law. As you may be aware, the statement of legislative intent appearing at the beginning of the law refers to the public's right to "observe" the performance of public officials. That right would not exist in the hypothetical situation that you described.

It is suggested that you might review opinions on our website pertaining to "email meetings" and "telephone voting."

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
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Albany, NY 12231
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OML-AO - 3929

From: Robert Freeman
To: William Ey
Date: 1/26/2005 2:22:18 PM
Subject: Re: Emails

I would like to point out that there is no law requiring that minutes be approved and that the Open Meetings Law requires that minutes be prepared and made available to the public within two weeks of a meeting. In situations in which it is the practice to approve minutes but they have not been approved within that time, it has been suggested that they be made available after marking or designating them as "unofficial", "draft" or "preliminary", for example. By so doing, the board would comply with law, and the recipient can learn generally of what occurred at the meeting; at the same time, he or she is notified that the minutes are subject to change.

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[redacted]

----- Original Message -----
From: "Robert Freeman" <RFreeman@dos.state.ny.us>
To: <supervisor@clarksonny.org>
Sent: Wednesday, January 26, 2005 9:32 AM
Subject: Re: Emails

> There is no law dealing with the privacy of email communications in the
> situation that you described. Further, an email transmitted to a
> government official in his or capacity as a government official falls
> within the coverage of the Freedom of Information Law.
>
> If you would like a more expansive opinion regarding the issue, please
> let me know.
>
> 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

ey. w

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15131
OML-AO-3929A

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January 28, 2005

Mr. Arthur Browne
Editorial Page Editor
Daily News
450 West Thirty-Third Street
New York, NY 10001-2681

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

Dear Mr. Browne:

I have received your letter in which you requested an advisory opinion concerning "the power of the Committee on Standards and Ethics of the New York City Council to conduct non-public proceedings and to bar council members from disclosing what transpires behind closed doors."

By way of background, the Committee on Standards and Ethics ("the Committee") publicly charged Councilman Allan Jennings with "alleged ethical breaches" and has conducted proceedings relating to the charges in executive session. Although Councilman Jennings asked that the proceedings be conducted in public, his request to do so was rejected. You added that:

> "While the hearings are underway, the committee has prohibited all council members, including Jennings, from discussing the proceeding publicly and from releasing a copy of the official transcript. The committee's acting chairman and the council's acting general counsel have made clear that Jennings would be subject to discipline were he or his lawyer to violate the panel's prohibition..."

A transcript of proceedings of the Committee conducted in executive session on September 21 refers to a statement made by the Acting Chairman, Councilman Rivera, who said that he had "made it perfectly clear" during the preceding day's proceedings "that no one should talk to the media", but that one or more persons present during that closed session did so, and that any such disclosure "does not do justice to the confidentiality agreement we have here in this Committee." Later during the executive session of September 21, he stated that:

> "...we're also going to read into the record, the Committee on Standards and Ethics proposed procedure for a disciplinary hearing says that 'all proceedings and related documents are confidential, and no Committee members shall discuss the proceedings with the responding Council member,' which means that, Councilman Jennings, we cannot have conversations in reference to these hearings in this location without your lawyer or any outside areas outside of this hearing. We cannot have any conversations with any of the members of any of the staff in reference to today's or tomorrow's proceedings while they are taking place.
>
> "So, those are the rules of this Committee, we're going to try to abide by them as much as possible."

Having obtained a copy of the Committee's rules, which were adopted in March of 2004, section (2) states in relevant part that:

> "All proceedings and related documents are confidential. No Committee Member shall discuss the proceedings with the respondent Council Member or Non-Committee Member, press, unauthorized staff or any member of the public."

In consideration of the foregoing, you have sought my views in relation to the following questions:

> "- - Does the committee properly rely on Section 105(1)(f) of the Public Officers Law (permitting closed executive sessions when the subject matter entails the possibility of employment-related discipline) in light of the councilman's own request that the sessions be open to the public?
>
> - - May the committee, invoking the threat of punishment, bar a committee member from speaking publicly about the substance of proceedings held in private under Section 105(1)(f) of the Public Officers Law?
>
> - - May the committee, invoking the threat of punishment, bar a council member from speaking publicly about the substance of proceedings held in private under Section 105(1)(f) of the Public Officers Law?
>
> - - May the committee, invoking the threat of punishment, impose the same bar on a council member who is not a committee member, who has been publicly charged with ethical breaches and whose conduct

is the focus of proceedings held in private under Section 105(1)(f) of the Public Officers Law?"

In this regard, first, §105(1)(f) of the Open Meetings Law permits a public body, such as a committee consisting of members of the City Council, 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..."

The facts that have been presented indicate in my view that executive sessions may validly have been held, for the issue involves a matter "leading to the...discipline...of a particular person", Councilman Jennings. However, there is nothing in the Open Meetings Law that gives the subject of a discussion the right to determine or direct a public body to consider an issue in public or in private. In short, I believe that discussing the conduct of Councilman Jennings in public or private is within the discretionary authority of the Committee, and that his desire to open the discussion to the public is irrelevant for purposes of the Open Meetings Law.

Your remaining questions involve essentially one issue: does the Committee have the authority to prohibit one of its members or any member of the City Council from speaking publicly about an executive session validly held under §105(1)(f) of the Open Meetings Law? Stated differently, is the Committee's rule that "[A]ll proceedings and related documents are confidential" concerning the discipline of a member of the City Council consistent with law?

In my opinion, there is no legal basis for prohibiting a member of the Committee, a member of the City Council, or any other person present during an executive session from speaking publicly about or disclosing information obtained during an executive session validly held. This is not intended to suggest that such speech or disclosures would be wise or proper in every instance, but rather, again, that there is no basis in law for prohibiting a person present during an executive session from speaking about that closed session. Further, I do not believe that a committee of the City Council can adopt a rule that has the force of law or is empowered to silence an elected official.

As you are aware, the Open Meetings Law sets forth a procedure for entry into executive session and specifies the subjects appropriate for consideration in executive session. Its statutory companion, the Freedom of Information Law, deals with documents, the other aspect of access to government information to which the rule refers. Both statutes contain permissive rather than mandatory language concerning the ability to discuss a matter in private or deny access to records.

A public body *may* enter into executive session in circumstances prescribed in the Open Meetings Law; it is *not required* to do so. Specifically, the introductory language of §105(1) entitled "Conduct of executive sessions" 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..."

The law clearly indicates that there is no obligation to conduct an executive session; a public body may choose do so, but only upon approval of a motion by a majority vote of its total membership. If a motion to enter into executive session is not approved, a public body is free to discuss the issue in public.

Similarly, although an agency *may* withhold records in accordance with the grounds for denial of access appearing in §87(2) of the Freedom of Information Law, the Court of Appeals has held that an agency is not obliged to do so and may opt 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].

In my view, records may be characterized as "confidential" only when a statute, an act of Congress or the State Legislature, specifies that they cannot be disclosed. That circumstance is reflected in §87(2)(a) of the Freedom of Information Law, the first exception to rights of access, which pertains to records that "are specifically exempted from disclosure by state or federal statute." Section 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. The effect is that the Open Meetings Law simply does not apply in those instances.

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

> "Although we have never held that a State statute must expressly state it is intended to establish a FOIL exemption, we have required a showing of clear legislative intent to establish and preserve that confidentiality which one resisting disclosure claims as protection" (id.).

In like manner, in construing the equivalent exception to rights of access in the federal Freedom of Information Act (5 USC §552), 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.

Since a public body, such as the Committee, 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, because a federal statute prohibits disclosure, 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. 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 a parent of the student consents 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.

I note that in a case in which the issue was whether discussions occurring during an executive session held by a school board could generally 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.

It is emphasized that it has been held by several courts, including the Court of Appeals, that an agency's rules or regulations or the provisions of a local enactment, such as an administrative code, local law, charter or ordinance, for example, do not constitute a "statute" [see e.g., Morris v. Martin, Chairman of the State Board of Equalization and Assessment, 440 NYS 2d 365, 82 Ad 2d 965, reversed 55 NY 2d 1026 (1982); Zuckerman v. NYS Board of Parole, 385 NYS 2d 811, 53 AD 2d 405 (1976); Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)]. Therefore, a local enactment, such as the rule adopted by the Committee, cannot confer, require or promise confidentiality. This not to suggest that many of the records used, developed or acquired in conjunction with an ethics investigation or proceeding must be disclosed; rather, I am suggesting that those records *may* in some instances be withheld in accordance with the grounds for denial appearing in the Freedom of Information Law, but that a local enactment cannot confer or require confidentiality; only a statute may do so.

Similarly, insofar as a local enactment is more restrictive concerning access than the Open Meetings Law, I believe that it would be invalid. Section 110 of the Open Meetings Law, entitled "Construction with other laws," states in subdivision (1) that:

> "Any provision of a charter, administrative code, local law, ordinance, or rule or regulation affecting a public body which is more restrictive with respect to public access than this article shall be deemed superseded hereby to the extent that such provision is more restrictive than this article."

Because the Open Meetings Law is permissive in that it authorizes but does not require executive sessions to be held in appropriate circumstances, it is not a statute that confers confidentiality or prohibits public discussion. I believe that the Committee's rule requiring that information discussed during an executive session is "confidential" is "more restrictive with respect to public access" than the Open Meetings Law and, therefore, should be deemed superseded and invalid.

Considering the issue from a different vantage point, based on a decision rendered by the U.S. Court of Appeals for the Second Circuit [Harman v. City of New York, 140 F.3d 111 (2nd Cir.

1998)], it appears that the Committee's rule may be unconstitutional. In Harman, the New York City Human Resources Administration (HRA) adopted an executive order that forbade its employees:

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

I note that §136 of the Social Services Law prohibits a social services agency from disclosing records identifiable to an applicant for or recipient of public assistance. Additionally, §372 of the Social Services Law prohibits the disclosure of records identifiable to "abandoned, delinquent, destitute, neglected or dependent children..." As such, there is no question that many of HRA's records are exempted from disclosure by statute and are, therefore, confidential. Nevertheless, the proceeding in Harman was precipitated by commentary that was not identifiable to any particular recipient, 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 information may be characterized and exempted from disclosure by statute only when a statute forbids disclosure.

While a member of a city council or other governing body may not be an "employee", in consideration of the possibility of sanctions, I believe that the holding in Harman would be applicable in the instant situation. In creating a "balancing test", it was held in Harman 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 "blanket policy" created by the Committee's rule that "[A]ll proceedings and related documents are confidential" applies potentially to any person who may be present during or is aware of proceedings conducted during an executive session. That being so, it would appear to be invalid, as the executive order was found to be invalid in Harman. Moreover, it was stressed by the court that the harm sought to be avoided by means of a restriction on speech must be real, and not merely conjectural. It was determined that:

> "...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).

The Committee's rule is prospective, for, in the words of Harman, "it chills speech before it happens" and does not focus on any harm that has actually occurred. In short, I believe that it stifles free speech in a manner that has been found to be unconstitutional.

Councilman Jennings is not the focus of a criminal proceeding, but rather alleged breaches of ethical conduct. Even if the proceeding involved a criminal matter, he would not be prohibited from speaking or discussing the matter with the news media or the public generally. Everyone is familiar with the first admonition given to a person arrested: "you have the right to remain silent." That warning does not impose any obligation to be silent, and a person arrested is free to speak to anyone. Section 190.25(4) of the Criminal Procedure Law specifies that grand jury proceedings are secret and that government officials present during those proceedings, such as a district attorney or court clerk, are barred form disclosing information regarding a grand jury proceeding. In that situation, a statute prohibits those persons from disclosing. However, there is nothing in §190.25 that prohibits a person from testifying before a grand jury from disclosing or discussing his or her testimony.

In sum, for the reasons expressed in the preceding commentary, I do not believe that the Committee's rule can prohibit Councilman Jennings, or any other person, from discussing or disclosing information acquired during an executive session, nor can it require that documents relating to its proceeding be kept confidential.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Helen Sears, Chair
Hon. Joel Rivera
Hon. Allan Jennings
Hon. Jay Damashek

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

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January 31, 2005

Ms. Eileen Haworth Weil
[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. Weil:

I have received your letter in which you raised a variety of issues relating to compliance with the Open Meetings Law in the Town of Manakating.

First, you wrote that the Town Board and the Planning Board both conduct meetings on the third Tuesday of each month. You have repeatedly asked "that one Board of the other change the meeting night so that residents would be able to attend both boards' monthly meetings", but the request has not been granted.

In my view, there is nothing in the law that requires the Town Board and the Planning Board to hold their meetings at different times. I point out, too, that open meetings of public bodies may be audio or video recorded, so long as the use of recording devices is neither disruptive nor obtrusive [see Csorny v. Shoreham-Wading River Central School District, 759 NYS2d 513, 305 AD2d 83 (2003)]. That being so, a recording of a meeting may be shared with those who are unable to attend.

Second, you wrote that microphones are "not consistently used at Planning or ZBA meetings, which are held in a large room with poor acoustics." You asked whether those Boards have "violated the ADA." The advisory jurisdiction of the Committee on Open Government relates to the state's Open Meetings Law, and I have neither the jurisdiction nor the expertise to comment with respect to the ADA, the Americans with Disabilities Act. Nevertheless, with respect to the capacity to hear what is said at meetings, I direct your attention to §100 of the Open Meetings Law, its legislative declaration. That provision states that:

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

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

Based upon the foregoing, it is clear in my view that public bodies must conduct meetings in a manner that guarantees the public the ability to "be fully aware of" and "listen to" the deliberative process. Further, I believe that every statute, including the Open Meetings Law, must be implemented in a manner that gives effect to its intent. In this instance, the Board must in my view situate itself and conduct its meetings in a manner in which those in attendance can observe and hear the proceedings. To do otherwise would in my opinion be unreasonable and fail to comply with a basis requirement of the Open Meetings Law. If microphones are available for use at the meetings in question, and if those present cannot hear the proceedings without their use, it would be unreasonable in my view not to use them.

Lastly, you referred to "several instances when a quorum of members of a Board have met without prior notification or access for the public." In this regard, I point out the definition of "meeting" [see Open Meetings Law, §102(1) has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be conducted open to the public, whether or not there is an intent to have action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 Ad 2d 409, aff'd 45 NY 2d 947 (1978)].

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

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

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

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

Based upon the direction given by the courts, when a majority of a public body is present to discuss public business, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law. I note, too, that every meeting must be preceded by notice of the time and place given to the news media and by means of posting pursuant to §104 of the Open Meetings Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board
Planning Board
ZBA

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January 31, 2005

Mr. Martin Z. Braun
Bloomberg News
732 Lexington Avenue
New York, NY 10022

The staff of the Committee on 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. Braun:

I have received your letter in which you questioned the propriety of certain executive sessions held by the boards of New York City's five pension funds, as well as denials of access to their records.

According to your letter, five separate pension funds have been established for categories of City employees, their holdings are valued at approximately 83 billion dollars, and they are known collectively as the New York City Retirement System. Each board is independent, but each relies on the office of the City Comptroller for oversight of asset management and staff support.

Having attended meetings of the boards of the three largest funds on various occasions, you indicated that reviews of a fund's investment performance generally occur in public and that you are given a copy of a "flash report", a one page summary. Often, however, discussions involve "quarterly reports or particular investment classes", and you are excluded from them. Executive sessions have also been held to discuss " a 12 month plan", "investment advisor updates", quarterly reports on "private equity" and real estate, "investment policy", emerging markets, compliance with ethics laws, a selection process for investment counsel, a "post-trade" analysis, and a status report on "large cap growth."

Additionally, in response to a request for a report on the performance of a particular fund, you were told that the report was "privileged." A request for a copy of an investment policy adopted during an executive session was denied, and you were told that you should obtain it from the Comptroller's office. In another instance, after the Board provided authority to enter negotiations with two private equity consultants, your request for their names was rejected based on a contention that disclosure "could impair the ability of the City Comptroller's office to negotiate terms of [a] deal and actually place the investment."

In this regard, I offer the following comments.

First, 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 the boards that are the subject of your correspondence, cannot enter into an executive session to discuss the subjects of their 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 basis for entry into executive session to which you referred and which is pertinent to several of the matters 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, a business enterprise 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 acquisition, sale or exchange of securities; only to the extent that publicity would "substantially affect the value of the property" can that provision validly be asserted.

When the boards at issue focus on a particular enterprise and consider whether to purchase or sell securities associated with that enterprise, because they purchase and sell securities involving a great deal of money, public discussion could have a significant effect on the value of the securities. If the effect of a public discussion would result in a substantial change in the price of securities considered for acquisition or sale, I believe that an executive session could properly be held. In those circumstances, a board would be focusing on a particular security or securities, and its discussion would involve prospective action. From my perspective, §105(1)(h) may be invoked in instances in which the discussion focuses on particular purchases or sales yet to be made. Discussions regarding past purchases or sales would not appear to "substantially affect" the value of securities. As you are well aware, there are circumstances too numerous to count or identify that deal with the strengths and weaknesses, both actual and predicted, of entities that are the subjects of the purchase and sale of securities. That being so, unless a discussion by a board involves particular entities, as opposed to sectors, it is doubtful in my view that it can be justifiably be contended that publicity would "substantially" affect the value of securities

Moreover, the five funds, although large, are among thousands of institutional purchasers and sellers of securities. That being so, discussions by the boards of the funds involving their policy,

pertaining to certain sectors, i.e., emerging markets or large cap companies, updates regarding previous transactions, or "post-trade" analyses would appear to have perhaps minimal or perhaps no effect on the value of securities. If that is so, §105(1)(h), in my view, could not be asserted as a basis for consideration in executive session.

I point out that a different ground for entry into executive session might apply in the context of the functions of the boards. Section 105(1)(f) authorizes public bodies 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 a board discusses the "financial history" of a particular corporation, for example, I believe that §105(1)(f) could properly be cited as a basis for conducting an executive session.

With respect to your efforts in obtaining records, the Freedom of Information Law is pertinent. In brief, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Further, the Court of Appeals, the state's highest court, confirmed its general view of the intent of the Freedom of Information Law in Gould v. New York City Police Department [87 NY 2d 267 (1996)], stating that:

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

There is nothing in the Freedom of Information Law that authorizes a person or agency to claim, promise or engage in an agreement conferring confidentiality or a "privilege" absent a statutory authority to do so. The Court of Appeals has held that a request for, a claim or a promise of confidentiality is all but meaningless; unless one or more of the grounds for denial appearing in the Freedom of Information Law may appropriately be asserted, the record sought must be made available. In Washington Post v. Insurance Department [61 NY2d 557 (1984)], the controversy involved a claim of confidentiality with respect to records prepared by corporate boards furnished voluntarily to a state agency. The Court of Appeals reversed a finding that the documents were not "records" subject to the Freedom of Information Law, thereby rejecting a claim that the documents

"were the private property of the intervenors, voluntarily put in the respondents' 'custody' for convenience under a promise of confidentiality" (id., 564). Moreover, it was determined that:

> "Respondent's long-standing promise of confidentiality to the intervenors is irrelevant to whether the requested documents fit within the Legislature's definition of 'records' under FOIL. The definition does not exclude or make any reference to information labeled as 'confidential' by the agency; confidentiality is relevant only when determining whether the record or a portion of it is exempt (see *Matter of John P. v Whalen*, 54 NY2d 89, 96; *Matter of Fink v Lefkowitz,* 47 NY2d 567, 571-572, *supra*; *Church of Scientology v State of New York*, 61 AD2d 942, 942-943, affd 46 NY2d 906; *Matter of Belth v Insurance Dept.*, 95 Misc 2d 18, 19-20). Nor is it relevant that the documents originated outside the government...Such a factor is not mentioned or implied in the statutory definition of records or in the statement of purpose..." (id., 565-566).

The Open Meetings and Freedom of Information Laws frequently relate to one another, as in the case of matters involving access to minutes of executive sessions. The Open Meetings Law contains direction concerning minutes of meetings and provides what might be viewed as minimum requirements pertaining to their contents. Specifically, §106 states that:

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

In view of the foregoing, as a general rule, a public body may take action during a properly convened executive session [see Open Meetings Law, §105(1)]. If action is taken during an executive session, minutes reflective of the action, the date and the vote must generally be recorded

in minutes pursuant to §106(2) of the Law. If no action is taken, there is no requirement that minutes of the executive session be prepared.

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)].

As indicated earlier, you referred to an executive session during which a board conferred authority to enter into negotiations with certain private equity consultants. When you requested the names of the consulting firms, the request was denied on the ground that disclosure would "impair the ability" of the City Comptroller to negotiate in an optimal manner. The provision in the Freedom of Information Law upon which the board appears to have relied, §87(2)(c), permits an agency to deny access to records to the extent that disclosure "would impair present or imminent contract awards or collective bargaining negotiations." The key word in that provision in my opinion is "impair", and the question under that provision involves whether or the extent to which disclosure would "impair" the process by diminishing the ability of the government to reach an optimal agreement on behalf of the taxpayers. That a contract has not been signed or ratified, in my view, is not determinative of rights of access or, conversely, an agency's ability to deny access to records. Rather, I believe that consideration of the effects of disclosure is the primary factor in determining the extent to which §87(2)(c) may justifiably be asserted.

As I understand its application, §87(2)(c) generally encompasses situations in which an agency or a party to negotiations maintains records that have not been made available to others. For example, if an agency seeking bids or proposals has received a number of bids, but the deadline for their submission has not been reached, premature disclosure for the bids to another possible submitter might provide that person or firm with an unfair advantage vis a vis those who already submitted bids. Further, disclosure of the identities of bidders or the number of bidders might enable another potential bidder to tailor his bid in a manner that provides him with an unfair advantage in the bidding process. In such a situation, harm or "impairment" would likely be the result, and the records could justifiably be denied. However, after the deadline for submission of bids or proposals are available after a contract has been awarded, and that, in view of the requirements of the Freedom of Information Law, "the successful bidder had no reasonable expectation of not having its bid open to the public" [Contracting Plumbers Cooperative Restoration Corp. v. Ameruso, 105 Misc. 2d 951, 430 NYS 2d 196, 198 (1980)]. Similarly, if an agency is involved in collective bargaining negotiations with a public employee union, and the union requests records reflective of the agency's strategy, the items that it considers to be important or otherwise, its estimates and projections, it is

likely that disclosure to the union would place the agency at an unfair disadvantage at the bargaining table and, therefore, that disclosure would "impair" negotiating the process.

I point out that the Court of Appeals sustained the assertion of §87(2)(c) in a case that did not clearly involve "contract awards" or collective bargaining negotiations. In Murray v. Troy Urban Renewal Agency [56 NY2d 888 (1982)], the issue pertained to real property transactions where appraisals in possession of an agency were requested prior to the consummation of a transaction. Because premature disclosure would have enabled the public to know the prices the agency sought, thereby potentially precluding the agency from receiving optimal prices, the agency's denial was upheld [see Murray v. Troy Urban Renewal Agency, 56 NY 2d 888 (1982)].

If there is no possibility that other consulting firms may be involved in the negotiations, it is difficult to envision how disclosure of the names of the two firms would "impair" the ability of a fund to reach an optimal agreement. This is not to suggest that other records involved in negotiations might not justifiably be withheld, but rather that the names of the two firms with which authority has been conferred to negotiate should be disclosed, unless there is justification for claiming that disclosure would impair a fund's ability to reach an optimal agreement on behalf of its members.

In an effort to enhance understanding of open government laws, copies of this opinion will be forwarded to the boards to which you referred.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Education
Fire Department
NYC Employees
Police Pension Fund
Teachers' Retirement Board

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February 1, 2005

Mr. George R. Hubbard
[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. Hubbard:

I have received your letter in which you wrote that you are a member of the Greece Board of Education and questioned the propriety of a policy adopted by the Board that states in part that:

> "Matters discussed in executive sessions must be treated as confidential; that is, never discussed outside of that executive session. A violation of confidentiality will lead to disciplinary action as established by the Commissioner of Education."

You asked whether a board of education has the authority "to declare what is...and what is not confidential" in relation to the Open Meetings and Freedom of Informa[redacted]

From my perspective, there is no legal basis for prohibiting a member of a board of education or any other person present during an executive session from speaking about or disclosing information obtained during an executive session validly held. This is not intended to suggest that such speech or disclosures would be wise, or ethical or in the best interest of a school district and its residents in every instance, but rather that there is no law that generally prohibits a person present during an executive session from speaking about that closed session. Further, I do not believe that a board of education can adopt a rule or policy that has the force of law or is empowered to silence an elected official.

As you are aware, the Open Meetings Law sets forth a procedure for entry into executive session and specifies the subjects appropriate for consideration in executive session. Its statutory companion, the Freedom of Information Law, deals with records. Both statutes contain permissive rather than mandatory language concerning the ability to discuss a matter in private or deny access to records.

A public body *may* enter into executive session in circumstances prescribed in the Open Meetings Law; it is *not required* to do so. Specifically, the introductory language of §105(1) entitled "Conduct of executive sessions" 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..."

The law clearly indicates that there is no obligation to conduct an executive session; a public body may choose do so, but only upon approval of a motion by a majority vote of its total membership. If a motion to enter into executive session is not approved, a public body is free to discuss the issue in public.

Similarly, although an agency *may* withhold records in accordance with the grounds for denial of access appearing in §87(2) of the Freedom of Information Law, the Court of Appeals has held that an agency is not obliged to do so and may opt 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].

In my view, records may be characterized as "confidential" only when a statute, an act of Congress or the State Legislature, specifies that they cannot be disclosed. That circumstance is reflected in §87(2)(a) of the Freedom of Information Law, the first exception to rights of access, which pertains to records that "are specifically exempted from disclosure by state or federal statute." Section 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. The effect is that the Open Meetings Law simply does not apply in those instances.

Both the Court of Appeals, the state's highest court, 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" (id.).

In like manner, in construing the equivalent exception to rights of access in the federal Freedom of Information Act (5 USC §552), 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.

Since a public body, such as the board of education, 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, because a federal statute prohibits disclosure, 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. 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 a parent of the student consents 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.

I note that in a case in which the issue was whether discussions occurring during an executive session held by a school board could generally 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.

It is emphasized that it has been held by several courts, including the Court of Appeals, that an agency's rules or regulations or the provisions of a local enactment, such as an administrative code, local law, charter or ordinance, for example, do not constitute a "statute" [see e.g., Morris v. Martin, Chairman of the State Board of Equalization and Assessment, 440 NYS 2d 365, 82 Ad 2d 965, reversed 55 NY 2d 1026 (1982); Zuckerman v. NYS Board of Parole, 385 NYS 2d 811, 53 AD 2d 405 (1976); Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)]. Therefore, a local enactment, such as a policy adopted by the board of education, cannot confer, require or promise confidentiality. This not to suggest that many of the records used, developed or acquired in conjunction with school district business must be disclosed; rather, I am suggesting that records *may* in some instances be withheld in accordance with the grounds for denial appearing in the Freedom of Information Law, but that a local enactment cannot confer or require confidentiality; only a statute may do so.

Similarly, insofar as a local enactment is more restrictive concerning access than the Open Meetings Law, I believe that it would be invalid. Section 110 of the Open Meetings Law, entitled "Construction with other laws," states in subdivision (1) that:

> "Any provision of a charter, administrative code, local law, ordinance, or rule or regulation affecting a public body which is more restrictive with respect to public access than this article shall be deemed superseded hereby to the extent that such provision is more restrictive than this article."

Because the Open Meetings Law is permissive in that it authorizes but does not require executive sessions to be held in appropriate circumstances, it is not a statute that confers confidentiality or prohibits public discussion. I believe that the Board's policy requiring that information discussed during an executive session is "confidential" is "more restrictive with respect to public access" than the Open Meetings Law and, therefore, should be deemed superseded and invalid.

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

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

I note that §136 of the Social Services Law prohibits a social services agency from disclosing records identifiable to an applicant for or recipient of public assistance. Additionally, §372 of the Social Services Law prohibits the disclosure of records identifiable to "abandoned, delinquent, destitute, neglected or dependent children..." As such, there is no question that many of HRA's records are exempted from disclosure by statute and are, therefore, confidential. Nevertheless, the proceeding in Harman was precipitated by commentary that was not identifiable to any particular recipient, 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 information may be characterized and exempted from disclosure by statute only when a statute forbids disclosure.

While a member of the board of education or other governing body may not be an "employee", in consideration of the possibility of sanctions, I believe that the holding in Harman would be applicable in the instant situation. In creating a "balancing test", it was held in Harman 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 "blanket policy" created by the Board that "[M]atters discussed in executive session must be treated as confidential" applies potentially to any person who may be present during or is aware of proceedings conducted during an executive session. That being so, it would appear to be invalid, as the executive order was found to be invalid in Harman. Moreover, it was stressed by the court that the harm sought to be avoided by means of a restriction on speech must be real, and not merely conjectural. It was determined that:

> "...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).

The Board's rule is prospective, for, in the words of Harman, "it chills speech before it happens" and does not focus on any harm that has actually occurred. In short, I believe that it stifles free speech in a manner that has been found to be unconstitutional.

In sum, for the reasons expressed in the preceding commentary, I do not believe that the Board's policy can validly prohibit a person from discussing or disclosing information acquired during an executive session, nor can it require that documents relating to its proceeding be kept confidential.

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 2, 2005

Mr. John Kwasnicki
[redacted]

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

Dear Mr. Kwasnicki:

I have received your letter and the materials attached to it. Having addressed many of the issues that you raised in previous correspondence, there is no reason to revisit them. However, since it appears to be your belief that the public has a right to speak at meetings of public bodies, I offer the following remarks.

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

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

FOIL-AO-15138
OML-AO-3934

From: Robert Freeman
To: [redacted]
Date: 2/2/2005 12:05:08 PM
Subject: Re: Fax

While I do not fully understand your question, I note that all agency records are subject to the Freedom of Information Law. Further, the Open Meetings Law requires that minutes be prepared and made available to the public within two weeks of a meeting. There is nothing in that law or any other that requires that requires that minutes be approved. If minutes have not been approved within two weeks, it has been advised that they should be made available after having been marked as "draft", "unapproved" or "preliminary", for example.

I hope that I have been of assistance.

Robert J. Freeman
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[redacted]

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February 2, 2005

E-MAIL

TO: Robert Mirabile

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. Mirabile:

I have received your letter in which you indicated that the Board of Commissioners of a fire/water district has "refused to provide minutes of a public meeting stating they were not 'official' and refused to provide unofficial minutes." You added that your request for minutes of executive sessions were withheld on the ground that they involved "a personnel issue."

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

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

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

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

There is nothing in the Open Meetings Law or any other statute of which I am aware that requires that minutes be approved. Nevertheless, as a matter of practice or policy, many public bodies approve minutes of their meetings. In the event that minutes have not been approved, to comply with the Open Meetings Law, it has consistently been advised that minutes be prepared and made available within two weeks, and that if the minutes have not been approved, they may be marked "unapproved", "draft" or "preliminary", for example. By so doing within the requisite time limitations, the public can generally know what transpired at a meeting; concurrently, the public is effectively notified that the minutes are subject to change. 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, if action is taken during an executive session, minutes reflective of the action, the date and the vote must generally be recorded in minutes pursuant to §106(2) of the Law. If no action is taken, there is no requirement that minutes of the executive session be prepared.

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

I hope that I have been of assistance.

RJF:tt

cc: Board of Commissioners

From: Robert Freeman
To: warrenbp@oneonta.edu
Date: 2/10/2005 9:26:28 AM
Subject: Dear Mr. Warren:

Dear Mr. Warren:

I have received your inquiry and question whether it may be based on a mistaken assuption. You referred to a "Council of Governments" as a "public entity." While that organization might consist of government officials, it may not itself be a governmental entity. Many organizations consist of government officials, i.e., the NY Association of Counties, the NY Conference of Mayors, the NYS School Boards Association, but the entities themselves are not part of the government. Consequently, their boards and their meetings would not be subject to the Open Meetings Law. In those circumstances, their meetings could be conducted in accordance with their own rules and by-laws.

On the other hand, when a governmental body, a "public body", falls within the coverage of the Open Meetings Law, a meeting may validly be held and votes validly taken only when a meeting is held in which there is a physical convening of a majority of its total membership, or when a meeting is held by videoconference and the members, as well as the public, have the ability to observe one another at two or more locations.

I hope that I have been of assistance.

Robert J. Freeman
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February 11, 2005

E-MAIL

TO: Hon. Richard Slagle, Mayor

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 Mayor Slagle:

I have received your letter in which you raised questions relating to the Open Meetings Law.

You wrote that a member of the Board of Trustees of the Village of Celeron alleged outside of a Board meeting that Village monies were missing and that bills were being paid without approval. After you brought up the issue during a Board meeting, you wrote that you were "criticized for not bringing it up under executive session." You expressed the belief, however, that "actions such as this that are taken by elected official in the course of their duties are not protected by the privilege of executive session unless the actions lead to litigation against the Village." You asked whether you are correct in that assumption.

In this regard, I offer the following comments.

First, the Open Meetings Law does not specifically refer either to elected officials or to employees of a municipality. The subjects of discussion considered in relation to the language of the grounds for entry into executive session appearing in §105(1) of the Open Meetings Law are the factors that determine whether an executive session may properly be held.

From my perspective, confusion frequently arises based on the mistaken belief that "personnel" matters rather than issues concerning others, such as elected officials, may be discussed during executive sessions. It is emphasized, however, that the term "personnel" appears nowhere in the Open Meetings Law. Further, the language of the exception that is cited to discuss so-called personnel matters is precise. Section 105(1)(f) of the Open Meetings Law 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."

The language quoted above includes reference to certain topics as they relate to a "particular person or corporation." When the subject matter of a discussion falls within the coverage of §105(1)(f), it might pertain to a particular employee, a particular elected official, a particular member of the public or a particular corporation.

Second, before an executive session may be held, a motion to do so must be approved by a majority vote of a public body's total membership. If no motion is made to conduct an executive session, an issue may be discussed in public, even though there is a basis for entry into executive session. If a motion made to conduct an executive session is not approved, a public body may discuss the issue in public. In short, although a public body *may* conduct an executive session in accordance with paragraphs (a) through (h) of §105(1) of the Open Meetings Law, it is not required to do so.

Lastly, judicial decisions provide direction concerning the ability to conduct executive sessions pursuant to §105(1)(d) of the Open Meetings Law, which permits a public body to enter into executive session to discuss "proposed, pending or current litigation." While the courts have not sought to define the distinction between "proposed" and "pending" or between "pending" and "current" litigation, they have 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.

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

RJF:tt

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February 11, 2005

E-Mail

TO: Gary Hayes

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. Hayes:

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

With respect to the Open Meetings Law, you asked as follows:

> "Is it legal for a Mayor in open session to discuss the appraisal for a parcel of Real Estate the Village is attempting to purchase and remark about how he feels he can obtain it cheaper than the appraised value in open session?"

From my perspective, there is nothing in the Open Meetings Law that would require that the mayor or the governing body of a municipality to discuss the issue to which you referred during an executive session. In short, the Open Meetings Law *permits* a public body to enter into an executive session in particular circumstances; it does not *require* that an executive session be held. 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..."

Based on the foregoing, a motion to conduct an executive session must be approved by a majority vote of a public body's total membership. If no such motion is made or if the motion is defeated, an executive session cannot be held.

I note, too, that the ability of a public body to conduct an executive session in relation to the issue described would be based on the facts and the effect of public discussion. Section 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."

Therefore, a public body may validly conduct an executive session under paragraph (h) only to the extent that publicity would "substantially affect" the value of the property under consideration.

Your second question concerns rights of access to real estate appraisals.

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, two of the grounds for denial are relevant to an analysis of rights of access.

Section 87(2)(c) permits an agency to withhold records to the extent that disclosure would "impair present or imminent contract awards or collective bargaining negotiations." As it relates to the impairment of "contract awards", §87(2)(c) is, in my opinion, generally cited and applicable in two types of circumstances.

One involves a situation in which an agency is involved in the process of seeking bids or proposals concerning the purchase of goods and services. If, for example, an agency seeking bids or proposals has received a number of bids, but the deadline for their submission has not been reached, premature disclosure for the bids to another possible submitter might provide that person or firm with an unfair advantage vis a vis those who already submitted bids. Further, disclosure of the identities of bidders or the number of bidders might enable another potential bidder to tailor his bid in a manner that provides him with an unfair advantage in the bidding process. In such a situation, harm or "impairment" would likely be the result, and the records could justifiably be denied. However, after the deadline for submission of bids or proposals are available after a contract has been awarded, and that, in view of the requirements of the Freedom of Information Law, "the successful bidder had no reasonable expectation of not having its bid open to the public" [Contracting Plumbers Cooperative Restoration Corp. v. Ameruso, 105 Misc. 2d 951, 430 NYS 2d 196, 198 (1980)].

The other situation in which §87(2)(c) has successfully been asserted to withhold records pertains to real property transactions where appraisals in possession of an agency were requested prior to the consummation of a transaction. Again, when premature disclosure would have enabled the public to know the prices the agency sought, thereby potentially precluding the agency from receiving an optimal price, an agency's denial was upheld [see Murray v. Troy Urban Renewal Agency, 56 NY 2d 888 (1982)]. From my perspective, disclosure of an appraisal prior to the

consummation of a transaction would provide knowledge to the recipient that might effectively prevent an agency from engaging in an agreement that is most beneficial to taxpayers.

When there is no inequality of knowledge between or among the parties to negotiations, or if records have been shared or exchanged by the parties, it is questionable and difficult to envision how disclosure would "impair present or imminent contract awards", (see Community Board 7 of Borough of Manhattan v. Schaffer, Supreme Court, New York County, NYLJ, March 20, 1991). Further, if an agreement has been reached or a transaction has been completed, any impairment that might have existed prior to the consummation of an agreement would essentially have disappeared. In that event, §87 (2)(c), in my opinion, would not be applicable as a basis for a denial of access.

The other provision of relevance is §87(2)(g), which pertains to the authority to withhold "inter-agency or intra-agency materials." If an appraisal or survey is prepared by agency officials, it could be characterized as "intra-agency material." Further, the Court of Appeals has held that appraisals and other reports prepared by consultants retained by agencies may also be considered as intra-agency materials subject to the provisions of §87(2)(g) [see Xerox Corporation v. Town of Webster, 65 NY 2d 131 (1985)].

More specifically, §87(2)(g) states that an agency may withhold records that:

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

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

It has been held that factual information appearing in narrative form, as well as those portions appearing in numerical or tabular form, is available under §87(2)(g)(i). For instance, in Ingram v. Axelrod, the Appellate Division held that:

> "Respondent, while admitting that the report contains factual data, contends that such data is so intertwined with subject analysis and opinion as to make the entire report exempt. After reviewing the

> report in camera and applying to it the above statutory and regulatory criteria, we find that Special Term correctly held pages 3-5 ('Chronology of Events' and 'Analysis of the Records') to be disclosable. These pages are clearly a 'collection of statements of objective information logically arranged and reflecting objective reality'. (10 NYCRR 50.2[b]). Additionally, pages 7-11 (ambulance records, list of interviews) should be disclosed as 'factual data'. They also contain factual information upon which the agency relies (Matter of Miracle Mile Assoc. v. Yudelson, 68 A2d 176, 181 mot for lve to app den 48 NY2d 706). Respondents erroneously claim that an agency record necessarily is exempt if both factual data and opinion are intertwined in it; we have held that '[t]he mere fact that some of the data might be an estimate or a recommendation does not convert it into an expression of opinion' (Matter of Polansky v. Regan, 81 AD2d 102, 104; emphasis added). Regardless, in the instant situation, we find these pages to be strictly factual and thus clearly disclosable" [90 AD 2d 568, 569 (1982)].

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

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

In short, even though statistical or factual information may be "intertwined" with opinions, the statistical or factual portions, if any, as well as any policy or determinations, would be available, unless a different ground for denial [i.e., §87(2)(c)] could properly be asserted. Therefore, if §87(2)(c) does not apply, insofar as an appraisal includes statistical or factual information, those portions of the appraisal must, in my view be disclosed.

Lastly, like the Open Meetings Law, the Freedom of Information Law is permissive; even though an agency *may* withhold records or portions thereof based on a ground for denial of access, there is no obligation to do so, and the agency may choose to disclose [see Capital Newspapers v. Burns, 67 NY2d, 562, 567 (1986)].

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
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February 25, 2005

Ms. Sharleen Reshard
[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. Reshard:

I have received your note and a variety of materials relating to an incident involving [redacted] and a member of the Hempstead Union Free School District.

In brief, the materials indicate that the Board of Education was holding a lengthy executive session on March 23. When a member of the Board came out of the room in which the executive session was held, [redacted] asked him how long it might continue. When the Board member opened the door to enable [redacted] to enter in order to ask the question of the Board president, another member allegedly began to yell, rushed toward [redacted] and hit him with her cane. Several other accounts of the incident, including that of the former superintendent, offer descriptions consistent with the foregoing. Some time thereafter, [redacted] received a letter from the new superintendent that "banned [him] from the property of the District" based on a "violation of the Code of Conduct; when [he] barged into an executive session..."

In this regard, first, the accounts of the incident suggest that [redacted] did not "barge" into the executive session, but rather that he was invited by a Board member to enter during a break in the executive session.

Second, §103 of the Open Meetings Law provides that any member of the general public has the right to attend a meeting of a public body, such as a board of education,. While I believe that §1709 of the Education Law authorizes a board of education to adopt rules governing its proceedings, it has been held that its rules must be reasonable [see e.g., Mitchell v. Board of Education of the Garden City Union Free School District, 113 AD2d 924 (1985)]. In this instance, while the District's Code of Conduct may be reasonable, it does not appear that the action taken with respect to [redacted] was warranted based on the facts described in the materials or, therefore, was reasonable. From my perspective, a public body may adopt reasonable rules concerning the conduct of those who attend meetings in relation to disruption, noise, interruptions and the like. In those instances, in which a person is disruptive, I believe that he or she could be ejected from the meeting

during which the disruption occurs. However, in my opinion, a person cannot be banned from meetings prospectively without limitation. Such a proscription would in my view be unreasonable and unsupportable.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: [redacted]
Board of Education
Susan Johnson
E. Christopher Murray
Barbara Bernstein

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February 25, 2005

Ms. JoAnn Piazzi
[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. Piazzi:

I have received your letter and the materials attached to it. You have raised a series of issues concerning alleged failures by the Windham-Ashland-Jewett Central School District and its Board of Education to comply with the Open Meetings and Freedom of Information Laws.

In an effort to address those issues, I offer the following comments.

First, as you are aware, 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. That law also contains a procedure that must be accomplished during an open meeting before an executive session may be held. Specifically, §105(1) states in relevant part that:

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

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

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

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

For the reasons expressed in the preceding commentary, a public body cannot in my view schedule or conduct an executive session in advance of or following a meeting. In short, a vote to enter into an executive session must be made and carried by a majority vote of the total membership during an open meeting.

Second, as indicated earlier, 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.

There is no ground for entry into executive session that generally authorizes closed door discussions of "legal matters." There is, however, a provision that focuses on litigation, §105(1)(d), which permits a public body to enter into executive session to discuss "proposed, pending or current litigation." While the courts have not sought to define the distinction between "proposed" and "pending" or between "pending" and "current" litigation, they have provided direction concerning the scope of the exception in a manner consistent with the description of the general intent of the grounds for entry into executive session suggested in my remarks in the preceding paragraph, i.e., that they are intended to enable public bodies to avoid some sort of identifiable harm. For instance, it has been determined that the mere possibility, threat or fear of litigation would be insufficient to conduct an executive session. Specifically, it was held that:

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

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

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

In my view, only to the extent that the Board discusses its litigation strategy could an executive session be properly held under §105(1)(d).

I note, too, that the courts have provided direction with respect to the sufficiency of a motion to discuss litigation, it has been held that:

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

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

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

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

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

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

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

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

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

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

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

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

> of Plattsburgh, 185 AD2d §18), and these exceptions, in turn, 'must be narrowly scrutinized, lest the article's clear mandate be thwarted by thinly veiled references to the areas delineated thereunder' (Weatherwax v Town of Stony Point, 97 AD2d 840, 841, quoting Daily Gazette Co. v Town Bd., Town of Cobleskill, supra, at 304; see, Matter of Orange County Publs., Div. of Ottaway Newspapers v County of Orange, 120 AD2d 596, lv dismissed 68 NY 2d 807).
>
> "Applying these principles to the matter before us, it is apparent that the Board's stated purpose for entering into executive session, to wit, the discussion of a 'personnel issue', does not satisfy the requirements of Public Officers Law § 105 (1) (f). The statute itself requires, with respect to personnel matters, that the discussion involve the 'employment history of a particular person" (id. [emphasis supplied]). Although this does not mandate that the individual in question be identified by name, it does require that any motion to enter into executive session describe with some detail the nature of the proposed discussion (see, State Comm on Open Govt Adv Opn dated Apr. 6, 1993), and we reject respondents' assertion that the Board's reference to a 'personnel issue' is the functional equivalent of identifying 'a particular person'" [Gordon v. Village of Monticello, 620 NY 2d 573, 575; 207AD 2d 55, 58 (1994)]

Third, with respect to a claim that honoring a request made under the Freedom of Information Law is "inconvenient", I point out that it has been held by several courts, including the State's highest court, that compliance with that law is a governmental obligation and that the language of that law "imposes a broad duty to make certain records publicly available irrespective of the private interests and the attendant burdens involved" [Gould v. NYC Police Department, 89 NY 2d 267, 279 (1996); see also Doolan v. BOCES, 48 NY 2d 341, 347 (1979)]. As stated in one decision: "An agency's disclosure of information pursuant to a FOIL request is as much a service owed by the agency to the public as the furnishing of police, fire or sanitation services" (Messinger v. Giuliani, Supreme Court, New York County, NYLJ, September 2, 1997).

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

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

Based on the foregoing, an agency must grant access to records, deny access or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgement

is given, it must include an approximate date indicating when it can be anticipated that a request will be granted or denied.

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

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

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

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)].

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. In my view, contracts and other records of your interest involving the District's finances are accessible, for none of the grounds for denial of access would be pertinent or applicable.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
John Wiktorko
Dolores Bushemi

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February 25, 2005

Mr. George D. Heidcamp, Sr.
President
Town of Saugerties Policeman's
Benevolent Association
P.O. Box 403
Saugerties, NY 12477

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

Dear Mr. Heidcamp:

I have received your letter in which you asked whether a grievance filed against a town or village "for violating a provision in the Collective Bargaining Agreement" must be discussed during an executive session pursuant to §105(1)(e) of the Open Meetings Law, or whether a grievance is "considered litigation."

In this regard, I offer the following comments.

First, the Open Meetings Law is permissive, and a public body, such as a town board or village board of trustees, is not required to conduct executive sessions, even when it has the authority to do so. As stated in the introductory language of §105(1) of the Open Meetings Law:

> "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..."

Second, as you know, §105(1)(e) permits a public body to discuss "collective negotiations" under the Taylor Law in executive session. In my view, a grievance does not involve collective negotiations, but rather whether the terms of an existing agreement are being carried out in accordance with the agreement. Therefore, I do not believe that consideration of a grievance could properly occur in executive session based on §105(1)(e).

Section 105(1)(d) permits an executive session to discuss "proposed, pending or current litigation." In my view, the term "litigation" involves a judicial contest, and I do not believe that the discussion of a grievance involves a judicial contest. As such, §105(1)(d) would not in my view be applicable as a basis for entry into executive session.

From my perspective, when a board is discussing a grievance, it is likely that the only ground for entry into executive session that might be pertinent would be §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..."

If a grievance pertains to a particular person in relation to a subject described in that provision, an executive session would appear to be appropriate. For instance, if an employee has complained that the air quality in his office is making him ill, the matter may involve his medical history. If, however, the grievance involves the policy concerning duties applicable to all employees, I do not believe that there would be any basis for conducting an executive session under §105(1)(f).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

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February 25, 2005

Ms. Loueda B. Bleiler
[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. Bleiler:

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

By way of background, you indicated that you serve on the Odessa-Montour Central School District Board of Education and that the District's auditor discussed the District's 2004 audit report "at length" during an executive session. You added the regulations of the Commissioner of Education require a district's treasurer to provide a board of education "with a budget status report at least quarterly", but that the Board "has not received these reports for many months", despite "repeated requests for them." In consideration of those matters, you prepared and read a statement during a Board meeting in which you discussed concerns raised by the audit and the audit process, asked questions, reminded District officials of their responsibilities and offered suggestions. The Superintendent thereafter forwarded your statement to the District's attorney, who submitted his opinion to the Board concerning the propriety of reading your statement in public. You have asked whether the attorney's opinion is confidential and whether you were "in violation of any law when [you] read [your] written statement of concern in a public meeting."

In this regard, I offer the following comments.

First, it does not appear that there was any basis for conducting an executive session during the auditor's presentation to the Board. In short, paragraphs (a) though (h) of §105(1) of the Open Meetings Law specify and limit the subjects that may properly be considered during an executive session. From my perspective, a presentation concerning the District's budget or finances would not fall within any of the grounds for entry into executive session.

Second, with respect to the opinion prepared by the attorney, I note as a general matter 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.

The first ground for denial, §87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute." For more than a century, the courts have found that legal advice given by a municipal attorney to his or her clients, municipal officials, is privileged when it is prepared in conjunction with an attorney-client relationship [see e.g., People ex rel. Updyke v. Gilon, 9 NYS 243, 244 (1889); Pennock v. Lane, 231 NYS 2d 897, 898, (1962); Bernkrant v. City Rent and Rehabilitation Administration, 242 NYS 2d 752 (1963), aff'd 17 App. Div. 2d 392]. As such, I believe that a municipal attorney may engage in a privileged relationship with his client and that records prepared in conjunction with an attorney-client relationship are considered privileged under §4503 of the Civil Practice Law and Rules. Further, since the enactment of the Freedom of Information Law, it has been found that records may be withheld when the privilege can appropriately be asserted when the attorney-client privilege is read in conjunction with §87(2)(a) of the Law [see e.g., Mid-Boro Medical Group v. New York City Department of Finance, Sup. Ct., Bronx Cty., NYLJ, December 7, 1979; Steele v. NYS Department of Health, 464 NY 2d 925 (1983)]. Similarly, the work product of an attorney may be confidential under §3101(c) of the Civil Practice Law and Rules. In my view, there need not be litigation for there to be an attorney-client relationship or to assert the attorney-client privilege.

In a discussion of the parameters of the attorney-client relationship and the conditions precedent to its initiation, it has been 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 proceeding, 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)].

Based on the foregoing, assuming that the privilege has not been intelligently and purposely waived, and that records consist of legal advice or opinion provided by counsel to the client, i.e., a board of education, such records would be confidential pursuant to §4503 of the Civil Practice Law and Rules and, therefore, exempted from disclosure under §87(2)(a) of the Freedom of Information Law.

Lastly, I am unfamiliar with the portion of the Superintendent's contract to which the attorney referred, contending that your statement "clearly violates the Board of Education's

commitment to the Superintendent in the contract to 'promptly and discreetly' refer criticisms and complaints to the Superintendent." Nevertheless, I believe that one of your responsibilities as an elected official involves expressing your views, including criticism, to the public. Moreover, it is questionable, according to judicial decisions concerning the first amendment and free speech, whether the provisions of the contract at issue is consistent with law. In my view, a public body, such as a board of education, may not have the authority to adopt a rule or contractually agree to silence an elected official.

As you are aware, the Open Meetings Law sets forth a procedure for entry into executive session and specifies the subjects appropriate for consideration in executive session. Its statutory companion, the Freedom of Information Law, deals with documents. Both statutes contain permissive rather than mandatory language concerning the ability to discuss a matter in private or deny access to records.

A public body *may* enter into executive session in circumstances prescribed in the Open Meetings Law; it is *not required* to do so. Specifically, the introductory language of §105(1) entitled "Conduct of executive sessions" 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..."

The law clearly indicates that there is no obligation to conduct an executive session; a public body may choose do so, but only upon approval of a motion by a majority vote of its total membership. If a motion to enter into executive session is not approved, a public body is free to discuss the issue in public.

Similarly, although an agency *may* withhold records in accordance with the grounds for denial of access appearing in §87(2) of the Freedom of Information Law, the Court of Appeals has held that an agency is not obliged to do so and may opt 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].

In my view, records may be characterized as "confidential" only when a statute, an act of Congress or the State Legislature, specifies that they cannot be disclosed. As indicated earlier, that circumstance is reflected in §87(2)(a) of the Freedom of Information Law, the first exception to rights of access, which pertains to records that "are specifically exempted from disclosure by state or federal statute." Section 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. The effect is that the Open Meetings Law simply does not apply in those instances.

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

> "Although we have never held that a State statute must expressly state it is intended to establish a FOIL exemption, we have required a showing of clear legislative intent to establish and preserve that confidentiality which one resisting disclosure claims as protection" (id.).

In like manner, in construing the equivalent exception to rights of access in the federal Freedom of Information Act (5 USC §552), 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.

Since a public body, such as the board of education, 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, because a federal statute prohibits disclosure, 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. 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 a parent of the student consents 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.

I note that in a case in which the issue was whether discussions occurring during an executive session held by a school board could generally 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.

It is emphasized that it has been held by several courts, including the Court of Appeals, that an agency's rules or regulations or the provisions of a local enactment, such as an administrative code, local law, charter or ordinance, for example, do not constitute a "statute" [see e.g., Morris v. Martin, Chairman of the State Board of Equalization and Assessment, 440 NYS 2d 365, 82 Ad 2d 965, reversed 55 NY 2d 1026 (1982); Zuckerman v. NYS Board of Parole, 385 NYS 2d 811, 53 AD 2d 405 (1976); Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)]. Therefore, a local enactment, such as the rule adopted by the Committee, cannot confer, require or promise confidentiality. This not to suggest that many of the records used, developed or acquired in conjunction with an ethics investigation or proceeding must be disclosed; rather, I am suggesting that those records *may* in some instances be withheld in accordance with the grounds for denial appearing in the Freedom of Information Law, but that a local enactment cannot confer or require confidentiality; only a statute may do so.

Considering the issue from a different vantage point, based on a decision rendered by the U.S. Court of Appeals for the Second Circuit [Harman v. City of New York, 140 F.3d 111 (2nd Cir. 1998)], it appears that the portion of the contract to which you referred may be unconstitutional. In Harman, the equivalent of a department of social services, 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 were exempted from disclosure by statute and were, therefore, confidential. Nevertheless, the proceeding in Harman was precipitated by commentary that was not identifiable to any particular recipient, 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 information may be characterized as confidential and exempted from disclosure by statute only when a statute forbids disclosure.

While a member of a board of education or other governing body may not be an "employee", I believe that the holding in Harman would be applicable in the instant situation. In creating a "balancing test", it was held in Harman 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).

Moreover, it was stressed by the court that the harm sought to be avoided by means of a restriction on speech must be real, and not merely conjectural. It was determined that:

"...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).

The admonition in the contract appears to be prospective, for, in the words of Harman, "it chills speech before it happens" and does not focus on any harm that has actually occurred. In short, it may stifle free speech in a manner that has been found to be unconstitutional.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3943

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February 25, 2005

E-MAIL

TO: G. Miller

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. Miller:

As you are aware, I have received your letter concerning the Open Meetings Law.

You wrote that you serve as a trustee on a library board and that the board's chair "constantly moves meeting dates w/o much prior notice to the public and often to board members..." You have asked for guidance concerning your "obligations for publishing meetings of the board and any subcommittees of the board to the public."

In this regard, I offer the following comments.

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

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

Based on the foregoing, as a general matter, the Open Meetings Law pertains to governmental bodies, such as a board of education, a city council, a county legislature, and the like. That statute does not typically apply to meetings of the boards of not-for-profit corporations or other entities that are not governmental in nature, despite the receipt of funding from the government.

Second, however, the Open Meetings Law, which is codified as Article 7 of the Public Officers Law, is applicable to boards of trustees of public libraries pursuant to §260-a of the Education Law, which states that:

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

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

When a committee or subcommittee consists solely of members of a public body, such as a board of education or the board of a municipal library, I believe that the Open Meetings Law is applicable. Based on the definition of "public body", any entity consisting of two or more members of a public body, such as a committee or subcommittee consisting of members of a public body, would fall within the requirements of the Open Meetings Law [see Syracuse United Neighbors v. City of Syracuse, 80 AD2d 984 (1981)].

In view of the foregoing, it is clear that a library board of trustees is required to comply with the Open Meetings Law. In the context of your inquiry, in view of the language of §260-a of the Education Law, a committee of a library board of trustees would be required to comply with the Open Meetings Law only if it is a committee of a public body as suggested earlier, or if it is a committee of a library board of trustees in New York City, the only city in the state with a population above one million.

In sum, while the meetings of the board are subject to the Open Meetings Law, if the board is not a public body because it is not a governmental entity, meetings of its committees would not, in my opinion, be subject to the requirements of that statute. On the other hand, if the library is a governmental entity, subcommittees consisting of two or more of its members would constitute public bodies required to comply with the Open Meetings Law.

This is not to suggest that a subcommittee of a non-governmental library board *could not* conduct open meetings, but rather that it would not be required to do so.

Third, §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 or faxing notice of the time and place of a meeting to the local news media and by posting notice in one or more designated locations.

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

> "Whether abbreviated notice is 'practicable' or 'reasonable' in a given case depends on the necessity for same. Here, respondents virtually concede a lack of urgency: They deny petitioner's characterization of the session as an 'emergency' and maintain nothing of substance was transacted at the meeting except to discuss the status of litigation and to authorize, pro forma, their insurance carrier's involvement in negotiations. It is manifest then that the executive session could easily have been scheduled for another date with only minimum delay. In that event respondents could even have provided the more extensive notice required by POL §104(1). Only respondent's choice in scheduling prevented this result [524 NYS 2d 643, 645 (1988)].

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

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
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February 25, 2005

E-Mail

TO: Doreen Tignanelli

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. Tignanelli:

As you are aware, I have received your correspondence concerning the status of a "Master Plan Committee" in the Town of Poughkeepsie. You indicated that the Committee's functions are advisory in nature and that it consists of two members of the Town Board, one member of the Zoning Board of Appeals, the chairmen of the Planning Board and Conservation Advisory Commission, and a local builder.

You have asked whether the committee is subject to the Open Meetings Law.

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

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

It has been held that advisory bodies are not required to comply with the Open Meetings Law [see e.g., NYPRIG v. Governor's Advisory Commission, 507 NYS2d 798, aff'd with no opinion, 135 AD2d 1149, motion for leave to appeal denied, 71 NY2d 964 (1988); Poughkeepsie Newspaper v. Mayor's Intergovernmental Task Force on New York City Water Supply Needs. 145 AD2d 65 (1989)].

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

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

If the Committee is a "special board", because it would have been created pursuant to a statute, I believe that it would constitute a "public body" subject to the Open Meetings Law. If it is not a special board created by law, I do not believe that it would fall within the coverage of the Open Meetings Law.

I hope that I have been of assistance.

RJF:jm

cc: Town Board

FOIL-AO-1517
OMC-AO-3944A

From: Robert Freeman
To: Charlie Murphy
Date: 2/25/2005 9:50:08 AM
Subject: Re: Fwd: Open Meeting and FOIL Questions

Hi - -

In brief, a committee or subcommittee consisting of at least two members of a governing body constitutes a "public body" subject to the Open Meetings Law. By means of example, if a county legislature consists of 15 members, its quorum would be 8; if it designates a committee consisting of three of its members, the quorum of the committee would be two. When a quorum gathers to conduct the business of the committee, the gathering would constitute a "meeting" falling within the coverage of the Open Meetings Law.

With respect to minutes or notations, FOIL defines the term "record" to include "any information kept, held, filed produced or reproduced by, with or for an agency....in any physical form whatsoever..." Therefore, the kinds of materials to which you referred would constitute "records" that fall within the scope of FOIL.

I hope that this helps. If you have additional questions, I'll be happy to accommodate.

Robert J. Freeman
Executive Director
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OML-AO - 3945

From: Robert Freeman
To: [redacted]
Date: 2/28/2005 10:51:58 AM
Subject: Dear Mr. Mattatall:

Dear Mr. Mattatall:

I have received your letter concerning the status of a political party committee under the Open Meetings Law.

In this regard, first, that statute applies to public bodies, and the phrase public body is defined in §102(2) to mean a governmental entity that consists of at least two members, conducts public business and performs a governmental function. From my perspective, a political party committee does not constitute a public body and, therefore, would not be subject to the Open Meetings Law. Second, even if members of a town board, for example, serve on a political committee, §108(2) specificies that political committees are exempt from the coverage of the Open Meetings Law.

I hope that I have been of assistance.

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OML-AO-3946

From: Robert Freeman
To: [redacted]
Date: 3/3/2005 9:02:44 AM
Subject: Dear Mr. Filiberti:

Dear Mr. Filiberti:

I have received your note concerning meetings of a condominium association board of managers. In this regard, the Committee on Open Government is authorized to provide advice and opinions concerning the NY Open Meetings Law. That statute applies governmental bodies, such as town boards, city councils, boards of education, etc. It does not apply to private entities, such as a board of managers of a condominium. If there is any direction at all concerning access to meetings of boards of that nature, it is typically found in the association's by-laws. In the absence of direction, certainly you, as President, could recommend amendments to the by-laws to achieve your goal.

I regret that I cannot be of greater assistance.

Robert J. Freeman
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STATE OF NEW YORK
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FOIL-AO-3947

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March 3, 2005

E-Mail

TO: Galen Seerup

FROM: Robert J. Freeman, Executive Director RJF

Dear Mr. Seerup:

As you are aware, I have received your letter. You have asked whether "the counsel for the Industrial Board of Appeals [was] correct in banning a video camera from a public hearing."

In this regard, I note that the advisory jurisdiction of the Committee on Open Government relates to the Open Meetings Law and that there may be a distinction between a "meeting" and a "hearing". The former involves a gathering of a majority of a public body for the purpose of conducting public business collectively, as a body. As such, meetings are ordinarily held for the purpose of discussion, deliberation, taking action and the like. A "hearing" typically is held to enable members of the public express their views on a particular subject, i.e., a budget, a change in zoning, a proposed rule or regulation, etc. In some instances, a hearing is held by less than a majority of the membership of a public body. In those circumstances, because a "meeting" is a convening of a majority of a public body for the purpose of conducting public business, the Open Meetings Law would not apply. If a majority of a public body, such as the Industrial Board of Appeals, is conducting a hearing, I believe that the event would constitute a meeting subject to the Open Meetings Law, as well as a hearing.

While I know of no judicial decision concerning the use of recording devices at public hearings, there are several decisions concerning the use of those devices at meetings of public bodies. In brief, it has been held that a public body conducting a meeting in accordance with the Open Meetings Law cannot prohibit the use of recording devices during meetings, unless such use would be obtrusive or disruptive [see e.g., Peloquin v. Arsenault, 616 NYS2d 716 (1994), Csorny v. Shoreham-Wading River Central School District, 759 NYS2d 513, 305 AD2d 83 (2003)].

Again, I am unaware of whether the event at issue was a meeting or a hearing or perhaps both.

Lastly, in proceedings in which a person is or may be compelled to testify, §52 of the Civil Rights Law would prohibit the use of a video camera. That statute states in relevant part that:

> "No person, firm, association or corporation shall televise, broadcast, take motion pictures or arrange for the televising, broadcasting, or taking of motion pictures within this state of proceedings, in which the testimony of witnesses by subpoena or other compulsory process is or may be taken, conducted by a court, commission, committee, administrative agency or other tribunal in this state..."

I hope that I have been of assistance.

RJF:jm

cc: John G. Binseel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3948

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March 3, 2005

Ms. Molly M. Roach
[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. Roach:

I have received your letter in which you sought my views concerning the subjects appearing on the executive session agenda pertaining to a recent meeting of the Riverhead Central School District Board of Education. You wrote that the Board President indicated that each of those subjects was "legally appropriate" for consideration in executive session.

In this regard, I offer the following comments.

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

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

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

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

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

For the reasons expressed in the preceding commentary, a public body cannot in my view schedule 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.

Second, paragraphs (a) through (h) of §105(1) of the Open Meetings Law specify and limit the subjects that may properly be considered during an executive session.

If item 2 concerning "RCFA Negotiations" involved a discussion of collective bargaining negotiations, I believe that §105(1)(e) would have served as a proper basis for entry into executive session. Insofar as a discussion of security might enable potential lawbreakers to evade detection or effective law enforcement, §105(1)(a) might have applied. That provision authorizes a public body to conduct an executive session to discuss matters which if disclosed would imperil public safety. I note that in some instances, public discussion relating to issues involving security may enhance public safety. For example, if students or others know that there will be patrols or security personnel present, improper or perhaps illegal activity may be deterred or prevented.

Discussions concerning the roles and responsibilities of Board members and "updates" regarding grants administration and transportation could not, in my opinion, have properly been discussed in executive session. In short, none of the grounds for entry into executive session would have applied.

Lastly, item 1 refers to "personnel." Despite its frequent use, I note that the term "personnel" appears nowhere in the Open Meetings Law as one of the grounds for entry into executive session often relates to personnel matters, from my perspective, the term is overused and is frequently cited in a manner that is misleading or causes unnecessary confusion. To be sure, some issues involving "personnel" may be properly considered in an executive session; others, in my view, cannot. Further, certain matters that have nothing to do with personnel may be discussed in private under the provision that is ordinarily cited to discuss personnel.

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

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

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

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

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

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

When a discussion concerns matters of policy, such as the manner in which public money is expended or allocated, the roles and responsibilities of those serving on a board or education, 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, 1992), and rejected respondents' assertion that the Board's reference to a 'personnel issue' is the functional equivalent of identifying 'a particular person'" [Gordon v. Village of Monticello, 620 NY 2d 573, 575; 207 AD 2d 55 (1994)].

As you requested, and in an effort to enhance understanding of and compliance with the Open Meetings Law, copies of this response will be sent to District officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Paul Doyle
Lori Montefusco

STATE OF NEW YORK
DEPARTMENT OF STATE
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March 3, 2005

Mr. Malchoff J. Davis
[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. Davis:

I have received your letter concerning the implementation of the Open Meetings Law in the Village of Cleveland. Specifically, you raised the following questions:

> "1. Are meetings that are attended by three or more members of the Village Board to develop a Comprehensive Plan considered public meetings that must be advertised or posted? Further one of the board members is the pastor of the Light House Assembly Church and these meetings are held at his church. I was told by the Mayor that these are committee meetings and do not have to be advertised.
>
> 2. Executive sessions have been called during the monthly board meetings to discuss Village Finances. The following is a quotation from the minutes of the November 10th Board Meetings. 'Executive Session: the board entered executive sessions to discuss financial matters with Joe Butler from Fiscal Advisor's.' Is this legal?"

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

also New York Public Interest Research Group v. Governor's Advisory Commission, 507 NYS 2d 798, aff'd with no opinion, 135 AD 2d 1149, motion for leave to appeal denied, 71 NY 2d 964 (1988)]. Therefore, an advisory body, such as a citizens' advisory committee, would not in my opinion be subject to the Open Meetings Law, even if a member of the Board of Education or the administration participates.

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

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

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

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

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

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

In view of the amendments to the definition of "public body", I believe that any entity consisting of two or more members of a public body, such as a committee or subcommittee consisting of members of the Board 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 e.g., General Construction Law, §41). Therefore, if, for example, a public body consists of seven, its quorum would be four; in the case of a committee consisting of three, a quorum would be two.

When a committee is subject to the Open Meetings Law, I believe that it has the same obligations regarding notice and openness, for example, as well as the same authority to conduct executive sessions, as a governing body [see Glens Falls Newspapers, Inc. v. Solid Waste and Recycling Committee of the Warren County Board of Supervisors, 195 AD 2d 898 (1993)].

Third, if the Village Board consists of five members (four trustees and a mayor), its quorum would be three, and I believe that a gathering of three, a majority, to discuss public business, would constitute a meeting that falls within the coverage of 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 the Board of Trustees gathers to discuss public business, any such gathering, in my opinion, would ordinarily constitute a "meeting" subject to the Open Meetings Law.

Next, with respect to the ability to conduct executive sessions, the Open Meetings Law contains a procedure that must be accomplished during an open meeting before an executive session may be held. Specifically, §105(1) states in relevant part that:

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

As indicated in the language quoted above, a motion to enter into an executive session must be made during an open meeting and include reference to the "general area or areas of the subject or subjects to be considered" during the executive session. Moreover, a public body may not conduct an executive session to discuss the subject of its choice. On the contrary, paragraphs (a) through (h) of §105(1) specify and limit the subjects that may properly be considered during an executive session. The subject to which you referred, "financial matters", would not in my view fall within any of the grounds for entry into an executive session.

Lastly, with regard to a meetings held in a church, from my perspective, particularly in consideration of the fact that a Board member is also a religious leader, a pastor of the church, I believe that the church would be an inappropriate location for the Board to conduct a meeting.

The Open Meetings Law does not specify where a public body must conduct its meetings. However, the Law does provide direction concerning the site of meetings. Section 103(b) of the 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 of the public buildings law."

Based upon the language quoted above, the Open Meetings Law, in my opinion, imposes no obligation upon a public body to construct a new facility or to renovate an existing facility to permit barrier-free access to physically handicapped persons. However, I believe that the law does impose a responsibility upon a public body to make "all reasonable efforts" to ensure that meetings are held in facilities that permit barrier-free access to physically handicapped persons. Therefore, if, for example, the Board has the capacity to hold its meetings in a first floor room in Village Hall

that is accessible to handicapped persons rather than a second floor room, I believe that the meetings should be held in the room that is most likely to accommodate the needs of people with handicapping conditions.

Aside from the issue of barrier-free access to physically handicapped persons, a church is not a government building, some may feel uncomfortable attending a meeting in a religious facility, especially when a board member is an authority figure in that facility. In my view, every law, including the Open Meetings Law, should be implemented in a manner that gives effect to its intent. Holding a meeting at a church would, in my opinion, be unreasonable and inconsistent with the intent of the law.

As you requested, a copy of this opinion will be sent to the Board of Trustees.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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March 7, 2005

Mr. Kris Thompson
Records Access Officer
New York Temporary
State Commission on Lobbying
Suite 1701, 2 Empire State Plaza
Albany, NY 12223-1254

The staff of the Committee 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. Thompson:

As you are aware, I have received your letter in which you asked that I confirm the opinions expressed during our conversation pertaining to a request made pursuant to the Freedom of Information Law. The request involves "copies of the minutes of the most recent meeting of the lobbing commission, the draft 2004 annual report and the 2004 annual report." You indicated that various elements of the draft report were discussed in public by the Commission, and that a final report was approved by the Commissioner.

In this regard, I offer the following comments.

First, the Open Meetings Law provides direction concerning the content of minutes of meetings of public bodies and the time within which they must be prepared and disclosed. 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, the Open Meetings Law provides what might be characterized as minimum requirements concerning the contents of minutes. At a minimum, minutes of open meetings must consist of a record or summary of motions, proposals, resolutions, action taken and the vote of each member of a public body. Further, that statute requires that minutes be prepared and made available within two weeks of meetings. While many public bodies approve their minutes, I point out that there is nothing in the Open Meetings Law or any other statute of which I am aware that requires that minutes be approved. If it is the practice or policy of a public body to approve its minutes but it has not done so within two weeks of a meeting, it has been suggested that the minutes be prepared and made available within that time and that they be marked "unapproved", "draft", "preliminary", for example. By so doing, a recipient of the minutes would have the ability to ascertain generally what occurred at a meeting; concurrently, he or she would be given notice that the minutes are subject to change.

Second, with respect to rights of access to 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. Both the draft and the final reports fall within the scope of §87(2)(g). Although that provision may potentially serve as a basis for a denial of access, due to its structure, it often requires disclosure. Specifically, §87(2)(g) authorizes an agency to withhold records that:

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

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

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

With respect to the draft, those portions consisting of statistical or factual information must be disclosed pursuant to §87(2)(g)(i). Insofar as it consists of recommendations or opinions that were not later adopted or approved by the Commission, those portions may be withheld, except to the extent that the recommendations or opinions were discussed and, therefore, effectively disclosed at one or more open meetings of the Commission. In short, I believe that portions of the draft report that might otherwise be withheld under §87(2)(g) must be disclosed if they were essentially made public during an open meeting or meetings. Public discussion of a recommendation or opinion would, in my view, effectively constitute a waiver of the ability to withhold a record containing the same or equivalent information.

Lastly, it is my understanding that the final report is being printed, and that printed copies will be available to the public. If that report now exists, although not in the form in which it will be distributed, I believe that it must be disclosed. It is assumed that the content of the existing report is the same as the report that will be disseminated to the public. Further, since it has been adopted by the Commission, I believe that it may be characterized as a final agency determination or statement of policy that is accessible under §87(2)(g)(iii).

If I have misinterpreted your remarks, please feel free to contact me.

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-3951

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March 9, 2005

Hon. Albert DeBenedetti
Erie County Legislator, 6th District
155 Lawn Avenue
Buffalo, NY 14207

The staff of the Committee on 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 DeBenedetti:

I have received your letter in which you inquired as the "proper course of conduct for an official confronted with clear violations of the Open Meetings Law." You wrote that you were invited and did attend a "closed meeting of a majority of Erie County Legislators with the Erie County Executive" held "for the express purpose of discussing, deliberating and reaching agreement on compromises to the 2005 Erie County Budget..."

In this regard, first, the term "meeting" has been expansively construed by the courts. In a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be conducted 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 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, any such gathering, in my opinion, would ordinarily constitute a "meeting" subject to the Open Meetings Law, irrespective of its characterization.

In consideration of the foregoing, I believe that the gathering that you described clearly constituted a "meeting" required to have been held in accordance with the Open Meetings Law.

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

Second, I believe that there are several possible courses of conduct or action that might be appropriate in the context of the situation that you described. From my perspective, often the most effective course of conduct involves attempts to educate or inform the members of the application of the Open Meetings Law and their duty to comply with law. Another involves informing the public, directly or otherwise, of the facts of the matter and your views. Frequently, shedding light on a situation has the effect of altering events and encouraging compliance with law. Additionally, any person may seek an advisory opinion from this office. While our opinions are not binding, it is our hope that they are educational and persuasive, and that they encourage compliance with law. And lastly, you or others could initiate a judicial proceeding in an effort to require compliance with law. Section 107(1) states in relevant part that:

> "Any aggrieved person shall have standing to enforce the provisions of this article against a public body by the commencement of a

proceeding pursuant to article seventy-eight of the civil practice law and rules, and/or an action for declaratory judgment and injunctive relief."

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

OML-AO-3952

From: Robert Freeman
To: [redacted]
Date: 3/17/2005 8:35:35 AM
Subject: Dear Mr. Strough:

Dear Mr. Strough:

I have received your inquiry in which you asked whether a town board may conduct an executive session to discuss "a new position" that a department head "is seeking to create within her department."

In short, the language of the Open Meetings Law and judicial decisions indicate that there is no basis for entry into executive session to discuss the creation or elimination of a position. The provision most often at issue, §105(1)(f), authorizes a public body, such as a town board, to conduct an executive session to discuss: "the medical, financial, credit or employment history of a *particular person* or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a *particular person* or corporation."

When the issue involves whether to create a position, and not the strengths or weaknesses of a particular candidate for the position, again, I do not believe that there would be any basis for conducting an executive session.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
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OML-AO-3953

From: Robert Freeman
To: [redacted]
Date: 3/17/2005 8:20:08 AM
Subject: Dear Mr. Singer:

Dear Mr. Singer:

I have received your inquiry concerning "the act of tabling an item on the agenda." In short, there is no law of which I am aware that deals with your question. It is noted that §63 of the Town Law provides that a town board "may determine the rules of its procedure." Therefore, if there is guidance concerning the matter, it would be found a board's rules.

I hope that I have been of assistance.
Bob Freeman

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

OML-AO- 3954

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March 24, 2005

E-Mail

TO: Arthur Norden

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. Norden:

I have received your letter in which you asked whether there is a "such a thing as a 'special meeting waiver notice' which, if signed, would allow a quorum of the board to discuss school business at this meeting and still be in compliance with OMLs?"

In this regard, the only provision of which I am aware that might authorize a waiver of notice is §1606(3) of the Education Law, which states that "A meeting of the board may be ordered by any member thereof, by giving not less than twenty-four hours' notice of the same." The notice referenced in the foregoing deals with notice to members; separate and distinct are the notice requirements imposed by the Open Meetings Law, which, in my view, can never be waived. Specifically, §104 of that statute provides that:

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

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

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

> "Whether abbreviated notice is 'practicable' or 'reasonable' in a given case depends on the necessity for same. Here, respondents virtually concede a lack of urgency: They deny petitioner's characterization of the session as an 'emergency' and maintain nothing of substance was transacted at the meeting except to discuss the status of litigation and to authorize, pro forma, their insurance carrier's involvement in negotiations. It is manifest then that the executive session could easily have been scheduled for another date with only minimum delay. In that event respondents could even have provided the more extensive notice required by POL §104(1). Only respondent's choice in scheduling prevented this result.
>
> "Moreover, given the short notice provided by respondents, it should have been apparent that the posting of a single notice in the School District offices would hardly serve to apprise the public that an executive session was being called...
>
> "In White v. Battaglia, 79 A.D. 2d 880, 881, 434 N.Y.S.ed 637, lv. to app. den. 53 N.Y.2d 603, 439 N.Y.S.2d 1027, 421 N.E.2d 854, the Court condemned an almost identical method of notice as one at bar:
>
> "Fay Powell, then president of the board, began contacting board members at 4:00 p.m. on June 27 to ask them to attend a meeting at 7:30 that evening at the central office, which was not the usual meeting date or place. The only notice given to the public was one typewritten announcement posted on the central office bulletin board...Special Term could find on this record that appellants violated the...Public Officers Law...in that notice was not given 'to the extent practicable, to the news media' nor was it 'conspicuously posted in one or more designated public locations' at a reasonable time 'prior thereto' (emphasis added)" [524 NYS 2d 643, 645 (1988)].

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

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
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OML-AO-3955

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March 24, 2005

Ms. E. Danielle Jose
Village Attorney
Village of Monticello
2 Pleasant Street
Monticello, NY 12701

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

Dear Ms. Jose:

I have received your letter concerning the manner in which the Board of Trustees of the Village of Monticello may deal with "disruptive residents at Village Board meetings."

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

In conjunction with the foregoing, I believe that the Board may adopt rules pursuant to §4-412 of the Village Law to prevent verbal interruptions, shouting or other outbursts, as well as slanderous or obscene language or signs; similarly, I believe that the Board may regulate movement so as not to interfere with meetings or prevent those in attendance from observing or hearing the deliberative process.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

OML-AO-3956

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March 25, 2005

Hon. Yancy F. McArthur
Supervisor
Town of Hyde Park
4383 Albany Post Road
Hyde Park, NY 12538

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

Dear Supervisor McArthur:

I have received your correspondence concerning the status of the Town of Hyde Park Zoning Review Committee. You indicated that the Committee is not a "Special Board" but rather is "a voluntary committee acting in an advisory capacity only."

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."

With specific respect to the matter at issue, 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.).

When an entity is a creation of law, it has been advised that it is a public body subject to the Open Meetings Law. For instance, §272-a of the Town Law entitled "Town comprehensive plan" includes reference to a "special board." That phrase is defined in subdivision (2)(c) of §272-a to mean:

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

If the Committee is a "special board", because it would have been created pursuant to a statute, I believe that it would constitute a "public body" subject to the Open Meetings Law. However, if as you indicated, it is not a special board created pursuant to §272-a of the Town Law, judicial decisions indicate that it would not be required to comply with the Open Meetings Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

From: Robert Freeman
To: Carl Falk
Date: 3/25/2005 4:22:31 PM
Subject: Re: Reconvienced meetings

Dear Mr. Falk:

From my perspective, a basic requirement of the Open Meetings Law involves the obligation of a public body, such as a town board, to inform the public of the time and place of its meetings. If a meeting is "recessed" and continued on another day, I believe that the "reconvening" would constitute a new meeting and, therefore, that notice of the time and place of that new meeting must be given to the news media and to the public by means of posting to comply with the Open Meetings Law.

I hope that I have been of assistance.

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March 28, 2005

E-MAIL

TO: Robert Herloski

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. Herloski:

As you are aware, I have received you correspondence concerning the posting of notice in a "designated public location", and whether posting notice on a website by a school district is adequate to comply with the 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."

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. Additionally, 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. 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.

While posting a notice on a website is, in my view, fully appropriate and positive, based on the language of the law, again, "posting" would involve the placement of notice of the time and place of meetings at a particular location or locations.

I hope that I have been of assistance.

RJF:tt

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FOIL-AO-3959

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March 28, 2005

Mr. Peter Z. Takacs, Ph.D.
[redacted]

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

Dear Dr. Takacs:

I have received your letter in which raised two items of concern relating to the Riverhead Central School District Board of Education: first, that the Board "does not record a proper motion when it recesses into executive session", and second, "that meeting minutes are not being provided to the public in a timely manner." You have asked that I provide guidance to the Board in an effort to encourage compliance with law.

In this regard, your first concern was addressed in part in an advisory opinion prepared earlier this month, and a copy was sent to the Board of Education. Enclosed is a copy for your review. The essence of the opinion involves the requirement imposed by §105(1) of the Open Meetings Law that a motion for entry into an executive session must be made during an open meeting and be sufficiently detailed to enable the public to know whether there is indeed a proper basis for conducting an executive session.

One of the decisions cited in that opinion dealt in part with the matter to which you referred in your letter, the ability to know when the Board discusses negotiations with the CSEA union. As you may be aware, §105(1)(e) authorizes a public body to enter into executive session to discuss "collective negotiations pursuant to article fourteen of the civil service law." Article fourteen is commonly known as the "Taylor Law", and it deals with the relationship between a public employer, i.e., a school district, and a public employee union. In Doolittle v. Board of Education (Supreme Court, Chemung County, October 20, 1981), it was held that motion merely indicating that an executive session will be held to discuss "negotiations" is inadequate. Rather, a proper motion in that instance must indicate that an executive session will be held to discuss "collective bargaining negotiations with the CSEA" or equivalent language.

Second, with respect to the minutes, §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, as you suggested, 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.

As you requested, 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
Enc.

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

OMC-AO-3960

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April 1, 2005

E-Mail

TO: James S. Sieracki

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. Sieracki:

I have received your inquiry in which you asked whether a "youth board (volunteer) [is] a 'public body' and therefore, subject to the Open Meetings Law."

In this regard, I was able to ascertain from the City of Lackawanna website that the Youth Bureau is part of the City government, rather than independent entity. I was not able, however, to obtain additional information concerning its creation, powers or duties. As you are aware, the Open Meetings Law is applicable to meetings of public bodies, and §102(2) defines the phrase "public body" to mean:

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

From my perspective, if the youth board is a creation of law, i.e., if the board exists due to the passage of a local law, an ordinance, or a provision of a city charter, I believe that it would constitute a public body required to comply with the Open Meetings Law. If, however, the Board was created by resolution, if is temporary or *ad hoc* in nature, and if its authority is purely advisory, judicial decisions indicate that it would not constitute a public body.

If you can provide additional information concerning the factors referenced in the preceding commentary, it is likely that I can offer more definitive guidance.

I hope that I have been of assistance.

RJF:jm

FOIL-AO-15248
OML-AO-3961

From: Robert Freeman
To: MULLEN, VICTORIA
Date: 4/8/2005 8:18:42 AM
Subject: Re: GUESS WHO NEEDS HELP

Good morning - -

It doesn't seem that the request should be difficult to answer. The budgets are clearly available, as are the minutes of open meetings. With respect to executive sessions, when a public body, such as a town board, conducts an executive session and merely discusses an issue but takes no action, there is no requirement that minutes be prepared. If action is taken during an executive session, the minutes must merely consist of an indication of the nature of the action taken and the vote of each member. Further, §106(2) of the Open Meetings Law provides, in essence, that minutes of executive seesions need not include information that may be withheld under the Freedom of Information Law.

The provision to which you were alluding, §87(2)(c) of the Freedom of Information Law, states that an agency may withhold records to the extent that disclosure would "impair present or imminent contract awards or collective bargaining negotiations." Again, minutes of open meetings would clearly be accessible, and I would conjecture that minutes of executive sessions, if they exist at all, would be brief and would not include a great deal of detail. If that is so, it would be doubtful in my view that disclosure would "impair" the collective bargaining process.

I hope that this will be of help to you.

All the best,
Bob

Robert J. Freeman
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STATE OF NEW YORK
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FOIL-AO-15247
OML-AO-3962

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April 8, 2005

Ms. Naomi Rubin
[redacted]

Dear Ms. Rubin:

As you are aware, your letter addressed to Comptroller Hevesi has been forwarded to the Committee on Open Government. The Committee, a unit of the Department of State, is authorized to provide advice and opinions pertaining to the Open Meetings Law. You have asked whether a "not for profit entity that obtains funding from the State for some of its programs is required" to comply with that statute.

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

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

Based on the foregoing, the Open Meetings Law applies to governmental entities, such as city councils, town boards, boards of education and the like. It does not generally apply to meetings of not-for-profit or other private organizations.

I note, however, that the companion of the Open Meetings Law, the Freedom of Information Law, may be of utility to you, for its coverage is more expansive. That statute applies to agencies, and §86(3) defines "agency" to include:

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

The provision quoted above indicates that all units of state and local government in New York fall within the scope of the Freedom of Information Law. Perhaps more importantly, that law includes all agency records, irrespective of their origin or function. The term "record" for purposes of the Freedom of Information Law is defined 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."

When a not-for-profit or other organization receives funding from or has a relationship with an agency, the records maintained by the agency concerning the not-for-profit or other entity fall within the coverage of the Freedom of Information Law. In short, that law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Enclosed for your consideration is "Your Right to Know", which summarizes the provisions of both the Freedom of Information and Open Meetings Laws.

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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FOIL-AO-3963

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April 11, 2005

Ms. Megan O'Neil-Haight
[redacted]

Mr. Alfred L. Streppa
Harris Beach PLLC
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, unless otherwise indicated.

Dear Ms. O'Neil-Haight and Mr. Streppa:

I have received correspondence from you concerning a series of events involving the Corning-Painted Post Area School District and its Board of Education. The primary issue raised by Ms. O'Neil-Haight involves whether "some public action must be taken" by the Board of Education to authorize Mr. Streppa's law firm to execute an option to purchase real property on behalf of the District. Mr. Streppa referred in a letter to the Superintendent to minutes of executive sessions and the approval of a resolution by the Board during an open meeting authorizing him and his firm to execute an option to purchase.

In this regard, as I understand the matter, the Board of Education is required to take action during a meeting of the Board to authorize its attorney to execute an option to purchase real property on behalf of the Board or the District. However, I believe that any such action must be taken in public.

In this regard, I offer the following comments.

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

public discussion, and that is so with respect to the ground for entry into executive session that is relevant in relation to the matter described.

The provision of apparent significance, §105(1)(h) of the Open Meetings Law, permits a public body to enter into executive session to discuss:

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

In my opinion, the language quoted above, like 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. A key question, in my view, involves the extent to which information relating to possible real property transactions is or has become known to the public. It has been advised, for example, that when an agency, such as a school district, 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 agency from reaching an optimal price on behalf of the taxpayers.

And second, even if the substance of a discussion by the Board could validly have been considered during an executive session, I believe that the Board could only have approved a resolution or motion authorizing Mr. Streppa and/or his firm to act on its behalf in public.

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

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

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

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

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

Those circumstances would arise, for example, when a board initiates charges against a tenured person pursuant to §3020-a of the Education Law, which requires that a vote to do so be taken during an executive session. The other instance would involve a situation in which action in public could identify a student. When information derived from a record that is personally identifiable to a student, the federal Family Educational Rights and Privacy Act (20 USC §1232g) would prohibit disclosure absent consent by a parent of the student.

In the context of the situation described, again, I believe that the Board of Education must take action in public. However, in my opinion, a motion or resolution need not be so detailed that public knowledge or disclosure would preclude the Board/District from reaching an optimal agreement on behalf of the public.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
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OMC-AO-3964

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April 12, 2005

Ms. Margie Rubin
Disabled in Action
[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. Rubin:

I have received your letter concerning what you characterized as "discrimination by community boards" in New York City. You indicated that the only opportunities to available to constituents to "mingle and talk freely with local politicians...are at social functions." However, "when a wheelchair user is invited to a social function, reaches the door, and finds there is no access", you contend that "this is clearly selective discrimination." You asked: "What are the rights of the disabled" and "Who has jurisdiction over enforcing the rights of the disabled."

In this regard, as you may be aware, the Committee on Open Government is authorized to provide advice and opinions concerning public access to government information, primarily in relation to the state's Freedom of Information Law, which pertains to access to records, and the Open Meetings Law, which pertains to meetings of public bodies. From my perspective, the Open Meetings Law would not have applied in the situation that you described.

By way of background, §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, a public body is an entity consisting of two or members that conducts public business and performs a governmental function collectively, as a body, such as a community board, a planning board, a city council, etc.

In a a landmark decision rendered in 1978, the state's highest court, the Court of Appeals, held that any gathering of a quorum of a public body for the purpose of conducting public business constitutes a "meeting" subject to the Open Meetings Law, whether or not there is an intent to take action, and regardless of the manner in which a gathering may be characterized [see Orange County Publications, Division of Ottoway Newspapers, Inc. v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. In my opinion, inherent in the definition of "meeting" is the notion of intent. If a majority of a public body gathers in order to conduct public business collectively, as a body, I believe that such a gathering would constitute a "meeting" subject to the Open Meetings Law.

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

If indeed the purpose of a gathering is social in nature, the Open Meetings Law, in my view, would not apply.

I point out that when there is an intent on the part of a public body to hold a meeting, §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."

In consideration of 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 at a location that is accessible to handicapped persons, I believe that the meetings should be held in the room that is most likely to accommodate the needs of those people.

Although the Open Meetings Law does not address the questions that you raised concerning the rights of the disabled and the enforcement of those rights in relation to the kinds of gatherings that you described, I hope that the preceding remarks serve to clarify your understanding and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

OML-AO-3965

From: Robert Freeman
To: [redacted]
Date: 4/15/2005 9:14:50 AM
Subject: Hi Ken - -

Hi Ken - -

When considering "the progress (or lack thereof) of a project as it relates to the performance (or lack thereof) of one or more specific architects and/or contractors", it is suggested that you analogize that situation to a comparable matter involving staff and particular employees.

From my perspective, a general discussion of the progress of a project or the performance of the architects and contractors as a group would not qualify for entry entry into executive session. However, when the discussion focuses on the performance of specific architects or contractors, it is likely that §105(1)(f) could be asserted. That provision, as you are aware, states that a public body may conduct an executive session to discuss the employment history of a particular person or corporation, as well as matters leading to the dismissal or removal of a particular person or corporation.

I hope that this helps.
Bob

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STATE OF NEW YORK
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April 15, 2005

Ms. Gertrude Gore
[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. Gore:

I have received your letter concerning access to meetings of the board of directors of a condominium. You have asked whether those meetings fall within the coverage of the Open Meetings Law.

In this regard, 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, the Open Meetings Law generally applies to meetings of governmental entities; it does not apply to meetings of the boards of private corporations or entities.

It is suggested that you and perhaps others attempt to encourage amending the by-laws to authorize owners of condominiums to attend meetings of your board of directors.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

FOIL-AO-15259
OML-AO-3967

From: Robert Freeman
To: Jill Warner
Date: 4/20/2005 5:05:27 PM
Subject: Re: Thruway Authority

Hi Jill - -

Let me offer congratulations on your appointment. I hope that you will feel free to call or write if ever you believe that I can offer guidance.

With respect to your first area of inquiry, you or, in fact, anyone may tape record an open meeting of a public body. Clerks, secretaries and others frequently do so for the reason to which you referred, to ensure the accuracy of minutes. It has also been held that others who attend meetings may tape or video record the meetings, so long as the use of the recording device is not disruptive or obtrusive. As for the ability to erase the tape after minutes have been prepared, I note that there are provisions in the Arts and Cultural Affairs Law, Article 57, that deal with the retention and disposal of records. In brief, state agencies are required to preserve their records until a minimum retention period established by the Commissioner of Education (through the State Archives) has been reached. I am unaware of whether a retention schedule has been established in this instance, and it is suggested that you might confer with the Authority's records manager or contact the State Archives. I believe that the person to speak with is Tom Ruller, who can be reached at 474-5561.

Section 106 of the Open Meetings Law pertains to minutes. In brief, if the Board enters into executive session and merely discusses one or more topics but takes no action, there is no requirement that minutes of the executive session be prepared. It is noted that a public body may take action during a proper executive session, so long as the vote is not to appropriate public moneys. If action is taken, the law requires that minutes be prepared within one week indicating the nature of the action taken and the vote of each member. The minutes would have to be available to the public to the extent required by the Freedom of Information Law. In most cases, as a matter of practice, public bodies do not take action during executive sessions; rather, they discuss an issue in private and vote in public when the executive session ends and they return to open session.

I hope that I have been of assistance.

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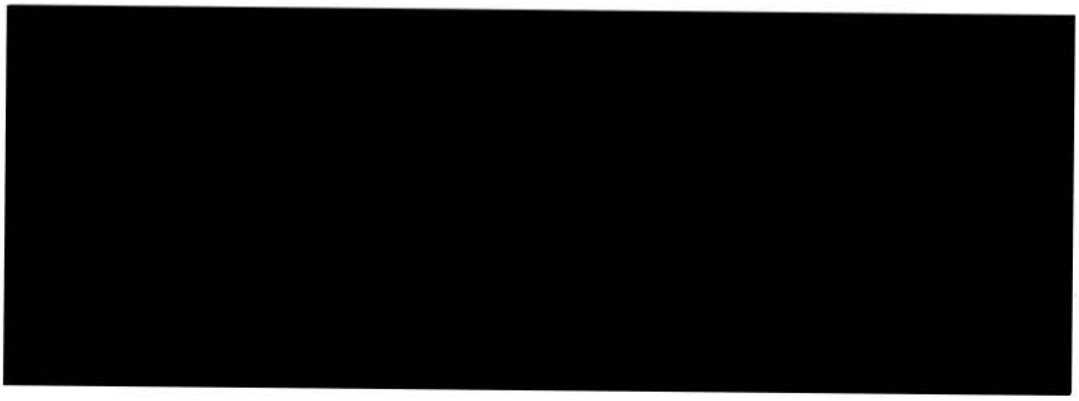

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OML-AO-3968

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April 29, 2005

E-Mail

TO: Megan O'Neil-Haight

FROM: Robert J. Freeman, Executive Director

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

Dear Ms. O'Neil-Haight:

I have received your letter and apologize for the delay in response. You described meetings during which the Superintendent of the Corning-Painted Post School District appears to have been authorized by the Board of Education while in executive session to "purchase an option to buy" on several occasions. You expressed the view that those actions by the Board should have been taken in public.

Having conducted legal research and conferred with an expert concerning school law, I believe that the Board's acts in which authority was conferred upon the Superintendent to purchase options to buy real property should have occurred during public portions of the Board's meetings. In this regard, I offer the following comments.

First, it appears that discussions by the Board concerning certain parcels could justifiably have been conducted during executive session. Section 105(1)(h) of the Open Meetings Law permits a public body, such as a board of education, 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."

If premature disclosure of information concerning the purchase of real property and the resultant publicity would likely preclude the District and/or the Board from engaging in an optimal agreement or price, I believe that the provision quoted above would have been applicable.

Second, however, I also believe that any action taken by the Board to authorize the Superintendent to purchase or exercise an option to buy property may only occur by means of an affirmative vote of a majority of the Board's total membership, and that any such vote must occur during an open meeting. By way of background, the Open Meetings Law pertains to public bodies, and §102(2) defines the phrase "public body" to mean:

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

The provision quoted above refers to entities that are required to conduct public business by means of a quorum. The term "quorum" is defined in §41 of the General Construction Law, which has been in effect since 1909. The cited provision states that:

> "Whenever three of more public officers are given any power or authority, or three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of the whole number of such persons or officers, 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, assuming that the direction given to the Superintendent is reflective the exercise of a "power, authority or duty" of the Board, such direction could only have been conferred by means of an affirmative vote of a majority of the Board's total membership.

Lastly, only in rare instances may a board of education take action during an executive session. As a general rule, a public body may take action during a properly convened executive session [see Open Meetings Law, §105(1)]. In the case of most public bodies, if action is taken during an executive session, minutes reflective of the action, the date and the vote must be recorded in minutes pursuant to §106(2) of the Law. If no action is taken, there is no requirement that minutes of the executive session be prepared. Various interpretations of the Education Law, §1708(3), however, indicate that, except in situations in which action during a closed session is permitted or required by statute, a school board cannot take action during an executive session [see

United Teachers of Northport v. Northport Union Free School District, 50 AD 2d 897 (1975); Kursch et al. v. Board of Education, Union Free School District #1, Town of North Hempstead, Nassau County, 7 AD 2d 922 (1959); Sanna v. Lindenhurst, 107 Misc. 2d 267, modified 85 AD 2d 157, aff'd 58 NY 2d 626 (1982)]. Stated differently, based upon judicial interpretations of the Education Law, a school board generally cannot vote during an executive session, except in those unusual circumstances in which a statute permits or requires such a vote.

Those circumstances would arise, for example, when a board initiates charges against a tenured person pursuant to §3020-a of the Education Law, which requires that a vote to do so be taken during an executive session. The other instance would involve a situation in which action in public could identify a student. When information derived from a record that is personally identifiable to a student, the federal Family Educational Rights and Privacy Act (20 USC §1232g) would prohibit disclosure absent consent by a parent of the student.

In short, I believe that the actions at issue were required to have been taken in public. This is not intended to suggest that motions made in public or minutes of meetings would be required to include detailed information, i.e., the location or potential price of a particular parcel; rather, the motions and minutes must in my view indicate that action was taken by the Board to authorize the Superintendent to engage in certain activities on its behalf. Further, the records reflective of such action must indicate the manner in which each member cast his or her vote [see Freedom of Information Law, §87(3)(a)].

I hope that I have been of assistance.

RJF:jm

cc: Board of Education

From: Robert Freeman
To: [redacted]
Date: 4/29/2005 1:14:01 PM
Subject: Dear Ms. Cirillo:

Dear Ms. Cirillo:

I apologize for the delay in response. The issue involves the ability of a person who is not a school district resident to have the same opportunity to address a board of education as residents.

I have read the decision of the Commissioner of Education, No. 12,861, in which it was determined that non-residents can be prohibited from addressing a board of education, stating that "Since board members represent only the residents of the district, these are the individuals who should be heard." You are familiar with the opinions rendered by this office involving the same issue, and in short, I disagree with the decision of the Commissioner for the reasons expressed in those opinions. In brief, any person, including a non-resident, has the right to attend a meeting of a board of education, and I do not believe that a person can be compelled to identify himself or herself as a condition precedent to attending. Further, situations have arisen in which identifying oneself would have an effect upon his or her child or would indicate that a battered woman lives within a certain community. In both instances, disclosure of those facts could result in detriment or even harm. Also, there are numerous instances in which property within a school district is owned by non-residents, and in which the actions of boards of education have a substantial impact on the value or use of their property.

There are no judicial decisions of which I am aware that have focused on the issue that you raised. However, again, it is my view that a public body, such as a board of education, cannot condition the ability to address that public body upon the residence of a person in attendance.

I hope that I have been of assistance.

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STATE OF NEW YORK
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May 2, 2005

E-MAIL

TO: Roy Hochberg

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. Hochberg:

I have received your letter and apologize for the delay in response.

You referred to a situation in the Town of Hurley in which a closed meeting was held in the Supervisor's office during which three members of the Town Board, the Town Attorney, the Town Solid Waste Manager and two other unidentified persons attended. You wrote that it was suggested that the gathering might have been a "working meeting" that members of the Town Board "apparently hold at the Town Hall or 'other locations.'" You indicated that all five of the members of the Town Board are from the same political party.

"Since the town attorney was apparently at the meetings to advise the Town", you wrote that you "would like a better understanding of the Open Meetings Law that allows meetings (other than executive sessions) like the above to be held behind closed doors and without public notice."

While the gathering in question might have been held in private in a manner consistent with law, it is not entirely clear that was so. 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, such as a town board, 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. When a workshop or similar gathering is 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, 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.

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

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

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

You indicated that two of the persons present at the gathering at issue were unknown to you. If they were Town officers or employees, and if the attorney was rendering legal advice, I believe that the gathering would have been exempt from the requirements of the Open Meetings Law due to the operation of the attorney-client privilege. However, if those persons are not Town officers or employees, it is likely that their presence would have resulted in a waiver of the attorney-client privilege. If that was so, it appears that the gathering would have constituted a "meeting" that fell within the scope of the Open Meetings Law.

Also pertinent is §108(2). 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.

Perhaps most relevant 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. 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
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3970

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May 5, 2005

E-MAIL

TO: Timothy Chittenden

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 Mr. Chittenden:

I have received your correspondence and apologize for the delay in response. You have sought guidance concerning the implementation of the Open Meetings Law by the Rye City Council.

You enclosed a notice of a meeting stating that:

> "There will be a regular meeting of the City Council of the City of Rye on Wednesday January 5, 2004, at 8:00 p.m. in the Council Room of City Hall. The Council will convene at 7:00 p.m. and it is expected that they will adjourn to an Executive Session to discuss a personnel matter with pending litigation at 7:31 p.m."

Based on the foregoing, 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 that 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.

In my view, because an executive session is a portion of a meeting, the notice that you sent should have indicated that the Council would begin its meeting at 7:00 p.m. However, the statement that the Council "is expected to adjourn to an executive session" after convening would not, in my view, be inconsistent with law.

Second, the provision pertaining to litigation, §105(1)(d), permits a public body to enter into executive session to discuss "proposed, pending or current litigation." While the courts have not sought to define the distinction between "proposed" and "pending" or between "pending" and "current" litigation, they have provided direction concerning the scope of the exception in a manner

consistent with the description of the general intent of the grounds for entry into executive session suggested in my remarks in the preceding paragraph, i.e., that they are intended to enable public bodies to avoid some sort of identifiable harm. For instance, it has been determined that the mere possibility, threat or fear of litigation would be insufficient to conduct an executive session. Specifically, it was held that:

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

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

In my view, only to the extent that the Council 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].

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.

RJF:tt

cc: City Council

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

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May 5, 2005

E-Mail

TO: Jehed Diamond

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. Diamond:

I have received your inquiry concerning a "public comment session" during which certain persons were "ruled out of order."

In this regard, first, it appears that the event was a "meeting" of a planning board rather than a "hearing." Typically, a hearing is held pursuant to law for the purpose of enabling members of the public to express their points of view concerning a particular subject, such as a local law, a change in zoning, or a budget. In general, the holding of a public hearing requires that those wanting to speak be given a reasonable opportunity to do so. A meeting, according to the Open Meetings Law is a gathering of a majority of a government body for the purpose of conducting public business, discussion, deliberation, and perhaps taking action by voting.

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

Although public bodies have the right to adopt rules to govern their own proceedings (see e.g., 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."

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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May 6, 2005

Ms. Sharon L. Brin
[redacted]

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

Dear Ms. Brin:

I have received your letter and apologize for the delay in response. You have raised a variety of questions and issues relating to the Town of East Greenbush. In consideration of your remarks, it is emphasized that the functions of the Committee on Open Government pertain to the Freedom of Information and Open Meetings Laws; this office has neither the jurisdiction nor the expertise to offer advice or commentary concerning conflicts of interest or compatibility of offices. That being so, I offer the following remarks.

First, the Freedom of Information Law is expansive in its coverage, for it pertains to all records of an agency, such as a town, and §86(4) defines the term "record" to include:

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

Based on the foregoing, when records are maintained by or for the Town, irrespective of the physical location of the records, I believe that they fall within the scope of the Freedom of Information Law.

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

Next, you referred to "pre-town meetings." If my understanding accurate, pre-town meetings are held by the Town Board prior to its regular or "official" meeting. In this regard, from my perspective, the "pre-town meetings" must be conducted in public in accordance with the Open Meetings Law. I point out the definition of "meeting" [see Open Meetings Law, §102(1) has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be conducted open to the public, whether or not there is an intent to have action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 Ad 2d 409, aff'd 45 NY 2d 947 (1978)].

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

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

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

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

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

Further, because a "pre-town meeting" is a "meeting", it must be preceded by notice of the time and place given to the news media and by means of posting pursuant to §104 of the Open Meetings Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board

OML-AO-3973

From: Robert Freeman
To: richfield-clerk@stny.rr.com
Date: 5/9/2005 12:33:08 PM
Subject: I have received your inquiry, and the gathering that you described in my view clearly would constitu

I have received your inquiry, and the gathering that you described in my view clearly would constitute a "meeting" that falls within the coverage of the Open Meetings Law. As you are likely aware, it has been held any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" subject to the Open Meetings Law, even if there is no intent to take action, and irrespective of the manner in which the gathering may be characterized. Further, every meeting must be preceded by notice given to the news media and the public by means of posting.

With respect to the subject matter, a review of the grounds for entry into executive session appearing in §105(1) of the Open Meetings Law suggests that none of the grounds would be applicable based on your description of the issue.

If you or others would like to discuss the matter, please do not hesitate 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 9, 2005

Ms. Pat Smouse
DeRuyter Central School District
711 Railroad Street
DeRuyter, NY 13052

Mr. Joseph B. Fallon
[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. Smouse and Mr. Fallon:

I have received a variety of materials from you concerning your efforts in gaining access to certain information from the DeRuyter Central School District. As I understand the matter, some of the materials have been disclosed. However, the District Clerk wrote that "[p]ersonal information such as certification, years in a position and other application information are protected under sub division 2 of section 87 and 89 of the Public Officer's [sic] Law."

From my perspective, which is based on the judicial interpretation of the Freedom of Information Law, the records that have been withheld must be made available in great measure, if not in their entirety. In this regard, I offer the following comments.

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

The only ground for denial significant to an analysis of rights of access is §87(2)(b), which permits an agency to withhold records to the extent that disclosure would result in "an unwarranted invasion of personal privacy." Although the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public employees. It is clear that public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public employees are required to be more

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

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

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

Certainly the number of years employed in a particular position is relevant to an employee's duties. Again, therefore, disclosure would constitute a permissible, not an unwarranted invasion of personal privacy. I note that §87(3)(b) has long required that a record that includes the name, public office address, title and salary of every officer or employee of an agency be maintained and made available to the public. That being so, the identity of a teacher and his or title or position is simply not secret.

Next, it has been held that many aspects of applications or resumes are accessible. The Appellate Division has held that disclosure of a public employee's educational background would not constitute an unwarranted invasion of personal privacy and must be disclosed [see Ruberti, Girvin & Ferlazzo v. NYS Division of State Police, 641 NYS 2d 411, 218 AD 2d 494 (1996)]. Most significantly, in the lower court decision rendered in Kwasnik v. City of New York, (Supreme Court, New York County, September 26, 1997), the court cited and relied upon an opinion rendered by this office and held that those portions of applications or resumes, including information detailing one's prior public employment, must be disclosed. The Court quoted from the Committee's opinion, which stated that:

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

Quoting from the opinion, the court also concurred with the following:

> "Although some aspects of one's employment history may be withheld, the fact of a person's public employment is a matter of public record, for records identifying public employees, their titles and salaries must be prepared and made available under the Freedom of Information Law [see §87(3)(b)]."

Items within an application for employment or a resume that may be withheld in my view would include social security numbers, marital status, home addresses, hobbies, and other details of one's life that are unrelated to the position for which he or she was hired.

In affirming the decision of the Supreme Court, the Appellate Division found that:

> "This result is supported by opinions of the Committee on Open Government, to which courts should defer (*see, Miracle Mile Assocs. v. Yudelson,* 68 AD2d 176, 181, *lv denied* 48 NY2d 706), favoring disclosure of public employees' resumes if only because public employment is, by dint of FOIL itself, a matter of public record (FOIL-AO-4010; FOIL-AO-7065; Public Officers Law §87[3][b]). The dates of attendance at academic institutions should also be subject to disclosure, at least where, as here, the employee did not meet the licensing requirement for employment when hired and therefore had to have worked a minimum number of years in the field in order to have qualified for the job. In such circumstances, the agency's need for the information would be great and the personal hardship of disclosure small (*see*, Public Officers Law §89[2][b][iv])" [262 AD2d 171, 691 NYS 2d 525, 526 (1999)].

In sum, again, I believe that the details within an employment application that are irrelevant to the performance of one's duties may generally be withheld. However, based on judicial decisions, those portions of such a record or its equivalent detailing one's prior public employment and other items that are matters of public record, general educational background, licenses and certifications, and items that indicate that an individual has met the requisite criteria to serve in the position, must be disclosed.

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

Those circumstances would arise, for example, when a board initiates charges against a tenured person pursuant to §3020-a of the Education Law, which requires that a vote to do so be taken during an executive session. The other instance would involve a situation in which action in public could identify a student. When information derived from a record that is personally identifiable to a student, the federal Family Educational Rights and Privacy Act (20 USC §1232g) would prohibit disclosure absent consent by a parent of the student.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Tim Decker

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3975

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May 12, 2005

E-Mail

TO: Richard Landman

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. Landman:

As you are aware, I have received your letter. Please accept my apologies for the delay in response.

You wrote that the leadership of the Community Board on which you are a member contends that a provision within the City Charter authorizes the Board "to conduct private hearings/meetings provided the Board takes no action at such meetings." The provision upon which reliance is placed, §2800(d)(3), states that:

> "Each community board shall....At its discretion hold public or private hearings or investigations with respect to any matter relating to the welfare of the district and its residents, but the board shall take action only at a meeting open to the public."

In this regard, from my perspective, there is a difference between a hearing and a meeting of a public body, such as a community board. A hearing may be held to provide members of the public with an opportunity to speak with respect to a particular issue or, as in the context of the provision quoted above, to elicit testimony, opinions or information from individuals, particularly those with certain knowledge or expertise. That provision in my view focuses on and implicitly distinguishes hearings from meetings. Further, a meeting held in accordance with the Open Meetings Law involves a gathering of a quorum, a majority of the members of a public body for the purpose of conducting public business. Hearings, on the other hand, do not require the presence of a quorum, and they are frequently conducted by fewer than a majority of the members.

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

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

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

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

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

Based upon the direction given by the courts, when 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.

I hope that I have been of assistance.

RJF:jm

OML-AO-3976

From: Robert Freeman
To: Janet Mercer; Richard Landman
Date: 5/13/2005 7:58:03 AM
Subject: Fwd: RE: Advisory Opinion from Committee on Open Government

The Daily Gazette decision was rendered before the enactment of amendments to the Open Meetings Law specifying that a "committee or subcommittee or similar body" of a public body is itself a public body required comply with that statute. To review the history of those amendments, go to the Open Meetings Law advisory opinions on our website, click on to "C", and scroll down to "committees and subcommittees." In short, if a committee of a community board consists of 5 members of the board, its quorum would be 3, and a gathering of a majority of the committee, in their capacities as members of that committee, would constitute a meeting of a public body subject to the Open Meetings Law.

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

STATE OF NEW YORK
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May 16, 2005

E-Mail

TO: Mary MacEntee

FROM: Robert J. Freeman

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

Dear Ms. MacEntee:

As you are aware, I have received your letters. Please accept my apologies for the delay in response.

If I understand your first letter correctly, you have raised issues concerning the ability a public body to invite non-members to attend executive sessions when you, a person employed by that public body, may be the subject of the discussion. In this regard, pertinent 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., the employing 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. You, although perhaps the subject of the discussion, would not have the right to be present or have control over the attendance of non-members during the executive session.

Your second letter involves the ability of municipal officials to contact a place of business that employs you on a part time basis to ascertain whether you work there, as well as your rate of pay, without your permission. While that question does not deal with the Freedom of Information or Open Meetings Laws, I know of no provision that would prohibit municipal officials from making

the kinds of inquiries to which you referred. Similarly, I know of no provision that would require a part time employer to respond to those questions.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

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May 16, 2005

E-Mail

TO: Glenn Emerson

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. Emerson:

I have received your letter and apologize for the delay in response. You raised questions concerning the propriety of a gathering of three trustees of the Village of Brockport that you characterized as a "closed meeting with the volunteer fire department."

In this regard, by way of background, the definition of "meeting" 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 members of the Village 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.

As you may be aware, §104 of the Open Meetings Law pertains to notice of meetings and requires that every meeting be preceded by notice given to the news media and posted. That provision states that:

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

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

Lastly, with respect to the enforcement of the Open Meetings Law, §107(1) of the Law states in part that:

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

However, the same provision states further that:

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

As such, when a legal challenge is initiated relating to a failure to provide notice, a key issue is whether a failure to comply with the notice requirements imposed by the Open Meetings Law was "unintentional".

I hope that I have been of assistance.

RJF:jm

cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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May 18, 2005

Mr. John W. Luther
Richmond Planning Board Chair
P.O. Box 27
Honeoye, NY 14471

The staff of the Committee on 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. Luther:

I have received your correspondence and hope that you will accept my apologies for the delay in response. In brief, you referred to a meeting of the Richmond Town Board and questioned the propriety of scheduling the meeting to be held at 5:30 p.m., as well as an executive session to discuss "personnel matters" and "pending legal matters."

In this regard, I offer the following comments.

First, although the Open Meetings Law does not specify when meetings may 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. In view of the intent of the Open Meetings Law, the initial question is whether it is reasonable to schedule a meeting at 5:30 p.m. In a decision that dealt in part with meetings of a board of education held at 7:30 a.m., it was stated that:

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

While the Court focused on the matter as it related to a Board of Education, I believe that similar factors would be present with respect to the ability of Town residents to attend meetings at 5:30 p.m. While some might not be able to attend, I would conjecture that a court would find that a meeting scheduled at that time would be reasonable.

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

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

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

There is not provision that refers to "legal matters." However, §105(1)(d) permits a public body to enter into an executive session to discuss "proposed, pending or current litigation". In construing the language quoted above, it has been held that:

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

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

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

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

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

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

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. If an issue involves the duties inherent in a position, or the creation or elimination of a position, irrespective of who might hold or be hired to fill that position, I do not believe that there would be a basis for conducting an 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 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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AD-3960

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May 18, 2005

Ms. Lynne Jackson
Save the Pine Bush, Inc.
[redacted]

Dear Ms. Jackson:

I have received your letter and apologize for the delay in response. You have requested an opinion "on who decides what topics may be addressed during a public hearing, and if there are rules regarding who may address those issues."

In this regard, the Committee on Open Government is authorized to provide advisory opinions concerning the Open Meetings Law. Your question involves a hearing, rather than a meeting, and I believe that there are distinctions between the two.

A hearing typically involves a situation in which members of the public are given an opportunity to offer their views in relation to a particular issue, such as a zoning change, a budget, etc. Public hearings are generally preceded by the publication of a legal notice that describes the issue and indicates that the public will be given the opportunity to speak. In contrast, a meeting, as that term is defined in §102(1) of the Open Meetings Law, is a gathering of a majority of public body for the purpose of conducting public business. Typically, a meeting is held for discussion and deliberation by the members of a public body, and potentially taking action. The Open Meetings Law must be preceded by notice of the time and place given to the news media and by means of posting, and §104 specifies that there is no requirement that a legal notice must be published prior to a meeting. Further, there is nothing in the Open Meetings Law refers to the ability of the public to speak at meetings.

In short, because the issue involves the conduct of a hearing, not a meeting held under the Open Meetings Law, I regret that I cannot respond to your question.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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OML-AO-3981

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May 23, 2005

E-Mail

TO: Debra Cohen

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. Cohen:

I have received your letter and apologize for the delay in response. You asked, first, whether the requirement in §106(3) of the Open Meetings Law that minutes be made available within two week "simply refer[s] to when the minutes must be finalized or does it relate to when they must be accessible to the public.

From my perspective, it is clear that minutes must be prepared and made available to the public within two weeks of the meetings to which they relate, irrespective of whether they are "finalized."

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

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

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

Significantly, 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.

You referred to a situation in which the City Council of the City of Yonkers authorized the Mayor to execute a certain lease agreement, and you asked whether "the lease agreement that is the subject of this resolution [is] a part of the official record of the meeting and therefore should be produced along with the resolution if requested." In this regard, unless the action taken expressly required that the lease agreement must be incorporated into the minutes, the agreement would not have to be part of the minutes. However, that record would clearly be accessible pursuant to the Freedom of Information Law. That being so, to obtain the records of interest, I believe that a proper request would involve minutes of a meeting during which action was taken, which, again, must be made available within two weeks of the meeting, as well as the full text of the resolution, and the lease agreement executed or signed by the Mayor.

Lastly, you wrote that meetings of the City Council are "recorded on videotapes that serve as the official minutes." While an audio or video recording would likely contain the elements of minutes, I believe that minutes should nonetheless be reduced to writing in order that they constitute a permanent, written record that can be viewed by the public. Perhaps just as important, a municipality often might need a permanent written record readily accessible to its officials who must refer to or rely upon the minutes in the performance of their duties. I point out, too, that in an opinion rendered by the State Comptroller, it was found that, although tape recordings may be used as an aid in compiling minutes, they do not constitute the "official record" (1978 Op. St. Compt. File #280).

I note that the State Archives and Records Administration, pursuant to provisions of the Arts and Cultural Affairs Law, develops schedules indicating minimum retention periods for various kinds of records. The retention schedule indicates that tape recordings of meetings must be retained for a minimum of four months. However, the schedule also indicates that minutes of meetings must be kept permanently. Because audio and video recordings cannot be preserved permanently, it would be inappropriate in my opinion to consider them as "official" minutes of City Council meetings.

I hope that I have been of assistance.

RJF:jm

cc: City Council

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-3982

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May 25, 2005

E-Mail

TO: Joanne Hameister

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. Hameister:

As you are aware, I have received your letter. Please accept my apologies for the delay in response. You wrote that your "issue is that the public is not allowed to speak at a work session and that business was conducted without public input."

In this regard, first, it has been held that any gathering of a majority of a public body for purpose of conducting public business constitutes a "meeting" that falls within the coverage of the Open Meetings Law, even if there is no intent to take action [see Orange County Publications v. Council of the City of Newburgh, 60 AD2d 409, aff'd 45 NY2d 947 (1978). Therefore, there is no distinction between a "work session" and a "meeting" for purposes of that statute.

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

Although public bodies have the right to adopt rules to govern their own proceedings (see e.g., Education Law, §1709; Town Law, §63), the courts have found in a variety of contexts that such rules must be reasonable. For example, although a board of education may "adopt by laws and rules for its government and operations", in a case in which a board's rule prohibited the use of tape

recorders at its meetings, the Appellate Division found that the rule was unreasonable, stating that the authority to adopt rules "is not unbridled" and that "unreasonable rules will not be sanctioned" [see Mitchell v. Garden City Union Free School District, 113 AD 2d 924, 925 (1985)]. Similarly, if by rule, a public body chose to permit certain citizens to address it for ten minutes while permitting others to address it for three, or not at all, such a rule, in my view, would be unreasonable.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

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May 25, 2005

Mr. Loren Larkin
[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. Larkin:

I have received your letter and the materials attached to it. Please accept my apologies for the delay in response. You referred to executive sessions held by the Board of Education of the Otselic Valley Central School District held pursuant to motions describing the subject to be considered as "personnel." Further, you referred specifically to an issue apparently considered in executive session involving the elimination of a position.

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

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

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

Second, although it is used frequently, the term "personnel" appears nowhere in the Open Meetings Law. 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. As stated judicially, "it would seem that under the statute matters related to personnel generally or to personnel policy should be discussed in public for such matters do not deal with any particular person" (<u>Doolittle v. Board of Education</u>, Supreme Court, Chemung County, October 20, 1981).

It has been advised that a motion describing the subject to be discussed as "personnel" 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: Board of Education
Jane Collins

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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OML-AO-3984

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June 2, 2005

E-Mail

TO: Leo Lubke

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. Lubke:

I have received your letter in which you asked whether the "Cornell Cooperative Extension of Erie County Board [is] subject to the Sunshine Law."

From my perspective, a county cooperative extension board is required to comply with the Freedom of Information Law, as well as the Open Meetings Law. In this regard, I offer the following remarks.

First, the Freedom of Information Law pertains to agency records, and that §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."

According to §224(8)(b) of the County Law, a county extension service association is a "subordinate governmental agency" whose organization and administration are "approved by Cornell University as agent for the state." As such, I believe that the Cooperative Extension is an "agency" required to comply with the Freedom of Information Law, for it performs a governmental function for the State and, in this instance, Erie County.

Similarly, I believe that the board of a county cooperative extension agency is subject to the Open Meetings Law. That statute pertains to meetings of public bodies, and §102(2) defines the phrase "public body" to mean:

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

Again, due to the direction provided by §224(8)(b) of the County Law, the board of a cooperative extension agency performs a governmental function for the state and a public corporation, Erie County.

Lastly, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of that law. In like manner, the Open Meetings Law requires that meetings of public bodies be conducted in public, unless there is a basis for entry into an executive session, and paragraphs (a) through (h) of that statute specify and limit the grounds for entry into executive session.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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June 3, 2005

Hon. Tom Macarille
[redacted]

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

Dear Councilman Macarille:

I have received your letter and apologize for the delay in response.

Attached to your letter is an interoffice memorandum addressed to the Chief of Police by the Saugerties Town Supervisor. The memorandum states in relevant part that:

> "In consulting with two other members of the town board, Leeanne Thornton and Fred Costello, and in speaking for myself, we have agreed by majority and direct you to rescind your order prohibiting officers from switching blocks of shifts, a violation of Article IV Past Practice.
>
> "This decision is to take effect immediately and will be followed by a vote at the next town board meeting."

You wrote that you serve as a member of the Town Board and that neither your nor the public were given notice of any meeting during which the decision referenced in the memorandum was made, and that the memorandum was issued without your knowledge or consent or that of another member of the Board.

From my perspective, the three members of the Board could not validly have made a decision in the circumstance that you described. In this regard, I offer the following comments.

It is noted at the outset that there is nothing in the Open Meetings Law that would preclude members of a public body from conferring individually, by telephone, via mail or e-mail. However, a private meeting of three of the members, a series of communications between individual members

or telephone calls among the members which results in a collective decision, or a meeting or vote held by means of a telephone conference, by mail or e-mail would in my opinion be inconsistent with law.

In my view, voting and action by a public body may be carried out only at a meeting during which a quorum has physically convened, or during a meeting held by videoconference. The Open Meetings Law pertains to public bodies, and §102(2) defines the phrase "public body" to mean:

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

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

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

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

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

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

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

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

Based on the foregoing, again, a valid meeting may occur only when a majority of the total membership of a public body, a quorum, has "gathered together in the presence of each other or through the use of videoconferencing." Moreover, only when a quorum has convened in the manner described in §41 of the General Construction Law would a public body have the authority to carry out its powers and duties. It is emphasized that §41 requires that reasonable notice be given to all members as a condition precedent to convening a quorum or, therefore, conducting a meeting during which action may be taken.

There is no authority to take action outside of a meeting held with the presence of a quorum, and in the only decision dealing with a vote taken by phone, the court found the vote to be a nullity. In Cheevers v. Town of Union (Supreme Court, Broome County, September 3, 1998), which cited and relied upon an opinion rendered by this office, the court stated that:

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

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

The Supervisor's admission that "we have agreed by majority", indicates that the Board took action in private, and not during a meeting held in accordance with the Open Meetings Law. If that is so, I believe that the Board would have failed to have complied with law. In that circumstance, as in Cheevers, I believe that a court would find its action to be a nullity and determine that it failed to comply with law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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June 6, 2005

Ms. Carol Buschynski
[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. Buschynski:

I have received your letter in which you raised questions concerning the ability to conduct an executive session to discuss a matter pertaining to an elected assessor.

By way of background, it is your assumption that the Broome Town Board entered into executive session to discuss the assessor's "lack of participation in assessing duties." You expressed the view, however, that there was no basis for discussing "the job performance of an elected official" during an executive session. Nevertheless, wrote that the "town attorney stated that he would give legal advice to the town board and an executive session was called."

In this regard, I offer the following comments.

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

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

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed and the motion must be carried by majority vote of a public body's membership before

such a session may validly be held. The ensuing provisions of §105(1) specify and limit the subjects that may appropriately be considered during an executive session. Therefore, a public body may not conduct an executive session to discuss the subject of its choice.

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

Second, it does not appear that the provision to which you alluded, §105(1)(f) of the Open Meetings Law, would have justified the holding of an executive session. The language of that provision is precise and 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 foregoing refers to certain matters as they pertain to a "particular person or corporation", but because an elected official is not an employee, I do not believe that §105(1)(f) would have served as a basis for conducting an executive session. In short, for that reason, the Board would not have considered his or her "employment history", and none of the other qualifiers would appear to have been applicable.

Nevertheless, of apparent relevance is §108(3), which exempts from the Open Meetings Law:

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

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

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

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

> "In general, 'the privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the

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

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

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

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

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board

OML-AO-3987

From: Robert Freeman
To: [redacted]
Date: 6/7/2005 8:59:20 AM
Subject: Dear Ms. Possemato:

Dear Ms. Possemato:

Your inquiry has been forwarded to this office, the Committee on Open Government. The Committee, a unit of the Department of State, is authorized to provide advice and opinions concerning the Open Meetings Law.

You have asked where you may "find the criteria that needs to be met for a town resident to meet in executive session with the local town board."

In this regard, in short, there are no such criteria. The only people who have the right to attend an executive session are the members of the town board, which is characterized as a "public body" for purposes of the Open Meetings Law. However, a public body may authorize others to attend an executive session. Specifically, §105(2) of the Open Meetings Law states that: "Attendance at an executive session shall be permitted to any member of the public body and any other persons authorized by the public body." If, for example, you have special knowledge or expertise that would be of value or significance to the board, it would have the authority to invite you into the executive session.

I point out that a public body cannot enter into an executive session to discuss the subject of it choice. On the contrary, paragraphs (a) through (h) of §105(1) the Open Meetings Law specify and limit the subjects that may properly be considered during an executive session.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
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OML-AO-3988

From: Robert Freeman
To: MULLEN, VICTORIA
Date: 6/7/2005 12:53:53 PM
Subject: Re:

Hi - -

In short, when a majority of a public body, such as a town board, convenes for the purpose of conducting public business, even if there is no intent to take action, the gathering would constitute a "meeting" that falls within the coverage of the Open Meetings Law. In that circumstance, the meeting would have to be preceded by notice given to the news media and posted. On the other hand, if less than a majority of a public body is present, the Open Meetings Law would not apply.

I hope that this helps.

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

mulle

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June 8, 2005

Mr. Scott L. Volkman
Gellert & Klein, P.C.
75 Washington Street
Poughkeepsie, NY 12601-2303

The staff of the Committee on 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. Volkman:

As you are aware, I have received your letter, which largely focuses on quorum and majority requirements applicable to the Dutchess County Legislature and its committees.

It is noted at the outset that the issues that you raised deal tangentially with the Open Meetings Law. However, since various provisions of that statute may be implicated by the application of the provisions to which you referred, I believe that it is within the authority of this office to respond. In this regard, I offer the following comments.

First, the County Legislature is clearly required to comply with the Open Meetings Law, and in my view, committees consisting of two or more of its members are also required to do so. That statute pertains to meetings of public bodies, and a "meeting" is a convening of a quorum of a public body for the purpose of conducting public business [see §102(1)]. Absent a quorum, the Open Meetings Law does not apply [see e.g., Mobil Oil Corp. v. City of Syracuse Industrial Development Agency, 224 AD2d 15, motion for leave to appeal denied, 89 NY2d 811 (1997)]. Further, when a committee consists solely of members of a public body, such as the County Legislature, the committee constitutes a "public body."

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

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

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

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

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

In view of the amendments to the definition of "public body", I believe that any entity consisting of two or more members of a public body, such as a committee or subcommittee consisting of members of a county legislature, would fall within the requirements of the Open Meetings Law, assuming that a committee discusses or conducts public business collectively as a body [see Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984 (1981)].

Second, as you aware, a "quorum", unless specific direction is provided by statute to the contrary, is, according to §41 of the General Construction Law, a majority of the total membership of a public body. Section 41 was amended in 2000 to authorize the presence of a quorum and the taking of action by public bodies by means of videoconferencing and 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 provision quoted above, 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.

Third, as I understand the County Law, its provisions are not inconsistent with the foregoing. Subdivision (2) of §153 states that a quorum of a county legislature is "a majority of the whole number of the members..." Similarly, subdivision (9) provides that:

> "The terms 'whole number of the members of the board' and 'whole number of its membership,' as used in this chapter, shall be construed to mean the total number which the board of supervisors would have were there no vacancies and were none of the supervisors disqualified from acting."

Subdivision (8) of §153 states that: "Except as otherwise expressly provided, the board of supervisors [i.e., the County Legislature in this instance] of each county shall determine the rules of its procedure." From my perspective, any such rules must be reasonable and consistent with law. Stated differently, insofar as rules promulgated by a county legislature are inconsistent with a statute, they should be deemed superseded.

You wrote that permanent committees of the Legislature consist of seven members. The primary issue that you raised pertains to the Legislature's Rule 5.5, entitled "Rules of Procedure for Committees", which in subsection C states in relevant part that:

> "A quorum shall be defined as a majority of the members of any given committee. The Chairman of the Legislature, the Majority Leader, Assistant Majority Leader, Minority Leader and Assistant Minority Leader shall not be considered members of any given committee for purpose of determining whether a quorum has been established.
>
> "For the purpose of conducting the business of any given committee, a quorum must be maintained. Except as provided in Rule 4.12, once a quorum has been established, all voting shall be decided by a majority of those present and voting, including the Chairman of the Legislature, the Majority Leader, Assistant Majority Leader, Minority Leader and Assistant Minority Leader..."

In consideration of the language quoted above, I believe that a quorum of a committee would be a majority of its total membership, and that the membership for purposes of determining the establishment of a quorum would exclude the Legislature's leaders identified in Rule 5.5. Therefore, if there are seven members on a committee, excluding the leaders, a quorum would be four. If, on the other hand, a committee is considered to consist of seven, plus the five *ex officio* for a total of twelve members, quorum would still be four, but a majority would be seven.

It is not within my authority to determine or advise what a majority of a committee might be - - it would be four if the *ex officio* members do not vote; if they do vote, a majority would be seven. Irrespective of the number considered to be voting members, I believe that the portion of the Rule concerning voting is inconsistent with a state statute, specifically, §41 of the General Construction Law. To reiterate, as it pertains to voting and the ability to take action, §41 states that "not less than a majority of the whole number may perform and exercise such power, authority or duty." The Rule states that "all voting shall be decided by a majority of those present and voting..." If a quorum is four and five members are present, a majority of those present would be three. However, based on §41 of the General Construction Law, if the total membership of a committee is seven, four affirmative votes would be needed to approve a motion or otherwise take action.

I point out that I have never encountered a situation in which members who appear to have the ability to vote are not counted toward the establishment of a quorum. I must admit to being confused due to what I view as an inconsistency or perhaps an anomaly within Rule 5.5. While the first paragraph of Rule 5.5 indicates that the Legislature's leaders serve as *ex officio* members of the committee, they are not counted for the purpose of determining the establishment of a quorum. Based on that provision, it would seem that the *ex officio* members cannot vote. Nevertheless, the second paragraph states that "all voting shall be decided by a majority of those present and voting", including the *ex officio* members. Those aspects of the Rule are unusual, and I cannot advise as to their intent or, therefore, their unequivocal meaning.

I regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
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OML-AO-3990

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June 9, 2005

E-Mail

TO: Gail Cholden

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. Cholden:

I have received your inquiry in which you asked whether "during public participation...non-residents [may] speak."

In this regard, 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), the Law 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, I believe that it should do so based upon rules that treat members of the public equally.

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

I note that §103 of the Open Meetings Law provides that meetings of public bodies are open to the "general public." As such, any member of the public, whether a resident of the community

served by a public body or of another jurisdiction, would have the same right to attend. That being so, I do not believe that a member of the public can be required to identify himself or herself by name or by residence in order to attend a meeting of a public body. Further, since any person can attend, I do not believe that a public body could by rule limit the ability to speak to residents only. There are many instances in which people other than residents, such as those who may own commercial property or conduct business and who pay taxes within a given community, attend meetings and have a significant interest in the operation of a municipality or school district. That being so, I do not believe that a public body may validly prohibit a person from speaking at its meeting based upon residency.

I hope that I have been of assistance.

RJF:jm

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June 13, 2005

Professor Richard Conway
Nassau Community College
One Education Drive
Garden City, NY 11530

Dear Professor Conway:

I have received your letter and apologize for the delay in response. You have asked whether "a Student Government Association at a public college in New York State [may] deny members of the campus newspaper the opportunity to tape record its weekly meetings."

From my perspective, those meetings may be recorded, so long as the use of a recording device is neither obtrusive nor disruptive. That is so because it has been determined by the state's highest court, the Court of Appeals, that an equivalent entity, a student association at a CUNY community college authorized to review budgets and allocate student activity fees, constitutes a "public body" required to comply with the Open Meetings Law [see Smith v. CUNY, 92 NY2d 707 (1999)]. It has also been determined in a variety of contexts that any person may record an open meeting of a public body, using either audio or video recording equipment, again, if the use of the equipment is not obtrusive or disruptive.

As you may be aware, until 1978, there had been but one judicial determination regarding the use of the recording devices at meetings of public bodies. The only case on the subject was Davidson v. Common Council of the City of White Plains, 244 NYS 2d 385, which was decided in 1963. In short, the court in Davidson found that the presence of a tape recorder, which at that time was a large, conspicuous machine, might detract from the deliberative process. Therefore, it was held that a public body could adopt rules generally prohibiting the use of tape recorders at open meetings.

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

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

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

Several years later, the Appellate Division, Second Department, which includes Nassau County, unanimously affirmed a decision of Supreme Court, 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, or the absence thereof, 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

(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).

In the most recent decision involving the use of recording devices at meetings, the Appellate Division, Second Department, confirmed my views as expressed above by citing and relying upon an opinion addressed to the petitioner [Csorny v. Shoreham-Wading River Central School District, 305 AD2d 83 (2003)]. In short, there is considerable authority, much of which involves judicial decisions by courts having jurisdiction in Nassau County, indicating that the Student Government Association cannot prohibit the use of a recording device at its open meetings, so long as the use of the device is not obtrusive or disruptive.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Student Government Association
Anna Marie Mascolo

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June 20, 2005

E-MAIL

TO: Martin McGloin

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. McGloin:

I have received your letter and apologize for the delay in response. You wrote that:

> "There was a meeting of the whole City Council, plus the Deputy Mayor Mr. Regan and the developer for a baseball stadium, Struever Brothers, last Thursday March 9th at 4pm 2005. At 4pm in city hall. Members of other city agencies including the Yonkers Industrial Development Agency were also present. Apparently all of those at the meeting were aware of this for more than one week, including all members of the city council. The press and public were not given any notice."

You have asked whether the meeting was "illegal", and in this regard, I offer the following comments.

First, 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.

Both the Yonkers City Council and the Industrial Development Agency constitute public bodies. If a majority of either or both gathered in the situation that you described for the purpose of conducting public business, collectively, as a body, I believe that the gathering would have constituted a meeting that fell within the coverage of the Open Meetings Law.

Second, every meeting of a public body must be preceded by notice given to the news media and posted. That provision states that:

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

> 3. The public notice provided for by this section shall not be construed to require publication as a legal notice."

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

Next, every meeting of a public body 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.

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.

RJF:tt

cc: City Council
Industrial Development Agency

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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OML-AO-3993

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June 21, 2005

Mr. Rich Stewart
[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. Stewart:

I have received your letter and apologize for the delay in response. You referred to executive sessions held by the Board of Trustees of the Village Penn Yan. It is your view that the motions for entry into executive session are "vague" and that the Board often discusses issues in private that should be discussed in public. In addition, you questioned whether the Clerk must "list how each member voted."

In this regard, I offer the following comments.

First, the Open Meetings Law is based on a presumption of openness. Stated differently, meetings of public bodies, such as village boards of trustees, must be conducted open to the public, unless there is a basis for entry into executive session. Paragraphs (a) through (h) of §105(1) specify and limit the subjects that may properly be discussed during an executive session.

Second, 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..."

Since you referred to motions to enter into executive session as "vague", I note that although it is used frequently, the term "personnel" appears nowhere in the Open Meetings Law. While one of the grounds for entry into executive session often relates to personnel matters, from my perspective, the term is overused and is frequently cited in a manner that is misleading or causes unnecessary confusion. To be sure, some issues involving "personnel" may be properly considered

in an executive session; others, in my view, cannot. Further, certain matters that have nothing to do with personnel may be discussed in private under the provision that is ordinarily cited to discuss personnel.

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

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

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

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

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

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

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 Council 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].

Based on the foregoing, a proper motion might be: "I move to enter into executive session to discuss litigation strategy in relation to the case of the XYZ Company v. the Village of Penn Yan", or something similar to that.

Lastly, with regard to information detailing how each member voted, 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", which is defined to include a state or municipal board [see §86(3)], such as a school board, a record must be prepared that indicates the manner in which each member who voted cast his or her vote. Ordinarily, records of votes will appear in minutes.

In terms of the rationale of §87(3)(a), it appears that the State Legislature in precluding secret ballot voting sought to ensure that the public has the right to know how its representatives may have voted individually with respect to particular issues. Although the Open Meetings Law does not refer specifically to the manner in which votes are taken or recorded, I believe that the thrust of §87(3)(a) of the Freedom of Information Law is consistent with the Legislative Declaration that appears at the beginning of the Open Meetings Law and states that:

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

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

In an effort to enhance understanding of and compliance with open government laws, a copy of this opinion will be sent to the Board of Trustees. You may duplicate and distribute copies as you see fit.

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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June 21, 2005

E-MAIL

TO: Steven M. Schneider

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. Schneider:

I have received your letter and apologize for the delay in response.

You indicated that you are a member of the Cherry Valley-Springfield Central School District Board of Education, and that you wrote to this office "as an individual member, and not as a representative of the Board of the District." You wrote that:

> "Our current contract with the Cherry Valley-Springfield Teacher's Association contains a procedure for handling grievances. Part of that procedure calls for a Board of Education hearing, should the Association wish to appeal a decision by the Superintendent. The contract explicitly states that these hearings shall be conducted by the Board of Education in an executive session."

It is your view, however, that:

> "...the contract binds the Board in an illegal way. As Members of the Board, we should be free to decide, on a case by case basis, if a matter ought to be considered in executive session. If, in the opinion of a majority of the Board, a matter ought not be heard in executive session, we should be free to make that choice. In other words, it seems to me that the particular contract provision obligating the Board to enter into executive session is contrary to law."

In this regard, I offer the following comments.

First, a contract cannot validly diminish rights conferred by law, and the Open Meetings Law, which is Article 7 of the Public Officers Law, states in §110(1) that:

> "Any provision of a charter, administrative code, local law, ordinance, or rule or regulation affecting a public body which is more restrictive with respect to public access than this article shall be deemed superseded hereby to the extent that such provision is more restrictive than this article."

Therefore, in the context of the situation that you described, insofar as the contract may require that an executive session must be held, even if the Open Meetings Law or some other provision requires that the proceeding be open, I believe that any such provision is invalid and of no effect.

Second, 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. Further, as you inferred, a public body has the option of entering into an executive session when there is an appropriate basis to do so; even when such a proper basis exists, there is no obligation to conduct an executive session.

From my perspective, the subject matter of a grievance is the key factor in considering whether an executive session may properly be held. If, for example, the grievance involves the bells going off too late or early or that there are not enough parking spaces, I do not believe that there would be any basis for entry into executive session. On the other hand, if a grievance relates to a teacher's health or medical condition, it is likely that an executive session could be justified [see §105(1)(f)].

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.

Of possible relevance to the matter is §108(1) of the Open Meetings Law, which exempts from the coverage of that statute "judicial or quasi-judicial proceedings..." 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 that one of the elements of a quasi-judicial proceeding is the authority to take final action. While I am unaware of any judicial decision that specifically so states, there are various decisions that infer that a quasi-judicial proceeding must result in a final determination reviewable only by a court. For instance, in a decision rendered under the Open Meetings Law, it was found that:

> "The test may be stated to be that action is judicial or quasi-judicial, when and only when, the body or officer is authorized and required to take evidence and all the parties interested are entitled to notice and a hearing, and, thus, the act of an administrative or ministerial officer becomes judicial and subject to review by certiorari only when there is an opportunity to be heard, evidence presented, and a decision had thereon" [Johnson Newspaper Corporation v. Howland, Sup. Ct., Jefferson Cty., July 27, 1982; see also City of Albany v. McMorran, 34 Misc. 2d 316 (1962)].

Another decision that described a particular body indicated that "[T]he Board is a quasi-judicial agency with authority to make decisions reviewable only in the Courts" [New York State Labor Relations Board v. Holland Laundry, 42 NYS 2d 183, 188 (1943)]. Further, in a discussion of quasi-judicial bodies and decisions pertaining to them, it was found that "[A]lthough these cases deal with differing statutes and rules and varying fact patterns they clearly recognize the need for finality in determinations of quasi-judicial bodies..." [200 West 79th St. Co. v. Galvin, 335 NYS 2d 715, 718 (1970)].

It is my opinion that the final determination of a controversy is a condition precedent that must be present before one can reach a finding that a proceeding is quasi-judicial. Reliance upon this notion is based in part upon the definition of "quasi-judicial" appearing in Black's Law Dictionary (revised fourth edition). Black's defines "quasi-judicial" as:

> "A term applied to the action, discretion, etc., of public administrative officials, who are required to investigate facts, or ascertain the existence of facts, and draw conclusions from them, as a basis for their official action, and to exercise discretion of a judicial nature."

In the situation that you described, it is unclear whether the Board, following a hearing, renders a determination that is final and binding. If it does so, I believe that its deliberations would be quasi-judicial and, therefore, exempt from the requirements of the Open Meetings Law. It is noted, however, that even when the deliberations of a board of education may be outside the coverage of the Open Meetings Law, its vote and other matters would not be exempt. As stated in Orange County Publications v. City of Newburgh:

> "there is a distinction between that portion of a meeting...wherein the members collectively weigh evidence taken during a public hearing, apply the law and reach a conclusion and that part of its proceedings in which its decision is announced, the vote of its members taken and all of its other regular business is conducted. The latter is clearly non-judicial and must be open to the public, while the former is indeed judicial in nature, as it affects the rights and liabilities of individuals" [60 AD 2d 409,418 (1978)].

Therefore, even if the Board may deliberate in private, based upon the decision cited above, the act of voting or taking action must in my view occur during a meeting.

Moreover, both the Freedom of Information Law and the Open Meetings Law impose record-keeping requirements upon public bodies, such as boards of education. With respect to minutes of open meetings, §106(1) of the Open Meetings Law states that:

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

The minutes are not required to indicate how the Board reached its conclusion; however, I believe that the conclusion itself, i.e., a motion or resolution, must be included in minutes. I note, too, that since its enactment, the Freedom of Information Law has contained a related requirement in §87(3). The provision states in part that:

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

In short, because a board of education is a "public body" and an "agency", I believe that it is required to prepare minutes in accordance with §106 of the Open Meetings Law, including a record of the votes of each member in conjunction with §87(3)(a) of the Freedom of Information Law.

Lastly, even if a hearing is exempt from the coverage of the Open Meetings Law, based on a decision rendered by the Court of Appeals, the state's highest court, it is questionable whether a hearing may be closed. In Herald Company, Inc. v. Weisenberg [59 NY2d 378 (1983)], it was held

that administrative and quasi-judicial proceedings are presumptively open to the press and the public, and that those proceedings may be closed only upon a showing of "compelling circumstances." Whether the holding in Herald Company would be applicable to the hearings that you described has not, to my knowledge, been determined.

I hope that I have been of assistance.

RJF:tt

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June 22, 2005

E-Mail

TO: Steve O'Shaughnessy

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. O'Shaughnessy:

As you aware, I have received your letter. Please accept my apologies for the delay in response.

You indicated that you are a member of a planning board that regularly meets at 5 pm on the third Thursday of the month. Because a quorum had not arrived by that time, you were about to contact a board member who had not arrived, and at that time you met individuals who said that they would be attending the meeting concerning their site plan, which had not yet been submitted. You wrote that you "told them that [you] didn't have a quorum yet and that they were not on the agenda that night because while we had had a pre-submission conference the previous month, they not submitted plans yet." Another member of the board arrived at 5:35 and the board began its meeting. Those individuals apparently complained to the town supervisor who, in your words, "said that [you] were wrong for conducting the meeting because it was too late after the scheduled time." You have asked whether that is so.

In short, there is nothing in the Open Meetings Law that addresses the kind of situation that you described. In my view, however, every law should be implemented reasonably. Under the circumstances, it would have been reasonable in my opinion to have informed those present that a quorum had not yet arrived, that the start of the meeting would be delayed, and that it could be anticipated that the meeting would begin by an approximate time. From my perspective, there would have been nothing to prohibit the board from beginning its meeting late, so long as those present were informed that a meeting would indeed be held.

I hope that I have been of assistance.

RJF:jm

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June 23, 2005

E-Mail

TO: Ann Fanizzi

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. Fanizzi:

As you aware, I have received your letter. Your kind words are much appreciated, and I hope that you will accept my apologies for the delay in response. The issue that you raised involves the ability of non-residents to speak at a town board meeting.

In this regard, 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), the Law 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, I believe that it should do so based upon rules that treat members of the public equally.

While public bodies have the right to adopt rules to govern their own proceedings (see e.g., Town Law, §63), the courts have found in a variety of contexts that such rules must be reasonable. For example, although a board of education may "adopt by laws and rules for its government and operations", in a case in which a board's rules prohibited the use of tape recorders at its meetings, the Appellate Division found that the rule was unreasonable, stating that the authority to adopt rules "is not unbridled" and that "unreasonable rules will not be sanctioned" [see Mitchell v. Garden City Union Free School District, 113 AD 2d 924, 925 (1985)]. Similarly, if by rule, a public body chose to permit certain citizens to address it for ten minutes while permitting others to address it for three, or not at all, such a rule, in my view, would be unreasonable.

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

I hope that I have been of assistance.

RJF:jm

cc: Town Board

OML-AO-3997

From: Robert Freeman
To: Connie Sowards
Date: 6/29/2005 8:17:32 AM
Subject: Re: Question on notification

Good morning - -

Under §104 of the Open Meetings Law, if a meeting is scheduled less than a week in advance, a public body is required to provide notice of the time and place of the meeting to the news media and by means of posting, "to the extent practicable" at a reasonable time prior to the meeting. I point out that the law does not require a public body to pay to place a legal notice in a newspaper. Similarly, when a news media organization receives notice of a meeting, it is not obliged to publish or publicize the notice.

In the context of your questions, that notice does not reach a newspaper in time to publish is not critical; the newspaper can send a reporter to attend the meeting. So long as notice has been given to the news media and posted in one or more designated, conspicuous public locations, the requirements of the Open Meetings Law would be met. There is nothing in the law pertaining to notice given via the internet. While I believe providing notice on a municipality's website is a favorable practice, it is not required, and it is doubtful in my view that court would find that notice given in that fashion would be considered a "posting."

I hope that I have been of assistance.

[redacted]

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July 12, 2005

E-Mail

TO: Cora Edwards

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. Edwards:

I have received your correspondence concerning your efforts in obtaining information relating to a proposed development in Swan Lake.

One of your questions involves your request that a second public hearing be held. In this regard, the advisory jurisdiction of the Committee on Open Government pertains to "meetings" and the Open Meetings Law. Provisions concerning "hearings" are separate and distinct, and I have neither the expertise nor the jurisdiction to offer guidance or advice concerning the possibility that a second public hearing may be required. Since the issues appear to involve environmental matters, it is suggested that you seek guidance from the regional office of the Department of Environmental Conservation.

Other questions relate to minutes of meetings of the Planning Board, and you referred audio tapes of meetings that had not yet been transcribed. Here I point out that there is no requirement that minutes consist of a verbatim account of all that is expressed during meetings, nor is there an obligation to prepare transcripts of tape recordings of meetings. If a transcript is prepared, it constitutes a "record" that would be accessible under the Freedom of Information Law. If, however, no transcript has been or will be prepared, a tape recording of an open meeting is also a record that would be accessible under that statute, and it was so held more than twenty-five years ago (see Zaleski v. Hicksville Union Free School District, Supreme Court, Nassau County, NYLJ, December 27, 1978).

The Open Meetings Law contains what might be viewed as minimum requirements concerning the contents of minutes, and in addition, it provides direction concerning the time within which minutes must be prepared and made available. 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 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."

Subdivision (3) deals specifically with the time within which minutes must be prepared and made available, a period of two weeks with respect to minutes of open meetings, and one week when action is taken during executive sessions.

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

I hope that I have been of assistance.

RJF:jm

cc: Planning Board

STATE OF NEW YORK
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July 13, 2005

Hon. Frederick J. Amato
Monroe County Legislator
[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 Legislator Amato:

I have received your letter and the materials attached to it. Please accept my apologies for the delay in response.

You have sought an advisory opinion concerning the applicability of the Freedom of Information and Open Meetings Laws to the Monroe County Internal Audit Committee (hereafter "the Committee"), for you have been told that the Committee's meetings, its reports and its "Audit Committee Plan" are "not open to public scrutiny."

From my perspective, the meetings of the Committee fall within the requirements of the Open Meetings Law, and its records are subject to rights conferred by the Freedom of Information Law. This is not intended to suggest that meetings of the Committee must necessarily be open to the public in their entirety or that the records to which you referred must be accessible to the public *in toto,* but rather that the meetings of the Committee must be held in accordance with the Open Meetings Law and that its records may be accessible or deniable in whole or in part in accordance with the Freedom of Information Law. In this regard, I offer the following comments.

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

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

It is noted that several decisions indicate generally that ad hoc entities consisting of persons other than members of public bodies having no power to take final action fall outside the scope of the Open Meetings Law. As stated in those decisions: "it has long been held that the mere giving of advice, even about governmental matters is not itself a governmental function" [Goodson-Todman Enterprises, Ltd. v. Town Board of Milan, 542 NYS 2d 373, 374, 151 AD 2d 642 (1989); Poughkeepsie Newspapers v. Mayor's Intergovernmental Task Force, 145 AD 2d 65, 67 (1989); see also New York Public Interest Research Group v. Governor's Advisory Commission, 507 NYS 2d 798, aff'd with no opinion, 135 AD 2d 1149, motion for leave to appeal denied, 71 NY 2d 964 (1988)]. In this instance, the entity in question is not ad hoc, for it has a continual existence and has certain legally imposed powers and duties. Moreover, it has been held that an advisory body created by law, which is so in this instance, is a public body subject to the Open Meetings Law [see MFY Legal Services, Inc. v. Toia, 402 NYS 2d 510 (1977)].

The Monroe County Code indicates, however, that the functions of the Committee are not solely advisory. According to excerpts from the Code, copies of which you attached, the Committee is a creation of law [§C6-5(4)(a)], it consists of seven members, and "[a] majority vote of the total Audit Committee (i.e., four votes) is required for Committee approval of any matter" [§C6-5(4)(b)]. The ensuing provision entitled "Powers and duties" states in part that the Committee shall "receive from the Director of Finance on or before March 15, and approve within 30 days of receipt, the presentation of the County's annual internal audit plan...."

In consideration of the foregoing, I believe that the Committee possesses the attributes necessary to conclude that it is a "public body" required to comply with the Open Meetings Law. In short, it consists of seven members, it functions and can carry out its duties only by means of a quorum, i.e., a majority vote of its total membership (see also, General Construction Law, §41), it clearly conducts public business and performs a governmental function for a public corporation, Monroe County, by means of its legal obligation to receive and approve the finance director's internal audit plan.

Second, you asked whether "documents produced" by the Committee, particularly "Internal Audit Reports", are "public documents." In my view, all such documents fall within the coverage of the Freedom of Information Law; their content, however, is the primary factor in determining the extent to which they must be disclosed pursuant to that law.

By way of brief background, the Freedom of Information Law pertains to agency records, and §86(4) defines the term "record" expansively to mean:

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

Based on the definition quoted above, any documents maintained, acquired or produced by the Committee constitute "records" that fall within the scope of the Freedom of Information Law.

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

I note that §C6-5(c)(2) of the County Code states in part that:

> "...the confidentiality of employee records cited in any audit shall be strictly maintained within the Committee. Such records shall be restricted solely to use within the Committee for informational purposes only and shall not be transmitted to the Legislature nor released to the public."

Insofar as the provision quoted above is inconsistent with the Freedom of Information Law, I believe that it is invalid and of no effect. The state's highest court, the Court of Appeals, has held that a request for, a promise or any assertion of confidentiality is all but meaningless; unless one or more of the grounds for denial appearing in the Freedom of Information Law may appropriately be asserted, the record sought must be made available.

Moreover, it has been held by several courts, including the Court of Appeals, that an agency's regulations or the provisions of a local enactment, such as a county code, local law, charter or ordinance, for example, do not constitute a "statute" [see e.g., Morris v. Martin, Chairman of the State Board of Equalization and Assessment, 440 NYS 2d 365, 82 Ad 2d 965, reversed 55 NY 2d 1026 (1982); Zuckerman v. NYS Board of Parole, 385 NYS 2d 811, 53 AD 2d 405 (1976); Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)]. For purposes of the Freedom of Information Law, a statute would be an enactment of the State Legislature or Congress. In short, a local enactment cannot confer, require or promise confidentiality.

There may, however, be portions of the records referenced in §C6-5(c)(2) that may be withheld. I point out that there is nothing in the Freedom of Information Law that deals specifically with employee records or personnel files. The nature and content of those records may differ from one agency to another and from one employee to another. 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 are the factors used in determining the extent to which they are available or deniable under the Freedom of Information Law.

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

There are numerous instances in which portions of employee records are available, while others are not. By means of example, items within a record indicating a public employee's gross pay would be accessible, but items involving charitable contributions, alimony, deductions and the like would be exempt; those latter items are unrelated to the performance of one's official duties. Attendance records indicating time in and out, days and dates of leave claimed have been found to be accessible (see Capital Newspapers, supra), but portions of those records indicating an employee's medical condition could be withheld.

With respect to internal audits and other internal governmental communications, the provision of primary significance §87(2)(g). That provision permits an agency to withhold records that:

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

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

Because the provision cited above refers to "external audits", it has been contended that internal audits, such as those that are the subject of your inquiry, may be withheld in their entirety. Nevertheless, there is nothing in the language of the Freedom of Information Law that pertains specifically to internal audits or that exempts them from disclosure. The fact that external audits must be disclosed does not suggest other records, such as internal audits, are exempt, in their entirety, from disclosure. On the contrary, as stated earlier, all records are presumed to be available, and silence in the law concerning a certain kind of record does not confer confidentiality, but rather a presumption of access. In this instance, an internal audit constitutes "intra-agency" material that is accessible or deniable, in whole or in part, based on its contents.

The paragraph quoted above, other than the first sentence, was quoted in full in Gannett Co. v. Rochester City School District [684 NYS 2d 757, 759 (1998)], and the Supreme Court, Monroe County, agreed with my opinion that portions of internal audits consisting of "statistical or factual tabulations or data" must be disclosed pursuant to subparagraph (i) of §87(2)(g), unless some other basis for denial, i.e., §87(2)(b), may properly be asserted.

I note, too, that the Court of Appeals dealt with a similar contention relating to a different aspect of §87(2)(g). In Gould et al. v. New York City Police Department [89 NY2d 267 (1996)], the agency denied access on the basis of §87(2)(g)(iii), which grants access to "final agency policy or determinations", on the ground that the records sought were not final and did not relate to any event whose outcome had been finally determined. As in Gannett, in which the agency contended that because external audits are accessible, internal audits can be withheld in their entirety, the New York City Police Department argued that because final determinations are public, records other than final may be withheld in their entirety. The Court of Appeals rejected that argument and stated that:

> "...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute *nonfinal* intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers Law §87[2][g][111]). However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (see, Matter of Farbman & Sons v. New York City Health & Hosp. Corp., 62 NY2d 75, 83, supra; Matter of MacRae v. Dolce, 130 AD2d 577)..."

> [Gould et al. v. New York City Police Department, 89 NY2d 267, 276 (1996); emphasis added by Court].

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

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

The Court of Appeals expressed its general view of the intent of the Freedom of Information Law in Gould, stating that:

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

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

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

Based on the language of the law and especially its judicial interpretation, again, those portions of internal audits consisting of statistical or factual information, in my view, must be disclosed, except to the extent that a different exception may be properly asserted.

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 14, 2005

E-MAIL

TO: Gail Yirce

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. Yirce:

I have received your inquiry in which you asked whether "a board of education trustee of a central school district [may] audiotape a meeting without informing other board of education trustees or the public in attendance at those meetings that the meeting is being taped."

From my perspective, based on judicial decisions, any person may record an open meeting of a public body, such as a school board, so long as the use of the recording device is neither disruptive nor obtrusive. Further, permission need not be obtained and notification need not be given to record such a meeting. In this regard, I offer the following comments.

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

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

Notwithstanding Davidson, the Committee on Open Government advised that the use of tape recorders should not be prohibited in situations in which the devices are unobtrusive, for the

presence of such devices would not detract from the deliberative process. In the Committee's view, a rule prohibiting the use of unobtrusive tape recording devices would not be reasonable if the presence of such devices would not detract from the deliberative process.

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

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

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

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

> the judgement annulling the resolution of the respondent board of education" (id. at 925).

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

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

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

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

Based on the foregoing, I believe that you, or any person, would have the right to record open meetings of the Board. Moreover, I do not believe that a person may be required to inform the Board or others of the intent to use a tape recorder at an open meeting, so long as the recording device is used in a manner that is not disruptive or obtrusive.

I hope that I have been of assistance.

RJF:tt

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July 14, 2005

E-Mail

TO: Joseph Granchelli

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. Granchelli:

I have received your inquiry concerning the ability to "audio-tape meetings" of public bodies, such as a village board of trustees, a planning board, or a zoning board of appeals.

In this regard, it is noted at the outset that neither the Open Meetings Law nor any other statute of which I am aware deals 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 determinations cited in the preceding commentary, 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.

I hope that I have been of assistance.

RJF:jm

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July 14, 2005

Hon. Judith H. Carson
Town Clerk
Town of Canandaigua
5440 Routes 5 &20 West
Canandaigua, NY 14424

The staff of the Committee on 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. Carson:

As you are aware, I have received your letter in which you wrote that an item of controversy involves "whether the Town Board minutes should be posted on the Town's web site." You indicated that, in your capacity as Town Clerk, you enter the names and addresses of those who speak at meetings "as part of the record", and that you do so "because in the 'Office of Town Clerk's' handbook put out by the Association of Towns it states that in the minutes 'names and addresses of persons appearing formally before the town board should be made part of the record.'"

You have sought my views concerning the foregoing, and in this regard, I offer the following comments.

First, while I have great respect for the Association of Towns, I know of no provision of law that requires that the names and addresses of those who speak at meetings of town boards or other public bodies be included in the minutes of a meeting or made "part of the record." On the contrary, the provision dealing with the content of minutes of meetings, §106 of the Open Meetings Law, includes what might be characterized as minimum requirements concerning the content 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 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. ..."

Subdivision (1) pertains to minutes of open meetings, and at a minimum, that provision directs that minutes consist of a record or summary of motions, proposals, resolutions, action taken and the votes of the members. While minutes *may* include greater detail, such as the names and addresses of speakers, clearly there is no obligation to do so. In short, again, there is no requirement that minutes of meetings or any other record include the names and addresses of those who speak at meetings.

Second, §103(a) of the Open Meetings Law states meetings of public bodies "shall be open to the general public." Since any person may attend a meeting of a public body, irrespective of his or her status, interest, or residence, I do not believe that person can be required to provide his or her identity or address as a condition precedent to attending or participating in the same manner as other members of the public.

Third, factual situations have been brought to the attention of this office that demonstrate that it may be inappropriate or even dangerous for a speaker to identify himself or herself. Battered women and victims of violence may want to express their views, but, if, for example, they are attempting to protect themselves from abusers or attackers, providing their names and especially their addresses could endanger their lives or safety. In a different context, parents of students may want to express their opinions before a board of education without identifying themselves, for doing so would identify their children, perhaps to their detriment. In short, I believe that there may be valid, justifiable reasons for speakers not identifying themselves or having their names and/or addresses included in minutes of meetings.

Lastly, there are innumerable instances in which records or portions of records, such as names and addresses, are and have historically been available to the public. However, the wisdom of placing those items on a website is, in my opinion, questionable. When a person's name and home address are placed on a website, anyone, anywhere in the world, has the ability to obtain and combine them with other items available in cyberspace by means of various search engines and data mining. When a name and an address are placed on a website, anyone, anywhere has the ability to acquire a variety of additional data about a person and use that information for purposes that cannot be anticipated. Persons identified may be solicited online or by other means; profiles of individuals can be developed; information about a person may be used for illegal purposes or perhaps to transmit viruses that can disable computers or electronic information systems.

In sum, while there is no law that would forbid the Town from including peoples' names and addresses in minutes of meetings or placing minutes on its website, there is nothing in the Open Meetings Law or any other statute that requires that speakers' names and addresses be included. Further, in consideration of the potential uses of personal information placed on a website, it is unwise, in my opinion, to include individuals' names and addresses in minutes that are to placed on a website. I note, too, that minutes of meetings of municipal boards are often accessible via municipalities' websites, but without the inclusion of those items of personal information.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
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OML-AO-4003

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July 15, 2005

E-Mail

TO: Brian Lace

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. Lace:

As you are aware, I have received your letter and related materials concerning the status of a "retreat" to be held by the Warrensburg Central School District Board of Education, to which you were recently elected. A memorandum addressed to you by the Superintendent indicates that the retreat "is the time when the board sets the goals, objectives and board committees for the upcoming school year as well as evaluates the accomplishments or near misses from the previous year." The retreat will be held at a restaurant in North Creek, and it is your view that the gathering would constitute a "meeting" that falls within the coverage of the Open Meetings Law.

I agree with your contention, and in this regard, I offer the following comments.

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

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

I point out that the decision rendered by the Court of Appeals was precipitated by contentions made by public bodies that so-called "work sessions" and similar gatherings held for the purpose of discussion, but without an intent to take action, fell outside the scope of the Open Meetings Law. In discussing the issue, the Appellate Division, 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. Based on the description of the topics to be considered at the retreat as described by the Superintendent, I believe that the gathering at issue would clearly constitute a "meeting" that must be held in accordance with the Open Meetings Law.

Second, there is nothing in the Open Meetings Law or any other provision of law of which I am aware that specifies that meetings of boards of education must be conducted within the boundaries of a school district. Nevertheless, in my view, every provision of law, including the Open Meetings Law, must be carried out in a manner that gives reasonable effect to its intent. Section 100 of that statute, the legislative declaration, states in part that: "It is essential...that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy." In my opinion, a meeting of

a board of education, or any municipal body, must be held at a location where members of the public who might want to attend may reasonably do so.

Lastly, §103(a) of the Open Meetings Law states that meetings of public bodies "shall be open to the general public..." In my opinion, because people are expected to make a purchase at a restaurant, a restaurant is an inappropriate location for conducting a meeting. In short, in my view, the attendance of the public at meetings of public bodies should not relate to or be conditioned on the ability to pay.

I hope that I have been of assistance.

RJF:jm

From: Robert Freeman
To: [redacted]
Date: 7/18/2005 5:26:41 PM
Subject: Dear Ms. Maxwell:

Dear Ms. Maxwell:

I have received your note. While I am not an expert regarding the Education Law, I believe that the information that you were given is accurate, that the Commissioner has no jurisdiction concerning the Open Meetings Law. I am unaware, however, of whether he may have authority to take action against board members or administrators who have admitted to have engaged in violations of law. Again, I do not have detailed knowledge relative to the Commissioner's powers, but it might be worthwhile to contact State Ed to attempt to learn more.

As for the Open Meetings Law, pursuant to §107 of that law, an aggrieved person may initiate a judicial proceeding under Article 78 of the Civil Practice Law and Rules. Such a proceeding must be initiated within four months of the action taken by the Board. A court in such proceeding may in its discretion, and upon good cause shown, invalidate action taken in violation of the Open Meetings Law. I point out that if deliberations occurred in private in contravention of the law but action was later taken in public, the courts have been inconsistent in their treatment of those kinds of situations. On one hand, there is case law indicating that if action is taken in public, even if deliberations occurred in private in violation of law, there is nothing to invalidate; on the other hand, there is also case law dealing with the situation in which action was effectively taken in private and later merely confirmed by a public vote, in which the court invalidated the action. In short, unless action was clearly taken in private, the likelihood of invalidation of action is diminished.

The text of the Open Meetings Law is available on our website. Should any further questions arise, please feel free to contact me.

I hope that I have been of assistance.

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July 20, 2005

E-MAIL

TO: Carl Falk

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Mr. Falk:

I have received your letter and apologize for the delay in response. You referred to executive sessions held by the Richland Town Board that are scheduled in advance of meetings, as well as executive sessions held to discuss "contracts." Additionally, I note that a copy of a determination following a request for records was sent to this office by the Town Supervisor in which he denied your appeal. That, too, will be addressed in 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. I understand that the intent was to be considerate to the public, and by indicating that an executive session is likely to be held (rather than *scheduled*), the public would implicitly be informed that there may be no overriding reason for arriving at the beginning of a meeting.

Second, paragraphs (a) through (h) of §105(1) specify and limit the grounds for entry into executive session. The only reference in §105(1) to "contracts", "negotiations" or "contract negotiations" appears in paragraph (e). The provision pertains only to collective bargaining negotiations involving a public employee union and would clearly be inapplicable in the context of the situation that you described.

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

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

> employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation..."

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

In short, a more precise or artful motion for entry into executive session might resolve some of the difficulties encountered.

Lastly, in determining your appeal under the Freedom of Information Law, the Supervisor wrote that "all interagency and intra-agency materials that are not final agency policy or determinations exempt from access..." Based on the language of the law and its interpretation by the state's highest court, the Court of Appeals, the Supervisor's contention is inaccurate. While the provision to which he referred, §87(2)(g), governs rights of access, due to its structure, it may require disclosure, depending on the contents of the records.

Specifically, §87 (2)(g) enables an agency to withhold records that:

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

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

One of the contentions offered by the New York City Police Department in a decision rendered by the Court of Appeals was that certain reports could be withheld because they are not

final and because they relate to incidents for which no final determination had been made. The Court of Appeals rejected that finding and stated that:

> "...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers Law §87[2][g][111]). However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (see, Matter of Farbman & Sons v. New York City Health & Hosp. Corp., 62 NY2d 75, 83, supra; Matter of MacRae v. Dolce, 130 AD2d 577)..." [Gould et al. v. New York City Police Department, 87 NY2d 267, 276 (1996)].

In short, that a record is predecisional or does not represent a final policy or determination does not necessarily signify an end of an analysis of rights of access or an agency's obligation to review the contents of a record.

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

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

In my view, insofar as the records at issue consist of statistical or factual information or other items accessible under subparagraphs (ii), (iii) or (iv) of §87(2)(g), they must be disclosed, unless a different basis for denial of access may properly be asserted.

I hope that I have been of assistance.

RJF:tt

cc: Town Board
Hon. James Atkinson

OML-AO-4006

From: Robert Freeman
To: Fred Isseks
Date: 7/20/2005 12:49:37 PM
Subject: Re: Middletown schools, again

Dear Fred Isseks:

Thanks for your kind words.

With respect to the issue, based on a statute entitled "Quorum and majority" that was enacted in 1909, §41 of the General Construction Law, a public body, such as a board of education, can take action only upon an affirmative vote of a majority of its total membership, notwithstanding absences or vacancies. Therefore, if a board consists of nine members when each position is occupied, five affirmative votes would be needed to take action, regardless of the number of vacancies or absent members.

There are many opinions available on our website that deal with the issue from various vantage points, and you might want to review advisory opinions rendered under the Open Meetings Law. When you have reached the page with the index to opinions, click on to "Q" for "quorum" and "A" for "Abstention from Voting."

I hope that I have been of assistance.

Robert J. Freeman
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July 22, 2005

E-MAIL

TO: Jeff Conlon

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. Conlon:

As you are aware, I have received your letter. Please accept my apologies for the delay in response. You have asked whether members of a board may "discuss what was discussed in executive session after the topic of that session is voted on and finalized" and whether a board member must indicate to you "what happen[ed] in exec. session."

In this regard, first, there is no requirement that a board member speak with you or describe what occurred during an executive session.

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

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

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

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

While there may be no prohibition against disclosure of the information acquired during executive sessions or records that could be withheld, the foregoing is not intended to suggest such disclosures would be uniformly appropriate or ethical. Obviously, the purpose of an executive session is to enable members of public bodies to deliberate, to speak freely and to develop strategies in situations in which some degree of secrecy is permitted. Similarly, the grounds for withholding records under the Freedom of Information Law relate in most instances to the ability to prevent some sort of harm. In both cases, inappropriate disclosures could work against the interests of a public body as a whole and the public generally. Moreover, a unilateral disclosure by a member of a public body might serve to defeat or circumvent the principles under which those bodies are intended to operate.

Historically, I believe that public bodies were created to order to reach collective determinations, determinations that better reflect various points of view within a community than a single decision maker could reach alone. Members of boards should not in my opinion be unanimous in every instance; on the contrary, they should represent disparate points of view which, when conveyed as part of a deliberative process, lead to fair and representative decision making. Nevertheless, notwithstanding distinctions in points of view, the decision or consensus by the

majority of a public body should in my opinion be recognized and honored by those members who may dissent. Disclosure made contrary to or in the absence of consent by the majority could result in unwarranted invasions of personal privacy, impairment of collective bargaining negotiations or even interference with criminal or other investigations. In those kinds of situations, even though there may be no statute that prohibits disclosure, release of information could be damaging to individuals and the functioning of government.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
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July 26, 2005

E-MAIL

TO: Regina Lepsch

FROM: Robert 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. Lepsch:

I have received your inquiry concerning the notice requirements pertaining to a "special board meeting."

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

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

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 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.

RJF:tt

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July 26, 2005

Ms. Cheryl Holmes
Citizens for True and Honest Government
P.O. Box 477
Fulton, NY 13069

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

Dear Ms. Holmes:

I have received your letter concerning the First Fire District in Granby and the Granby Center Fire Department. Because the jurisdiction of this office is limited matters involving the Freedom of Information and Open Meetings Laws, the following comments will relate to your questions in which those laws are implicated.

It is noted at the outset that the First Fire District and the Granby Center Fire Department are separate entities. I believe, however, that both are required to comply with the Freedom of Information Law, as well as the Open Meetings Law.

By way of background, the Freedom of Information Law pertains to agency records, and 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.

Section 174(6) of the Town Law states in part that "A fire district is a political subdivision of the state and a district corporation within the meaning of section three of the general corporation law". Since a district corporation is also a public corporation [see General Construction Law, §66(1)], a fire district is an "agency" that falls within the coverage of the Freedom of Information Law.

I point out that the status of volunteer fire companies had been unclear for several years. 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. I note that the records at issue in that case involved a lottery conducted by a volunteer fire company, and the Court found that those records were subject to rights of access conferred by the Freedom of Information Law.

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

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

Based on the foregoing, an agency was required to grant access to records, deny access or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgement was given, it was required to include an approximate date indicating when it would be anticipated that a request will be granted or denied.

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

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

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 was given within five business days, if an agency delayed responding for an unreasonable time after it acknowledged that a request had been received, or if the acknowledgement of the receipt of a request failed to include an estimated date for granting or denying access, a request, in my opinion, would 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 could 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 was made but a determination was 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 exhausted his or her administrative remedies and could 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 note that the Freedom of Information Law was recently amended, and as of May 3, when an agency receives a request, §89(3) of the Freedom of Information Law requires that it has five business days to grant or deny access in whole or in part, or if more time is needed, to acknowledge the receipt of the request in writing. The acknowledgment must include an approximate date that indicates when an agency will grant or deny the request. The date must be reasonable under the circumstances of the request, and in most instances, it cannot exceed twenty additional business days. If more than twenty additional business days is needed, the agency must provide an explanation and a date certain within which it will grant or deny the request in whole or in part.

That date, too, must be reasonable in consideration of the facts (i.e., the volume or complexity of the request, the need to search for records, or the obligation to review records to determine rights of access). The amendments specify that a failure to comply with any of the time periods would constitute a denial of a request that may be appealed. The person designated to determine the appeal has ten business days to grant access or fully explain in writing the reasons for further denial. The law now also makes clear that a failure to determine the appeal within ten business days constitutes a denial of the appeal, and that the person denied access may initiate a judicial proceeding to challenge the denial of access.

It is noted that it has been held that an agency may require payment of fees for copies of records prior to making copies available to an applicant [see Sambucci v. McGuire, Supreme Court, New York County, November 4, 1982].

Next, the Open Meetings Law is applicable to meetings of public bodies, and §102(2) of that 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."

The governing body of a fire district, which, again, is a public corporation, is a board of fire commissioners, which is clearly a "public body" required to comply with the Open Meetings Law. Additionally, 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.

Lastly, both the Freedom of Information Law and the Open Meetings Law are based on a presumption of openness. In the case of the former, the law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In the case of the latter, meetings of public bodies are required to be held open to the public, unless there is a basis for entry into executive session. Paragraphs (a) through (h) of §105(1) specify and limit the grounds for entry into executive session. That being so, a public body cannot conduct an executive session to discuss the subject of its choice.

Enclosed for your review are copies of the Freedom of Information and Open Meetings Laws.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: First Fire District
Granby Center Fire Department

Encs.

FOIL-AO-15398
OML-AO-4010

From: Robert Freeman
To: Freer
Date: 7/27/2005 9:19:40 AM
Subject: Re: District Clerk Workshop

Good morning:

During the sessions at NYSASBO during which I spoke, no mention was made of any requirement that minutes of a meeting of a board of education must indicate the time when board members arrive late or leave prior to the conclusion of the meeting. The Open Meetings Law does not address that issue, and while I am not an expert regarding the Education Law, I know of no provision within that body of law that offers specific direction.

I recall indicating that the Open Meetings Law includes what might be characterized as minimum requirements concerning the contents of minutes (see §106). At a minimum, they must consist of a record or summary of all motions, proposals, resolutions, and the vote of the members. It is emphasized, too, that the Freedom of Information Law, §87(3)(a), has long required that a record be maintained that indicates the final vote of each member in every instance in which the member votes. The record of votes appears in the minutes and clearly precludes secret ballot voting or its equivalent. If the vote is 4 to 3, the minutes must identify which 4 members voted in the affirmative and the 3 in the negative.

The foregoing is not intended to suggest that the times that board members arrive late or leave early should not be included in the minutes; on the contrary, it may be wise and appropriate to include entries of that nature. I am merely suggesting that I know of no law that requires that the information at issue must be included in the minutes.

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

Robert J. Freeman
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NYS Committee on Open Government
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July 28, 2005

Ms. Diane Schena
[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. Schena:

I have received your letter and apologize for the delay in response. You wrote that you serve as a member of the Board of Commissioners of the Providence Fire District, and that in that capacity, you have sought to attend meetings of the Providence Volunteer Fire Department. You have raised a series of issues concerning the Department's obligation to comply with the Open Meetings Law.

Before offering a perspective regarding information that you provided, I point out that the statutory functions of this office in relation to the Open Meetings Law are advisory in nature. The Committee does not have the authority or the resources to conduct investigations, nor is it empowered to determine that an entity or person has complied with or "violated" the law. The following remarks should, therefore, be viewed as an opinion that is advisory.

In considering whether volunteer fire departments or companies are subject to the Open Meetings Law, it is necessary to reference a decision rendered by the Court of Appeals, the state's highest court, concerning its statutory companion, the Freedom of Information Law. By way of background, I note that the status of volunteer fire companies had been unclear for several years. 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.

The Open Meetings Law is applicable to meetings of public bodies, and §102(2) of that 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."

By reviewing the components in the definition of "public body", I believe that each is present with respect to the governing body of a volunteer fire company. The governing body 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. Since each of the elements in the definition of "public body" pertains to the board of a volunteer fire company, I believe that the governing body of such a company is a "public body" subject to the Open Meetings Law.

As indicated in the definition quoted above, a committee or subcommittee of a public body is itself a public body. Therefore, if, for example, the governing body of a volunteer fire company designates two or more of its members as a committee or subcommittee, that entity in my opinion would fall within the coverage of the Open Meetings Law.

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.

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..."

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.

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.

In the context of the situation at issue, I do not believe that a discussion of the "leadership style" of the Board's president would have fallen within the coverage of §105(1)(f).

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

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

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

see, Matter of Orange County Publs., Div. of Ottaway Newspapers v County of Orange, 120 AD2d 596, lv dismissed 68 NY 2d 807).

"Applying these principles to the matter before us, it is apparent that the Board's stated purpose for entering into executive session, to wit, the discussion of a 'personnel issue', does not satisfy the requirements of Public Officers Law § 105 (1) (f). The statute itself requires, with respect to personnel matters, that the discussion involve the 'employment history of a particular person" (id. [emphasis supplied]). Although this does not mandate that the individual in question be identified by name, it does require that any motion to enter into executive session describe with some detail the nature of the proposed discussion (see, State Comm on Open Govt Adv Opn dated Apr. 6, 1993), and we reject respondents' assertion that the Board's reference to a 'personnel issue' is the functional equivalent of identifying 'a particular person'" [Gordon v. Village of Monticello, 620 NY 2d 573, 575; 207AD 2d 55, 58 (1994)]

With respect to 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".

Lastly, you asked whether town justices "are trained in the Open Meetings Laws..." I would conjecture that knowledge of the Open Meetings Law is not required of town justices. The Open Meetings Law in §108(1) exempts judicial proceedings from its coverage. In short, while public bodies are subject to the requirements of the Open Meetings Law, the courts are not.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Providence Volunteer Fire Department

STATE OF NEW YORK
DEPARTMENT OF STATE
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July 29, 2005

Mr. Rob Howard
Editor in Chief
The Daily Orange
744 Ostrom Avenue
Syracuse, NY 13210

The staff of the Committee on 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. Howard:

I have received your letter and apologize for the delay in response.

You wrote that you serve as editor in chief of the *Daily Orange*, the student run newspaper at Syracuse University and the SUNY College of Environmental Science and Forestry (ESF). The University's student association (the SA) has contended that it is not a "public agency" and therefore is not subject to either the Freedom of Information or Open Meetings Laws. You wrote that:

> "The question of the SA's status stems from the fact that it represents the students of Syracuse University, a private institution, and SUNY-ESF, a public institution. The two schools are inextricably linked; their campuses are adjacent, and their students can live in the same residence halls and take the same classes. As part of this relationship, SU and SUNY-ESF students pay a mandatory activity fee--for ESF students, $36 per year goes directly to SU. The sum of the activity fees in then divided among student groups by the Student Association.
>
> "There is no question that the Student Association received money from the mandatory fee paid by SUNY-ESF students, and the SA constitution makes clear that the organization represents all the matriculated undergraduates enrolled in both schools. Even the organizations official name, the 'SU and SUNY-ESF Student Association,' shows the SA's attachment to the public institution."

In this regard, as you may be aware, it has been held that student government organizations at colleges within the SUNY and City University of New York systems are subject to both the Freedom of Information Law and Open Meetings Law [see e.g., Smith v. CUNY, 92 NY2d 707 (1999); Wallace v. City University of New York, Supreme Court, New York County, NYLJ, July7; 2000; Stony Brook Statesman v. Associate Vice Chancellor for University Relations, Supreme Court, Ulster County, January 22, 1996]. In each of those instances, the organizations were associated with wholly governmental entities. More analogous to the situation that you described is Cornell University. Many of the institutions within the University are private, but in addition, there are four "statutory" colleges that are in some respects extensions of the State University. The Court of Appeals, the state's highest court, has twice considered the status of Cornell under the Freedom of Information Law.

In the first, Stoll v. NYS College of Veterinary Medicine [94 NY2d 162 (1999)], the request involved records of complaints brought under the University's Campus Code of Conduct relating to any administrator, professor or student of any statutory college. Because "the Legislature has chosen to vest Cornell – with discretion over the 'maintenance of discipline' at the four statutory colleges....there is no statutory provision for oversight by the SUNY Trustees, or for any appeal to the SUNY Board...[and] the disciplinary records of the statutory colleges and the private colleges are all held by the same private office of the University" (id., 167-168). That being so, because the records were not unique to the statutory colleges or under the direct control of SUNY, the Court concluded that the records fall beyond the scope of the Freedom of Information Law.

The second decision, Alderson v. NYS College of Agriculture and Life Sciences [4 NY3d 225 (2005)], involved a request for records relating to research and other activities conducted by a unit of one of the statutory colleges, and the Court asserted that "the proper inquiry is whether the documents requested under FOIL relate to an activity over which Cornell, as manager of the statutory colleges, exercises autonomy and control" (id., 232). In finding that it does, it was determined that:

> "Neither the SUNY trustees nor any other state agency participate in decisions relating to prospective or ongoing research pursuits. Because Cornell is vested by statute with broad authority over 'all matters pertaining to....educational policies, activities and operations, including research work' at CALS and the Agricultural Experiment Station, documents relating to those activities involve a private function and are therefore not subject to FOIL" (id.,232-233).

In those instances in which, to use your words, Syracuse University and ESF are "inextricably linked", records relating to those functions would, according to the Court of Appeals, be beyond the coverage of the Freedom of Information Law.

I note that the Court in Alderson determined that Cornell is "subject to certain financial reporting requirements to allow state officials to track the expenditure of state funds" and that [t]o the extent that Cornell is accountable for the expenditure of public funds, it is performing a public

function"(id., 233). When that is so, it was found that records "relating to this activity are subject to FOIL" (id.). In like manner, §6005 concerning SUNY-ESF states that:

> "The state university trustees shall maintain general supervision over the requests for appropriations, budget, estimates and expenditures of such college. All moneys received from state appropriations for such college shall be expended upon vouchers approved by the chancellor of the state university, as the chief administrative officer of the state university, or by such authority or authorities in the state university as shall be designated by the chancellor by a rule or written direction filed with the comptroller, when and in the manner authorized by the state university trustees."

The records of the Student Association do not appear to distinguish between student of Syracuse University and SUNY-ESF. If that is so, I do not believe that the Freedom of Information Law would apply. However, those prepared to comply with §6005 of the Education Law would appear to fall within the scope of that law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF;tt

STATE OF NEW YORK
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OML-AO-4013

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August 1, 2005

Darleen Reveille
Garfield Health Department
60 Elizabeth Street
Garfield, NJ 07026

The staff of the Committee on 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. Reveille:

As you are aware, I have received your letter. I hope that you will accept my apologies for the delay in response.

Attached to your correspondence is a copy of a publication of "SOCA at Work" in which you highlighted a passage that you "feel indicates a violation of the Open Meetings Law." The passage reads as follows:

> "We also wish to acknowledge the assistance of SOCA At Work, spearheaded by Jonathan Swiller, who, according to Supervisor Sheila Conroy, was instrumental in facilitating opening of these discussions. Jonathan's efforts were invaluable, added Councilwoman Lorraine McNeil, who participated in discussions, along with Town Suepervisor Sheila Conroy, and Town Council member Gerri Gianzero with the support of Council woman Colleen Campbell."

The foregoing suggests that certain discussions occurred, and that four members of the Woodbury Town Board participated.

In this regard, the issue is whether the discussions to which the publication refers constituted "meetings" of the Town Board. In short, when a majority of public body, such as a town board, gathers to conduct public business, any such gathering constitutes a meeting that falls within the coverage of the Open Meetings Law.

By way of background, I note that the definition of "meeting" [see Open Meetings Law, §102(1)] has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the

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

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

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

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

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

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

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

"meeting" if a quorum of the body is present for the purpose of conducting public business collectively as a body.

In the context of the situation described, it is unclear whether there may have been a series of discussions, and whether those discussions might have included the presence of one or two Board members, or perhaps a majority of the Board. Insofar as those gatherings included less than a majority of the Board, I do not believe that the Open Meetings Law would have applied. On the other hand, if a majority of the members of the Board attended and functioned as a body, I believe that the Open Meetings Law would have applied, for those gatherings in my view would have constituted "meetings" of the 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

FOIL-AO-4014

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August 1, 2005

E-MAIL

TO: William Costigan

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. Costigan:

As you are aware, I have received your letter. Please accept my apologies for the delay in response.

You have asked whether a majority of the members of a board of education may meet "without public notice" with a "PTA group" prior to the adoption of a budget for the purpose of making "a presentation to the voters of the community."

In this regard, when a majority of public body, such as a school board, gathers to conduct public business, collectively, as a body, any such gathering constitutes a meeting that falls within the coverage of the Open Meetings Law.

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

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

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

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

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

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

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

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

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

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

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

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
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August 3, 2005

E-Mail

TO: Valerie Malta

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. Malta:

As you are aware, I have received your letter. Please accept my apologies for the delay in response. The matter relates to a prohibition concerning your ability to video record meetings of a village board of trustees. You wrote that "the recorder fits in the palm of [your] hand", and you asked whether you have the right to record the proceedings.

From my perspective, which is based on a series of judicial decisions, those meetings may be recorded, so long as the use of a recording device is neither obtrusive nor disruptive.

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

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

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

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

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

Several years later, the Appellate Division unanimously affirmed a decision of Supreme Court, 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, or the absence thereof, 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).

In the most recent decision involving the use of recording devices at meetings, the Appellate Division, Second Department, confirmed my views as expressed above by citing and relying upon an opinion addressed to the petitioner [Csorny v. Shoreham-Wading River Central School District, 305 AD2d 83 (2003)]. In short, there is considerable authority indicating that a public body, such as a village board of trustees, cannot prohibit the use of a recording device at its open meetings, so long as the use of the device is not obtrusive or disruptive.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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August 5, 2005

Mr. Robert D. Lonski
Administrator
Erie County Bar Association
107 Delaware Avenue
670 Statler Towers
Buffalo, NY 14202-2906

The staff of the Committee on 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. Lonski:

I have received your letter and hope that you will accept my apologies for the delay in response.

You have requested an advisory opinion concerning whether or the extent to which the Open Meetings Law applies to "the Erie County Bar Association Aid to Indigent Prisoners Society, Inc. [hereafter 'the Program'], commonly known as the Assigned Counsel Program." You wrote that:

> "This organization is a private not-for-profit member corporation, whose sole member is the Bar Association of Erie County. It is governed by a Board of Directors which, pursuant to its bylaws, must have a quorum at its meetings in order to conduct business. Funding for the program is provided primarily by the County of Erie and the State of New York Its sole purpose is to provide legal counsel pursuant to the plan of the county and the Bar Association of Erie County in accordance with Article 18-B of the County Law.
>
> "The County of Erie contracts with two not for profit organizations to provide legal representation pursuant to Article 18-B. One is The Legal Aid Bureau of Buffalo, which provides such representation only in Buffalo City Court, and which is also a not-for-profit corporation. The other is the Assigned Counsel Program, which provides representation in all local, County, and Supreme Courts in Erie County. Neither employees of the Assigned Counsel Program itself nor the attorneys who provide legal services through the

> Program are employees of the County of Erie. Consequently, none of these employees or attorneys receive government benefits, including participation in the state retirement system. The same is true of employees and attorneys of The Legal Aid Bureau."

Although questions have arisen in the past concerning rights of access to records conferred by the Freedom of Information Law in relation to assigned counsel or "Article 18-B" programs, your question involves a matter of first impression. In considering the status of the Board of Directors of the Program under the Open Meetings Law, it is useful in my view to refer to essentially the same issue as it has arisen under the Freedom of Information Law.

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."

As such, the Freedom of Information Law generally applies to records maintained by state and local government; it would not ordinarily apply to a private organization.

As you are aware, Article 18-B, encompasses §§722 to 722-f of the County Law. Under §722, the governing body of a county and the City Council in New York City are required to adopt plans for providing counsel to persons "who are financially unable to obtain counsel." Those plans may involve providing representation by a public defender, by a legal aid organization, through a bar association, or by means of a combination of the foregoing.

While I believe that the records of the governmental entity required to adopt a plan under Article 18-B are subject to the Freedom of Information Law, the records of an individual attorney or private organization performing services under Article 18-B may or may not be subject to the Freedom of Information Law, depending upon the nature of the plan. For instance, if a plan involves the services of a public defender, I believe that the records maintained by an office of public defender would fall within the scope of the Freedom of Information Law (see County Law, §716), for that office in my view would constitute an "agency" as defined in §86(3). However, if it involves services rendered by private attorneys or associations, those persons or entities would not in my view constitute agencies subject to the Freedom of Information Law.

The Erie County Bar Association and the Program are not, in my opinion, "agencies" subject to the Freedom of Information Law. However, if a bar association, for example, or other organization maintains records for a county, I believe that those records would constitute county records. The Freedom of Information Law pertains to all agency records, and §86(4) of that statute defines the term "record" expansively to include:

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

Based upon the language quoted above, documents need not be in the physical possession of an agency to constitute agency records; so long as they are produced, kept or filed for an agency, the courts have held they constitute "agency records", even if they are maintained apart from an agency's premises.

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

In sum, insofar as records are maintained for the County, I believe that the County would be required to direct the custodian of the records to disclose them in accordance with the Freedom of Information Law, or obtain them in order to disclose them to the extent required by law.

The Open Meetings Law is applicable to public bodies, and §102(2) of that 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 generally applies to governmental bodies. However, in Smith v. City University of New York [92 NY2d 707 (1999)], the Court of Appeals held that a student government association carried out various governmental functions on behalf of CUNY and, therefore, that its governing body is subject to the Open Meetings Law. In its consideration of the matter, the Court found that:

> "in determining whether the entity is a public body, various criteria or benchmarks are material. They include the authority under which the entity is created, the power distribution or sharing model under which it exists, the nature of its role, the power it possesses and under

> which it purports to act, and a realistic appraisal of its functional relationship to affected parties and constituencies" (id., 713).

You wrote that two not-for-profit entities provide legal representation under the County's Article 18-B program, one of which is the Legal Aid Bureau of Buffalo. If that entity is similar to other legal aid organizations, it performs numerous law related functions that are carried out in a variety of contexts. One element of those functions involves the 18-B program. In contrast, you wrote that the "sole purpose" of the Program "is to provide legal counsel pursuant to the plan of the county and the Bar Association of Erie County in accordance with Article 18-B..." If my understanding is accurate, the Program would not exist, but for its relationship with the County. Its umbrella organization, the Bar Association, performs a variety of functions, and it is my opinion that the Bar Association does not fall within the coverage of the Open Meetings Law. The only function of the Program, however, involves carrying out duties in accordance with Article 18-B pursuant to a contract with the County. That being so, because its only functions are carried out for the County, it appears that its Board of Directors constitutes a "public body" subject to the Open Meetings Law.

Further, by breaking the definition of "public body" into its components, it appears that each condition necessary to a finding that the Board of the Program is a "public body" may be met. It is an entity for which a quorum is required pursuant to the provisions of the Not-for-Profit Corporation Law. It consists of more than two members. In view of the degree of its nexus with the County, it appears to conduct public business and perform a governmental function for a governmental entity.

Notwithstanding the foregoing, as you inferred, even if the Board of Directors of the Program may be characterized as a public body, it is likely that significant aspects of its meetings may be conducted during executive sessions.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
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August 8, 2005

Ms. Patricia Lee
[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. Lee:

I have received your letter in which you asked that I "help [you] and the Board of the Education to understand Executive Session issues." You referred to executive sessions held by the Windsor Central School District Board of Education that involved discussions concerning "personnel." According to your letter, however, the closed sessions were held to discuss the budget and "cutting positions."

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, such as a board of education, 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:

> 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.

Second, the Open Meetings Law is based on a presumption of openness. Paragraphs (a) through (h) of §105(1) specify and limit the grounds for entry into executive session. That being so, a public body cannot conduct an executive session to discuss the subject of its choice. When a public body is discussing its budget, including the addition or elimination of positions, both the language of the law and judicial decisions indicate that there is no basis for conducting an executive session.

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

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

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

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

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

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

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

When a discussion concerns matters of policy, such as the manner in which public money will be expended or allocated, the functions of a department or perhaps the creation or elimination of positions, I do not believe that §105(1)(f) could be asserted, even though the discussion may relate to "personnel". For example, if a discussion 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 compliance and understanding of the Open Meetings Law, a copy of this opinion will be sent to the Board of Education. Additionally, if there is a need to share

information concerning the Open Meetings Law or the Freedom of Information Law with District officials and residents, I am available to conduct a seminar or workshop.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

OML-AO- 4018

From: Robert Freeman
To: [redacted]
Date: 8/10/2005 9:33:32 AM
Subject: http://www.dos.state.ny.us/coog/otext/o2790.htm

http://www.dos.state.ny.us/coog/otext/o2790.htm

Good morning:

I hope that you, too, are enjoying the summer.

Based on your comments, it appears that board members may misunderstand the Open Meetings Law. As indicated in the attached opinion, the Open Meetings Law applies to public bodies, and the definition of "public body" includes governing bodies as well as committees and subcommittees of those bodies. In short, a committee consisting of two or more members of a governing body would itself constitute a "public body" required to comply with the Open Meetings Law.

With respect to quorum requirements, a quorum is a majority of the total membership of a public body. If a governing body consists of seven members, a quorum would be four. If it designates a committee consisting of three of its members, the committee would be a public body, and its quorum would be two.

In the context of your inquiry, I believe that a committee consisting of two members of a town board or a village board of trustees would constitute a public body. If two committees meet jointly, I believe that the Open Meetings Law would be applicable.

I hope that I have been of assistance.

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

OML-AD-4019

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August 11, 2005

E-MAIL

TO: Carl Falk

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. Falk:

I have received your letter concerning the ability of a town board to use "the term 'Legal Opinion' to exclude the public from parts of their meetings."

In this regard, there are two vehicles that may authorize a public body to discuss public business in private. One involves entry into an executive session. Section 102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded, and 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.

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

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

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

In my view, only to the extent that the Board discusses its litigation strategy could an executive session be properly held under §105(1)(d).

I note, too, that the courts have provided direction with respect to the sufficiency of a motion to discuss litigation, it has been held that:

> "It is insufficient to merely regurgitate the statutory language; to wit, 'discussions regarding proposed, pending or current litigation'. This boilerplate recitation does not comply with the intent of the statute. To validly convene an executive session for discussion of proposed,

> pending or current litigation, the public body must identify with particularity *the* pending, proposed or current litigation to be discussed during the executive session" [Daily Gazette Co., Inc. v. Town Board, Town of Cobleskill, 44 NYS 2d 44, 46 (1981), emphasis added by court].

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

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

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

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

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

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

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

into executive session would not apply, there may be a proper assertion of the attorney-client privilege.

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

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

I hope that I have been of assistance.

RJF:tt

cc: Town Board

OML - AO - 4020

From: Robert Freeman
To: A Isselhard
Date: 8/12/2005 12:07:51 PM
Subject: Re: minutes of meetings

Dear Mr. Isselhard:

The advisory jurisdiction of this office relates to the Open Meetings Law; it does not relate to hearings. While I do not believe that there is an obligation to prepare a transcript of a hearing, it is suggested that you seek guidance from an expert on the subject.

With respect to meetings, whether they are regular or special meetings, §106 of the Open Meetings Law provides direction. That statute provides what might be characterized as minimum requirements concerning the contents of minutes. At a minimum, minutes of open meetings must consist of a record or summary of motions, proposals, resolutions, action taken and the vote of each member. There is no requirement that a transcript or verbatim account of what is said during a meeting be prepared.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
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Website - www.dos.state.ny.us/coog/coogwww.html

From: Robert Freeman
To: [redacted]
Date: 8/18/2005 4:55:08 PM
Subject: Dear Mr. Bodin:

Dear Mr. Bodin:

I have received your inquiry in which you asked whether "the Board of Governors Executive Committee meetings of churches [are] required to be open to the public."

In this regard, the Open Meetings Law, the statute within the advisory jurisdiction of this office, is applicable to governmental entities, such as city councils, town boards, boards of education and the like. It does not apply to private entities, such as churches or the organizations associated with them. Further, there is no law of which I am aware that requires the kinds of meetings to which you referred to be open to the general public.

I hope that I have been of assistance.

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STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4022

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August 22, 2005

Hon. Jeffrey K. Branch
Trustee, Village of Saranac Lake
[redacted]

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

Dear Trustee Branch:

I have received your letter, which reached this office approximately three weeks after it is dated. Please accept my apologies for the delay in response.

Your inquiry pertains to the propriety of action taken by means communications via email. One of the issues in my view is whether an action may be taken only by a governing body, such as the Board of Trustees, or whether action may be taken by an administrator, manager or other person. For purposes of the following remarks, it will be assumed that action may only be taken by the governing body.

By way of background, there is nothing in the Open Meetings Law that would preclude members of a public body from conferring individually, by telephone, via mail or e-mail. However, a series of communications between individual members or telephone calls among the members which results in a collective decision, a meeting held by means of a telephone conference, or a vote taken by mail or e-mail would in my opinion be inconsistent with law.

From my perspective, voting and action by a public body, such as a village board of trustees, may be carried out only at a meeting during which a quorum has physically convened, or during a meeting held by videoconference. It is noted that the Open Meetings Law pertains to public bodies, and §102(2) defines the phrase "public body" to mean:

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

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

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

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

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

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

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

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

Conducting a vote or taking action via e-mail would, in my view, be equivalent to voting by means of a series of telephone calls, and in the only decision dealing with a vote taken by phone, the court found the vote to be a nullity. In Cheevers v. Town of Union (Supreme Court, Broome County, September 3, 1998), which cited and relied upon an opinion rendered by this office, the court stated that:

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

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

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

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

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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August 22, 2005

Mr. Francis L. Crumb
[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. Crumb:

I have received your letter and apologize for the delay in response.

You referred to a meeting of the Holland Patent Central School District Board of Education during which a "standing-room-only crowd" attended. At the beginning of the meeting, the Board announced that representatives of an engineering firm would make a presentation concerning a District renovation program. Following that presentation, the Board's presiding officer indicated that there would be a five minute recess. However, "[sitting] in the front row, [you] (along with several others) heard him comment to fellow Board members: 'we need a sidebar.'" The five members then "retired to a glass-enclosed room...where they could be seen conversing." You wrote that "this 'sidebar' meeting had the distinct appearance of an unannounced 'executive session' not sanctioned under the state's Open Meetings Law", and you have sought my views on the matter.

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

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

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

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

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

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

Based upon the direction given by the courts, when a majority of the Board gathers or is present to discuss District business, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law. In the context of the situation that you described, if the "sidebar" involved a discussion of public business by the Board, that gathering in my view would have been part of the meeting, and it should have been conducted in a manner consistent with the Open Meetings Law.

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

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

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

and limit the subjects that may appropriately be considered during an executive session. Therefore, a public body may not conduct an executive session to discuss the subject of its choice.

In an effort to enhance compliance with and understanding of the Open Meetings Law, a copy of this response will be sent to the Board of 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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August 23, 2005

Mr. Arthur Springer
[redacted]

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

Dear Mr. Springer:

I have received your letter and apologize for the delay in response. You have questioned the extent to which a public body may "restrict members of the public from exercising their right of free speech" during a session held to permit the public to speak. You referred to a rule stating that:

> "Speakers must notify DOH at least 48 hrs in advance of their intent to speak at the committee meeting. To get on the agenda, you may call 518-486-3209 or e-mail ppno@health.state.ny.us (please reference P&T Committee). Public comments are limited to the items on the agenda and must be brief. Written material may also be submitted to the Committee if received by DOH at least 48 hours in advance of the meeting. Written material should summarize key points and may not exceed two pages in length."

It is your view that the foregoing is "unreasonably restrictive."

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

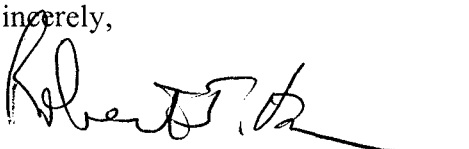
In the case of the New York Open Meetings Law, in a statement of general principle and intent, that statute confers upon the public the right to attend meetings of public bodies, to listen to their deliberations and observe the performance of public officials. However, as you are aware, that

right is limited, for public bodies in appropriate circumstances may enter into closed or executive sessions. As such, it is reiterated that, in my opinion, there is no constitutional right to attend meetings.

Within the language of the Open Meetings Law, there is nothing that pertains to the right of those in attendance to speak or otherwise participate. Certainly a member of the public may speak or express opinions about meetings or about the conduct of public business before or after meetings to other persons. However, since neither the Open Meetings Law nor any other provision of which I am aware provides the public with the right to speak during meetings, I do not believe that a public body is required to permit the public to do so during meetings. Certainly a public body may in my view permit the public to speak, and if it does so, it has been suggested that rules and procedures be developed that regarding the privilege to speak that are reasonable and that treat members of the public equally. From my perspective, a rule authorizing any person in attendance to speak for a maximum prescribed time on agenda items, and those items only, would be reasonable and valid, so long as it is carried out reasonably and consistently.

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

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Medicaid Pharmacy and Therapeutics Committee

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4025

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August 23, 2005

E-MAIL

TO: Brian Minchin

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. Minchin:

I have received your inquiry in which you asked whether a soccer association meeting in a high school auditorium must be held open to the public.

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

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

From my perspective, the association to which you referred clearly falls beyond the coverage of the Open Meetings Law.

However, depending upon its purpose, an event held on school property might be required to be conducted in public, even though the event does not involve a public body or the Open Meetings Law. The Education Law enables a board of education to authorize that school property be used for various purposes, including:

> "For holding social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community; but such meetings, entertainment and uses shall be non-exclusive and shall be open to the general public" [§414(1)(c)].

Therefore, if an entity meets on school property for a social or civic purpose, or for a purpose pertaining to the welfare of the community, its meetings would appear to be open to the public, even if the Open Meetings Law does not apply.

Based on the facts that you provided, it appears that the meeting that you described would be held for a social or civic purpose. If that is so, it appears that §414 of the Education Law would require that the meeting be open to the public.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4026

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August 24, 2005

E-MAIL

TO: Shelly Cromwell

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. Cromwell:

As you are aware, I have received your letter. Please accept my apologies for the delay in response.

You referred to an executive session during which you believe that action was taken by a board of education. In response to your request for minutes of the executive session, you were told that no such record exists. In this regard, I offer the following comments.

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

Those circumstances would arise, for example, when a board initiates charges against a tenured person pursuant to §3020-a of the Education Law, which requires that a vote to do so be taken during an executive session. The other instance would involve a situation in which action in public could identify a student. When information derived from a record that is personally identifiable to a student, the federal Family Educational Rights and Privacy Act (20 USC §1232g) would prohibit disclosure absent consent by a parent of the student.

Second, 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 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.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4027

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August 25, 2005

Mr. Barton D. Graham
[redacted]

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

Dear Mr. Graham:

I have received your letter and the materials attached to it. Please accept my apologies for the delay in response.

In your capacity as a member of the Elmira City School District Board of Education, you wrote that, due to unusual circumstances, the Superintendent may be both a plaintiff and a defendant in a lawsuit involving the District. That being so, you raised questions concerning "the qualifications or eligibility requirements for membership" in a public body and the authority of a superintendent of schools to attend executive sessions of the Board.

In this regard, §105(2) of the Open Meetings Law states that: "Attendance at an executive session shall be permitted to any member of the public body and any other persons authorized by the public body." Based on that provision, I believe that only the members of a public body, such as a board of education, have the right to attend an executive session. While a public body may permit others to attend, those who are not members have no right to attend.

The issue concerning the superintendent's right to attend emanates from §2508(1) of the Education Law, which states that:

> "The superintendent of schools of a city school district shall possess, subject to the bylaws of the board of education, the following powers and be charged with the following duties:
>
> 1. To be the chief executive officer of the school district and the educational system, and to have a seat on the board of education and the right to speak on all matters before the board, but not to vote."

In consideration of the foregoing, if a superintendent is a member of a board of education, he or she would have the right to attend executive sessions; conversely, if he or she is not considered a member of the board, I do not believe that the superintendent would have the right to do so.

While I am not an expert concerning the Education Law, it appears that §2502(2) indicates who "qualifies" and in fact is a "member" of a city school district board of education. That provision states in relevant part that:

> "Each board of education shall consist of five, seven or nine members, to be known as members of the board of education...Members of such board shall be elected by the qualified voters at large of the school district at annual school district elections..."

As I interpret the language quoted above, the members of a board of education are those persons elected to the board. A superintendent is not elected; rather, he or she is appointed by the board, the governing body of the school district, to serve in his or her position. A superintendent carries out his or her duties pursuant to law, as well as a contract delineating his or her compensation and benefits. Board members do not carry out their duties pursuant to any similar contractual agreement; the voters elect them to serve for specific terms.

In consideration of the foregoing, I do not believe that a superintendent is a member of a board of education, a public body. In my opinion, therefore, a superintendent does not have the right to attend an executive session of the board. Again, a board of education may choose to authorize the attendance of a superintendent at its executive sessions, but in my view, it is not required to do so.

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 15475
OML-AO-4028

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August 25, 2005

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

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

Dear Ms. Clearwater:

I have received your letter and the memorandum relating to it. Please accept my apologies for the delay in response.

You indicated that the Hyde Park Town Board conducted an executive session that you did not attend, and when it reconvened in public, "the Supervisor announced that two (2) decisions were made." On the following day, you contacted the Town Attorney to request that he verify that a vote was taken during the executive session. He referred your inquiry to the attorney who was present and wrote that:

> "No votes were taken in Executive Session. In both instances the Board simply confirmed decisions it had previously made."

You wrote that you "fail to understand what that answer means." I must admit that I do not understand it either. Nevertheless, I offer the following comments.

First, as you are aware, the Open Meetings Law contains direction concerning minutes of meetings and provides what might be viewed as minimum requirements pertaining to their contents. Specifically, §106 states that:

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

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

In view of the foregoing, as a general rule, a public body may take action during a properly convened executive session [see Open Meetings Law, §105(1)]. If action is taken during an executive session, minutes reflective of the action, the date and the vote must generally be recorded in minutes pursuant to §106(2) of the Law. If no action is taken, there is no requirement that minutes of the executive session be prepared.

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

On occasion, public bodies have taken action by what has been characterized as "consensus." 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).

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 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.

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-4029

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August 29, 2005

Mr. Richard J. Farfaglia
[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. Farfaglia:

I have received your letter and the handbook of the New York State Public High School Athletic Association (hereafter "the Association"). Please accept my apologies for the delay in response. Your question is whether the Association is subject to the Open Meetings Law.

As you may be aware, 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."

Based on the foregoing, in general, the Open Meetings Law pertains to governmental entities, rather than private or not-for-profit organizations. Nevertheless, in this instance, I believe that the Association's board of directors, which is characterized as the "Central Committee" in Article III of the Association's constitution, has each of the attributes necessary to conclude that it is a "public body" required to comply with the Open Meetings Law.

In considering the definition of "public body" by means of its components, the Central Committee consists of more than two members, it must conduct it business through a quorum requirement pursuant to the Not-for-Profit Corporation Law, and most significantly, based on a review of its constitution and by-laws, I believe that it conducts public business and performs a governmental function for school districts, which are public corporations (see General Construction Law, 66).

It is noted that I know of no judicial decision that deals squarely with an entity fully analogous to the Association. Further, in analyzing the issue, a variety of comparisons were made with other organizations whose membership consists wholly of government entities or officers. For instance, the New York State School Boards Association has a membership which I believe consists solely of boards of education of public school districts. However, there is no obligation imposed on a district board of education to join as a condition precedent to participation in activities integral to the functioning of a school district or necessary to comply with law. Further, if a district chooses not to join the School Boards Association, while it might not be able to avail itself of the services and expertise offered by the Association, it is my understanding that a failure to join does not preclude a school district from engaging in fundamental educational activities in which it is required to engage by law.

The Association's handbook includes an excerpt from §135.4 of the regulations promulgated by the Commissioner of Education, which states in part that it is the duty of "trustees and boards of education to "conduct school extraclass athletic activities" [§134.4(7)(i)] and to "permit individuals to serve as coaches of interschool athletic teams, other than intramural or extramural teams...." Additionally, §134.4(7)(ii) states that: "It shall be the duty of trustees and board of education to conduct interschool athletic competition for grades 7 through 12..." In short, school boards are required by law to ensure that their districts' students participate in interscholastic athletic programs.

The first paragraph of the Association's "Bylaws and Eligibility Standards", quoting from its Constitution, Article II. (2), states as follows:

> "These standards are the rules of the New York State Public High School Athletic Association, Inc. and apply to grades 9 to 12. Athletes must meet all standards of eligibility for practice and competition. 'All schools agree to abide by the minimum eligibility rules adopted by the Central Committee in all interscholastic competitions.'"

As I understand the foregoing, neither a student nor a school district has the ability to participate in interscholastic sports unless both the student athlete and the school district agree to abide by the Association's rules. Unlike other associations in which membership is optional and in which students and district may partake in various functions absent membership, in this instance, boards of education and the districts and students they serve cannot comply with the Commissioner's regulations unless they agree to abide by the Association's constitution and bylaws. Having reviewed minutes of meetings of the Central Committee on the Association's website, it is clear that the Committee approves motions and take action that directly affect school districts' activities in relation to interscholastic sports. Its actions are binding on districts, and they must be implemented by trustees and boards of education to comply with law, with the regulations of the Commissioner.

In view of the obligation of trustees and boards of education to comply with law, the Commissioner's regulations, and their inability to do so unless they comply with the Association's constitution and bylaws, it must be concluded in my opinion that the Central Committee conducts public business and performs a governmental function for hundreds of public corporations. If that

is so, I believe that it constitutes a public body that falls within the requirements of the Open Meetings Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Nina Van Erk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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August 29, 2005

Hon. Jeffrey K. Branch
Trustee
[redacted]

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

Dear Trustee Branch:

I have received your letter in which you referred to a meeting of the Village of Saranac Lake Board of Trustees during which the Board discussed "details of the administrative contracts" pertaining to "higher level" appointed officials who are not represented by unions.

In this regard, as you are likely aware, paragraphs (a) through (h) of §105(1) of the Open Meetings Law specify and limit the subjects that may properly be considered during an executive session. Paragraph (e) pertains to "collective negotiations pursuant to article fourteen of the civil service law", which, stated differently, refers to collective bargaining negotiations involving a public employee union. If the officials whose contracts were the subject of the discussion, §105(1)(e) would not have applied, for those officials are not union members.

The only other ground for entry into executive session that might have been applicable, §105(1)(f), permits a public body, such as the 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..."

If, for example, the appointed officials to whom you referred were considered as a group, i.e., for "across the board" consideration of appointees, I do not believe that there would have been a basis for entry into executive session. If the discussion pertained to a position, irrespective of the identity of the incumbent of the position, and the discussion concerned a comparison of salaries paid to those in similar positions in other municipalities, again, in my view, there would have been no basis

for conducting an executive session. In neither of those instances would the discussion have focused on any "particular person." In the former, the discussion would have involved several officials treated collectively; in the latter, the discussion would have involved positions, rather than the individuals who hold them.

On the other hand, if the discussion focused on a particular person in relation to his or her performance, i.e., his or her employment history, or a matter leading to his or her promotion or demotion, to that extent, I believe that an executive session could properly have been held.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

OML-AO-4031

From: Robert Freeman
To: Richard Fishman
Date: 9/8/2005 2:23:55 PM
Subject: Re: Public Notice

Pursuant to §104 of the Open Meetings Law, posting of notice in a conspicuous location within the building and and providing notice of the time and place of a meeting to the Legislative Correspondents Association would be sufficient to comply with law. There is no requirement that "all media" be given notice.

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

From: Robert Freeman
To: [redacted]
Date: 9/12/2005 1:05:02 PM
Subject: Dear Mr. Golden:

Dear Mr. Golden:

I have received your inquiry relating to the role of this office and the ability of a member of the public to video record open meetings of a board of education.

In this regard, first, certainly a person seeking records may transmit a copy of his or her request made under the FOIL to this office. In some instances, the reference to a "cc" may encourage the agency in receipt of the request to respond more quickly than it might otherwise. I note that the primary function of the Committee on Open Government involves providing advice and opinions concerning public access to government records. Neither the Committee nor its staff has the authority to compel an agency to comply with law or to determine appeals. An appeal of a denial of access, according to §89(4)(a) of FOIL, is made to the head or governing body of an agency (e.g., a board of education) or to a person or designated by the agency head or governing body to determine appeals. Any person, however, may contact this office for advice, guidance, or to request a written advisory opinion. While opinions prepared by the Committee are not binding, it is our hope that they are educational and persuasive, and that they serve to encourage compliance with law.

With respect to the second issue, while there is nothing in the Open Meetings Law that addresses the ability to record an open meetings, judicial decisions indicate, in brief, that any person may audio or video record an open meeting, so long as the use of the recording equipment is neither obtrusive nor disruptive. To obtain more detailed information, advisory opinions accessible via the Open Meetings Law index to opinions on our website can be found under the headings "tape recorders, use of" and "video equipment, use of."

I hope that I have been of assistance.

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

FOIL-AO-1543
OML-AO-4033

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September 14, 2005

Hon. Kenneth F. Dillon
Town Supervisor
Town of Montour
P.O. Box 261
Montour Falls, NY 14865

The staff of the Committee on 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 Dillon:

I have received your letter and the materials attached to it. Please accept my apologies for the delay in response. You have raised a variety of questions and issues, and I will attempt to respond to them, but not necessarily in the order in which they were presented. Additionally, the responses will be offered through commentary concerning the law and its judicial interpretation, and not necessarily in specific relation to unique facts that you presented.

It is noted at the outset 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..."

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 point out that §105(2) of the Open Meetings Law states that any member of a public body, such as a town board, has the right to attend executive sessions held by that public body. While a public body may authorize persons other than its own members to attend an executive session, none other than the members have the right to attend an executive session.

One of the issues pertained to the exception involving litigation, and as you may be aware, §105(1)(d) permits a public body to enter into an executive session to discuss "proposed, pending or current litigation". In construing the language quoted above, it has been held that:

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

Based upon the foregoing, I believe that the exception is intended to permit a public body to discuss its litigation strategy behind closed doors, rather than issues that might eventually result in litigation. I point out that one of the decisions cited above, Concerned Citizens, involved a situation in which a town was involved in litigation and held an executive session with its adversary in the litigation in an attempt to reach a settlement. In brief, because the exception is intended to enable a public body to discussion litigation strategy in private, the court determined that an executive session could not be held with the presence of the town's adversary.

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 Montour."

Next, although the term "personnel" is frequently cited as a basis for entry into executive session, that word appears nowhere in the Open Meetings Law. The language of the so-called "personnel" exception, §105(1)(f) of the Open Meetings Law, is limited and precise. In terms of

legislative history, as originally enacted, the provision in question permitted a public body to enter into an executive session to discuss:

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

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

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

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

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

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

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

> "...the public body must identify the subject matter to be discussed (See, Public Officers Law § 105 [1]), and it is apparent that this must be accomplished with some degree of particularity, i.e., merely reciting the statutory language is insufficient (see, Daily Gazette Co.

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

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

You raised questions in relation to special meetings held by the Town Board. In this regard, two statutes are pertinent to an analysis of the matter. 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."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Based on the foregoing, I believe that any person has the right to record open meetings of the Board, without permission to do so from the Board, so long as the recording device is used in a manner that is not disruptive.

Lastly, you referred to unanswered requests made under the Freedom of Information Law. In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

> circumstances of the request, when such request will be granted or denied..."

It is noted that new language was added to that provision on May 3 (Chapter 22, Laws of 2005) stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgement is given, it must include an approximate date within twenty business days indicating when it can be anticipated that a request will be granted or denied. However, if it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." From my perspective, 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, when 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 delay in disclosure. As the Court of Appeals, the state's highest court, 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 concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "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"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

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 beyond the approximate date of less than twenty business days given in its acknowledgement, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, 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."

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, 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.

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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September 15, 2005

E-MAIL

TO: Chris D. Brothers

FROM: Camille Jobin-Davis, Assistant Director CJD

The staff of the Committee on 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. Brothers:

I have received your communication dated August 18, 2005, which pertains to the obligation of the Town of Chazy to disclose meeting times and business conducted by a newly formed committee to which you have been appointed. According to your description of the entity, the purpose of the committee is to review the town's comprehensive plan and formulate any appropriate updates.

You inquire whether it is necessary to "advertise" your meetings to the public, whether the media may have access to your proceedings, and whether any minutes and/or tapes of the meetings would be available under the Freedom of Information Law ("FOIL"). As you note, the committee is most likely a special board, created pursuant to Town Law §272-a.

First, the Open Meetings Law is applicable to meetings of all public bodies. 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."

Although it has been held that advisory bodies are not required to comply with the Open Meetings Law [see e.g., NYPIRG v. Governor's Advisory Commission, 507 NYS2d 798, aff'd with no opinion, 135 AD2d 1149, motion for leave to appeal denied, 71 NY2d 964 (1988); Poughkeepsie

Newspaper v. Mayor's Intergovernmental Task Force on New York City Water Supply Needs, 145 AD2d 65 (1989)], in this instance, the committee appears to be a creation of law. Section 272-a of the Town Law entitled "Town comprehensive plan" includes reference to a "special board." That phrase is defined in subdivision (2)(c) of §272-a to mean:

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

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

As you are likely aware, the Open Meetings Law requires that meetings of public bodies be conducted in public, unless 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 grounds for entry into executive session. While the Open Meetings Law does not require that a public body must pay to "advertise" its meetings, that statute requires that notice be posted and given to the news media prior to every meeting of a public body. Specifically, §104 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.

Documents prepared by a public body, minutes, and tape recordings of an open meeting, would fall within the scope of the Freedom of Information Law, which pertains to agency records. Section 86(4) of the Law defines the term "record" expansively to include:

> "...any information kept, held, filed, produced, reproduced by, with of or 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 entity maintains minutes and/or a tape recording of a meeting, the minutes and the tape would constitute "records" that fall within the coverage of the Freedom of Information Law.

Finally, 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, like minutes 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].

I hope that I have been of assistance.

CJD:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
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September 16, 2005

E-MAIL

TO: Kate Tim

FROM: Camille Jobin-Davis, 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. Bader:

As you are aware, I have received your e-mail communication of July 16, 2005 in which you express concerns about a meeting of various persons at the home of a Town Board member and request an advisory opinion. The advisory jurisdiction of the Committee on Open Government is limited to matters relating to open government statutes. Therefore, the following commentary will be limited to the statutory responsibilities of elected officials imposed by the Open Meetings Law.

First in my view, a gathering at the home of a Town Board member or any other similar gathering in which a majority of the Board discusses Town business would constitute a "meeting" required to be conducted in accordance with the Open Meetings Law.

In this regard, it is noted that the Open Meetings Law pertains to meetings of public bodies, e.g., town boards, and that the courts have construed the term "meeting" [§102(1)] expansively. In a landmark decision rendered in 1978, the state's highest court, the Court of Appeals, held that any gathering of a quorum of a public body for the purpose of conducting public business constitutes a "meeting" subject to the Open Meetings Law, whether or not there is an intent to take action, and regardless of the manner in which a gathering may be characterized [see Orange County Publications, Division of Ottoway Newspapers, Inc. v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

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

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

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

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

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

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. Regardless of the location or the timing of the meeting, since a session held by a majority of a public body is a "meeting", it would have the same responsibilities in relation to openness, notice and the taking of minutes as in the case of a formal meeting.

Finally, the Open Meetings Law does not specify where a public body must conduct its meetings. However, the Law does provide direction concerning the site of meetings. Section 103(b) of the 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 of the public buildings law."

Based upon the language quoted above, the Open Meetings Law, in my opinion, imposes no obligation upon a public body to construct a new facility or to renovate an existing facility to permit barrier-free access to physically handicapped persons. However, I believe that the law does impose a responsibility upon a public body to make "all reasonable efforts" to ensure that meetings are held in facilities that permit barrier-free access to physically handicapped persons. Therefore, if, for example, the Board has the capacity to hold its meetings in a first floor room that is accessible to handicapped persons rather than a second floor room, I believe that the meetings should be held in the room that is most likely to accommodate the needs of people with handicapping conditions.

From my perspective, a member's home would generally not be an appropriate location for a meeting of a public body. Aside from the issue of barrier-free access to physically handicapped persons, a home is not a public facility, and many have suggested that entry into a home to attend a meeting involves a sense of intrusion or intimidation. In my view, every law, including the Open Meetings Law, should be implemented in a manner that gives effect to its intent. Holding a meeting at a member's home would, in my opinion, be unreasonable and inconsistent with the intent of the law.

I hope I have been of assistance in this matter.

CJD:tt

cc: Town Board

STATE OF NEW YORK
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September 26, 2005

Hon. James B. Duncan
Chairman, Board of Commissioners
Port Washington Police District
500 Port Washington Boulevard
Port Washington, NY 11050-4295

The staff of the Committee on 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 Duncan:

I have received your letter and apologize for the delay in response.

In your capacity as Chairman of the Board of Commissioners of the Port Washington Police District, you wrote that the Board holds staff meetings with the Police Chief and support personnel prior to its regular meetings. You added that:

> "Current events are discussed as well as some personnel issues, labor management, equipment that may be needed, problems being encountered in other police jurisdictions and any ideas or programs that the Chief and his staff may want to discuss. At no time are any formal votes taken or are there any monetary expenditures approved. All motions, votes or expenditures are discussed at the regular business meeting in front of the public."

You have asked whether staff meetings are subject to the Open Meetings Law and "need to be posted."

From my perspective, when a majority of the Board of Commissioners gathers to discuss public business, even if there is no intent to introduce motions or cast votes, and despite its characterization as a "staff meeting", the gathering constitutes a "meeting" that falls within the coverage of the Open Meetings Law.

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

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

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

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

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

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

Based upon the direction given by the courts, when a majority of the Board is present to discuss District business, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law. Further, any such gathering must be preceded by notice of the time and place given to the news media and by means of posting pursuant to §104 of the Open Meetings Law. Therefore, if a majority of the Board (i.e., two of its three members) intends to meet with staff, I believe that the meeting must be preceded by notice of the time and place given to the news media and by means of posting.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4037

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

September 26, 2005

Mr. Frederick S. Martin
[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. Martin:

I have received your correspondence and hope that you will accept my apologies for the delay in response.

You have sought my views concerning the adequacy of minutes of a meeting of the Town of Granby Zoning Board of Appeals. In this regard, §106 of the Open Meetings Law deals with minutes, and under that statute, it is clear that minutes need not consist of a verbatim account of what is said. Rather, at a minimum, minutes must consist of a record or summary of motions, proposals, resolutions, action taken and the vote of each member. Specifically, §106 of the Open Meetings Law provides that:

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

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

Based on the foregoing, minutes need not consist of a verbatim account of everything that was said; on the contrary, so long as the minutes include the kinds of information described in §106, I believe that they would be appropriate and meet legal requirements. Most importantly, I believe that minutes must be accurate. Preparation or alteration of minutes in a manner that does not accurately reflect what occurred or what was said at a meeting, would, in my view, be inconsistent with law.

I note that the minutes attached to your letter include reference to questions that you raised concerning the content of minutes and the length of time that they must be retained. The response by the Secretary for the Board was, in my view, appropriate. As she indicated, minutes must be retained permanently, and tape recordings of meetings must be kept for a minimum of four months. The fact that tapes are kept for three years, therefore, exceeds legal requirements. I point out, too, that minutes often do not include substantial detail, for a tape recording can be played to ensure accuracy and provide a verbatim account of what is expressed at meetings.

As you requested, enclosed are copies of the Open Meetings Law and a guide to that statute, as well as the Freedom of Information Law.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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OML-AO-4038

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September 26, 2005

Ms. Lynn Marsh
Advocate for Cherry Valley
P.O. Box 147
Cherry Valley, NY 13320

The staff of the Committee on 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. Marsh:

I have received your letter and apologize for the delay in response.

According to your letter, officials of the Town of Cherry Valley, such as members of the Town Board, gather both prior to an after Board meetings "to further discuss and decide." You added that various requests for records under the Freedom of Information Law have been denied without justification.

In this regard, first, as a general matter, when a majority of a public body, such as a town board or a planning board, gathers to discuss public business, the gathering constitutes a "meeting" that falls within requirements of the Open Meetings Law. I point out the definition of "meeting" [see Open Meetings Law, §102(1) has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be conducted open to the public, whether or not there is an intent to have action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 Ad 2d 409, aff'd 45 NY 2d 947 (1978)].

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

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

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

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

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

Based upon the direction given by the courts, when a majority of either of the boards to which you referred is present to discuss Town business, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law. Further, any such gathering must be preceded by notice of the time and place given to the news media and by means of posting pursuant to §104 of the Open Meetings Law.

Second, with respect to requests for 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.

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

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

I point out that new language was added to that provision on May 3 (Chapter 22, Laws of 2005) stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgement is given, it must include an approximate date within twenty business days indicating when it can be anticipated that a request will be granted or denied. However, if it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." From my perspective, 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, when 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 delay in disclosure. As the Court of Appeals, the state's highest court, 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 concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "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"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

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 beyond the approximate date of less than twenty business days given in its acknowledgement, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, 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."

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, 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.

In an effort to enhance their understanding and compliance with the Open Meetings and Freedom of Information Laws, copies of this opinion will be sent to the Town Board and the Planning Board.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Town Board
Planning Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-15504
OML-AO-4039

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September 26, 2005

E-MAIL

TO: Ineli Zaloh

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. Zaloh:

As you are aware, I have received your inquiry concerning the status of the New York Public Library under the Freedom of Information Law. Please accept my apologies for the delay in response.

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

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

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

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

> "The term 'public' library as used in this chapter shall be construed to mean a library, other than professional, technical or public school library, established for free purposes by official action of a

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

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

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

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

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

It is noted that confusion concerning the application of the Freedom of Information Law to non-governmental libraries open to the public has arisen in several instances, perhaps because its companion statute, the Open Meetings Law, is applicable to meetings of their boards of

trustees. The Open Meetings Law, which is codified as Article 7 of the Public Officers Law, is applicable to public and association libraries due to direction provided in the Education Law. Specifically, §260-a of the Education Law states in relevant part that:

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

Again, since Article 7 of the Public Officers Law is the Open Meetings Law, meetings of boards of trustees of various libraries must be conducted in accordance with that statute, even though the records of those entities fall beyond the coverage of the Freedom of Information Law.

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

RJF:tt

cc: Director, New York Public Library

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4040

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

September 28, 2005

E-MAIL

TO: Donald Csaposs

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. Csaposs:

As you are aware, I have received your inquiry. Please accept my apologies for the delay in response. You have asked whether "the exemption provision in 108.1 of the Open Meetings Law appl[ies] to meetings of a Town's Board of Assessment Review."

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."

In consideration of the foregoing, I believe that a board of assessment review is clearly a "public body" required to comply with the Open Meetings Law.

As a general matter, meetings of public bodies must be conducted in public, unless there is a basis for entry into executive session or when an exemption from the Open Meetings Law is pertinent. From my perspective, the portion of the meeting of a board of assessment review during those challenging their assessments are heard must be conducted open to the public. Following oral presentations, a board's deliberations may in my opinion be characterized as "quasi-judicial proceedings" and, therefore, would be exempt from the Open Meetings Law pursuant to §108(1) of that statute. It is emphasized, however, that even when the deliberations of such a board may be

outside the coverage of the Open Meetings Law, its vote and other matters would not be exempt. As stated in Orange County Publications v. City of Newburgh:

> "there is a distinction between that portion of a meeting...wherein the members collectively weigh evidence taken during a public hearing, apply the law and reach a conclusion and that part of its proceedings in which its decision is announced, the vote of its members taken and all of its other regular business is conducted. The latter is clearly non-judicial and must be open to the public, while the former is indeed judicial in nature, as it affects the rights and liabilities of individuals" [60 AD 2d 409,418 (1978)].

Therefore, although an assessment board of review may deliberate in private, based upon the decision cited above, oral presentations before the board, as well as the act of voting or taking action, must in my view occur during a meeting held open to the public.

Additionally, I note that both the Freedom of Information Law and the Open Meetings Law impose record-keeping requirements upon public bodies. With respect to minutes of open meetings, §106(1) of the Open Meetings Law states that:

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

The minutes are not required to indicate how the Board reached its conclusion; however, I believe that the conclusion itself, i.e., a motion or resolution, must be included in minutes. I note, too, that since its enactment, the Freedom of Information Law has contained a related requirement in §87(3). The provision states in part that:

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

In short, because an assessment board of review is a "public body" and an "agency", I believe that it is required to prepare minutes in accordance with §106 of the Open Meetings Law, including a record of the votes of each member in conjunction with §87(3)(a) of the Freedom of Information Law. The minutes that you enclosed do indicate how the Board members voted.

Lastly, I point out that §525(2)(a) of the Real Property Tax Law entitled "Hearing and determination of complaints" states in part that:

> "The assessor shall have the right to be heard on any complaint and upon his request his or her remarks with respect to any complaint

> shall be recorded in the minutes of the board. Such remarks may be made only in open and public session of the board of assessment review."

Based on the foregoing, insofar as the assessor is present for the purpose of offering information or a point of view, I believe that the public, pursuant to the Real Property Tax Law, has the right to be present.

I hope that I have been of assistance.

RJF:tt

cc: Board of Assessment Review

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4041

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September 28, 2005

E-MAIL

TO: Jerome Donovan

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. Donovan:

As you are aware, I have received your inquiry. Please accept my apologies for the delay in response. You have asked whether a town board is "permitted to conduct discussions pertaining to a municipal services agreement with a not-for-profit organization in executive session." You added that the "discussions center around payment for police, fire and related government services."

Although it seems unlikely that there would be a basis for entry into executive session, I offer the following comments.

First, the Open Meetings Law requires that meetings of public bodies must be conducted open to the public, unless there is a basis for entry into an executive session. The subjects that may properly be considered in executive session are specified in paragraphs (a) through (h) of §105(1) of the Open Meetings Law. Because those subjects are limited, a public body cannot conduct an executive session to discuss the subject of its choice.

Second, although certain "contractual negotiations" may be conducted or discussed in executive session, not all such negotiations fall within the grounds for entry into executive session. The only provision that pertains specifically to negotiations, §105(1)(e), deals with collective bargaining negotiations between a public employer and a public employee union under Article 14 of the Civil Service Law, which is commonly known as the Taylor Law. That provision appears to be inapplicable in the context of the situation that you described.

The remaining ground for entry into executive session that may be pertinent, §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..."

Based on your description of the matter, it does not appear that the decision would focus on any particular person. If the discussion involves the financial history of the not-for-profit entity or matters leading to its appointment or employment by the town, to that extent, an executive session could, in my view, properly be held. If those topics are not the subjects of the discussion, again, it does not appear that there would be a basis for entry into 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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September 28, 2005

E-MAIL

TO: John Kwasnicki

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. Kwasnicki:

As you are aware, I have received your letter. Please accept my apologies for the delay in response. Your inquiry pertains to a "meeting time change without public notice."

According to your letter, the Sloatsburg Village Board of Trustees conducts its regular meetings beginning at 7:30 PM. However, a recent meeting was preceded by a notice posted at 2 p.m. on the day of the meeting indicating that the meeting would begin at 7 PM. You have asked whether the Board was required to have given a "Legal Notice of the change of time from their Regular Meetings starts of 7:30 PM."

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

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

Subdivision (3) specifies that a public body is not required to provide a "legal notice" prior to its meetings. Stated differently, a public body is not required to expend public money to place a legal notice in a newspaper.

Nevertheless, subdivision (1) §104 specifies that 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, subdivision (2) requires that 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 some circumstances, public bodies have given notice to the news media, and the newspapers or radio stations in receipt of the notices have chosen not to print or publicize the meetings to which the notices relate. In those cases, despite the failure of a notice to be publicized, a public body would have complied with law.

I 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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OML-AO-4043

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September 28, 2005

E-MAIL

TO: Larry Hogan

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. Hogan:

As you are aware, I have received your letter. Please accept my apologies for the delay in response.

According to your letter, in the town in which you own property:

> "The board of assessment review met in a private meeting room (the door was open) and the public was required to sit in the lobby until it was your turn to be heard. When I asked about sitting in the meeting I was told only when it was my turn. I have been attending assessment meetings in various town over the years and I was always under the impression that they were open to the public."

You asked whether your impression is correct.

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."

In consideration of the foregoing, I believe that a board of assessment review is clearly a "public body" required to comply with the Open Meetings Law.

As a general matter, meetings of public bodies must be conducted in public, unless there is a basis for entry into executive session when an exemption from the Open Meetings Law is pertinent. From my perspective, which is consistent with your understanding, the portion of the meeting of a board of assessment review during which those challenging their assessments are heard must be conducted open to the public. Following oral presentations, a board's deliberations could be characterized as "quasi-judicial proceedings" that would be exempt from the Open Meetings Law pursuant to §108(1) of that statute. It is emphasized, however, that even when the deliberations of such a board may be outside the coverage of the Open Meetings Law, its vote and other matters would not be exempt. As stated in Orange County Publications v. City of Newburgh:

> "there is a distinction between that portion of a meeting...wherein the members collectively weigh evidence taken during a public hearing, apply the law and reach a conclusion and that part of its proceedings in which its decision is announced, the vote of its members taken and all of its other regular business is conducted. The latter is clearly non-judicial and must be open to the public, while the former is indeed judicial in nature, as it affects the rights and liabilities of individuals" [60 AD 2d 409,418 (1978)].

Therefore, although an assessment board of review may deliberate in private, based upon the decision cited above, oral presentations before the board, as well as the act of voting or taking action must in my view occur during a meeting held open to the public.

Additionally, I note that both the Freedom of Information Law and the Open Meetings Law impose record-keeping requirements upon public bodies. With respect to minutes of open meetings, §106(1) of the Open Meetings Law states that:

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

The minutes are not required to indicate how the Board reached its conclusion; however, I believe that the conclusion itself, i.e., a motion or resolution, must be included in minutes. I note, too, that since its enactment, the Freedom of Information Law has contained a related requirement in §87(3). The provision states in part that:

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

In short, because an assessment board of review is a "public body" and an "agency", I believe that it is required to prepare minutes in accordance with §106 of the Open Meetings Law, including a record of the votes of each member in conjunction with §87(3)(a) of the Freedom of Information Law. The minutes that you enclosed do indicate how the Board members voted.

Lastly, I point out that §525(2)(a) of the Real Property Tax Law entitled "Hearing and determination of complaints" states in part that:

> "The assessor shall have the right to be heard on any complaint and upon his request his or her remarks with respect to any complaint shall be recorded in the minutes of the board. Such remarks may be made only in open and public session of the board of assessment review."

Based on the foregoing, insofar as the assessor is present for the purpose of offering information or a point of view, I believe that the public, pursuant to the Real Property Tax Law, has the right to be present.

I hope that I have been of assistance.

RJF:tt

cc: Board of Assessment Review

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4044

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September 30, 2005

E-MAIL

TO: Katherine Delain

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. Delain:

As you are aware, I have received your letter. Please accept my apologies for the delay in response.

You wrote that Barbara Strangfeld, a member of the Schenectady City Council, informed you that I:

> "...agreed with the council's attempts to add 'structure and order:' to their meetings/ did you realize that President Blanchfield now demand we must sign in to speak, that we must write down what we plan to say,. And tha [sic] if he feels it is not Council business, he will not call on someone?"

You added that you:

> "...may not tape committee meetings, and they are trying to eliminate televised coverage of privilege of the floor, or even the meetings themselves."

In this regard, I offer the following comments.

First, while the Open Meetings Law clearly provides the public with the right "to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy" (see Open Meetings Law, §100), the Law is silent with respect to public participation. Consequently, by means of example, if a public body, such as the City Council,

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."

In the context of the specific issues that you raised, I believe that a court would determine that a public body may limit the amount of time allotted to person who wishes to speak at a meeting, so long as the limitation is reasonable. Similarly, it is my view that the City Council may limit

comments to matters involving City business or the operation of City government and require a brief written summary of the subject intended to be discussed by a person wishing to address the Council.

From my perspective, the President of the Council *presides* over Council meetings. It is questionable, however, whether he may validly determine unilaterally whether the subject matter of comment proposed by a person desiring to speak involves City Council business. He is but one member of the Council, and I believe that the Council, if necessary, should determine by means of a majority vote of its total membership (see General Construction Law, §41) if there is a question or disagreement regarding whether a subject relates to City Council business. I believe that the Council in that circumstance should determine whether the subject may be raised, rather than the President of the Council reaching a determination alone.

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

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

Lastly, with respect to the ability to tape record or video record open meetings, there is nothing in the Open Meetings Law that addresses the issue. However, there is a series of decisions pertaining to the use of recording equipment at meetings and in my opinion, they consistently apply certain principles. One is that a public body, such as the City Council, has the ability to adopt reasonable rules concerning its proceedings. The other involves whether the use of the equipment would be disruptive.

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

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

the use of unobtrusive tape recording devices would not be reasonable if the presence of such devices would not detract from the deliberative process.

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

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

Several years later, the Appellate Division unanimously affirmed a decision which annulled a resolution adopted by a board of education prohibiting the use of tape recorders at its meetings and directed the board to permit the public to tape record public meetings of the board [Mitchell v. Board of Education of Garden City School District, supra]. 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 policy, that policy would, if adopted, be found by a court to be equally unreasonable and void. The same conclusion was reached more recently in Csorny v. Shoreham-Wading River Central School District [759 NYS 2d 513, 305 AD2d 83 (2003)].

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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OML-AO-4045

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October 3, 2005

E-MAIL

TO: Debra Cohen

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. Cohen:

I have received your letter in which referred to an article published in the *Journal News* concerning a decision by the City of Yonkers Board of Education "to seek $12,727 from Angelo Petrone, saying the former schools superintendent wasn't entitled to 12 unused vacation days that he cashed in before he resigned." The article indicates that the Board took action "behind closed doors and later reported to the public."

From my perspective, there would likely have been no basis for entry into executive session. Further, I do not believe that the Board could validly have taken action in private. In this regard, I offer the following comments.

First, as you are aware, the Open Meetings Law specifies and limits the subjects that may properly be considered in executive session. Under the circumstances, it appears that only one of the grounds for conducting an executive session, §105(1)(f), the so-called "personnel" exception, would have been pertinent. However, the scope of that provision is limited and precise. Specifically, §105(1)(f) permits a public body, such as a board of education, to enter into executive session to discuss:

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

language quoted above. If that is so, I do not believe that there would have been any basis for entry into executive session.

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

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

In my opinion, which is based on judicial decisions, the Board could not validly have taken action during an executive session.

I hope that I have been of assistance.

RJF:tt

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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October 3, 2005

E-MAIL

TO: Lori Heitoff

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.

Hi Lori - -

I have received your inquiry and apologize for the delay in response. "If a town has already adopted a budget that included a particular position and a salary range", a local official asked whether a town board may "discuss the specific salary they will offer the candidate in executive session while going over the person's job qualifications". It was also asked whether such a vote would be considered an appropriation of public money.

In this regard, assuming that the discussion focused on a specific individual's qualifications in order to determine or offer an appropriate salary, it appears that an executive session could properly have been held pursuant to §105(1)(f) of the Open Meetings Law. 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."

The discussion would apparently have dealt with the employment history of a particular person as well as a matter leading to the appointment or employment of that person. If that was so, again, an executive session could properly have been held.

When a public body has properly entered into executive session, it may take action during the executive session, unless the action is to appropriate public monies. Having discussed the issue with representatives of the office of the State Comptroller, it is our view that if moneys have been budgeted, an action or vote to expend those moneys does not constitute an appropriation, but rather

a decision to spend monies already appropriated. Therefore, the vote to which you referred could, in my opinion, have been taken during an executive session.

I hope that I have been of assistance.

RJF:tt

OML-AO- 4047

TO: George Goetschius October 3, 2005

FROM: Robert J. Freeman, Executive Director

Dear Mr. Goetschius:

I have received your inquiry and apologize for the delay in response. You wrote that you are a member of the Alfred State College Council, and you raised a series of questions concerning an upcoming meeting of the Council.

In brief, first, a college council in my view is clearly a "public body" required to comply with the Open Meetings Law.

Second, while there is nothing in that statute specifying where meetings may be held, it has been advised that every law must be implemented in a manner that gives reasonable effect to its intent, and it has been determined that "the scheduling of a meeting at a location some twenty(20) miles distant" from the municipality that was served by the public body in question constituted "a violation of the letter and the spirit of the Open Meetings Law" (Goetschius v. Board of Education, Supreme Court, March 8, 1999). Based on that decision, a meeting held 45 minutes from the campus of Alfred State College would likely constitute a failure to comply with law.

Third, even if the items to be considered may be discussed during an executive session, as you inferred, an 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. In addition, §105(1) requires that a procedure be accomplished, during an open meeting, before an executive session may be held.

Lastly, although an agenda might refer only to items that may properly be discussed during an executive session, there is nothing that requires that an agenda be followed or that precludes a public body from discussing issues that are not referenced on an agenda, including issues that may only be considered in public. That being so, again, it appears that location of the meeting would be inappropriate.

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

Robert J. Freeman
Executive Director
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OML-AO-4048

State of New York
COMMITTEE ON OPEN GOVERNMENT
MEMORANDUM

TO: Ralph Miccio October 3, 2005

FROM: Bob Freeman

SUBJECT: Hearings held by the Temporary State Commission on Lobbying

During our telephone conversation, you referred to §1-d(3) of the Legislative Law concerning the Temporary State Commission on Lobbying. The cited provision states that the Commission "shall have the power and duty to...conduct private and public hearings pursuant to article seven of the public officers law..." As you are aware, Article 7 of the Public Officers Law is the Open Meetings Law.

While hearings are often quasi-judicial and therefore exempt from the coverage of the Open Meetings Law [see Public Officers Law, §108(1)], due to the specific reference in §1-d(3) to the Open Meetings Law, I believe that the Commission's hearings are required to be held in accordance with that statute. In short, when a statute, such as §1-d(3), provides specific direction, it supersedes a statute pertaining to the same subject area that provides general direction.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
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October 3, 2005

E-MAIL

TO: Christine Iacobucci

FROM: Camille S. Jobin-Davis, Assistant Director CSJ

The staff of the Committee on 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. Iacobucci:

We are in receipt of your e-mail correspondence from June 29, 2005, in which you request an opinion concerning whether the school district adequately publicized a meeting.

As you relate, the Lansing Central School District recently formed a Health Advisory Council ("Council") for the purpose of making recommendations to the Board of Education regarding the District's HIV/AIDS curriculum. It is unclear to you whether notice of the meetings has been adequately given. Additionally you inquire as to whether any recommendations of the Council would be invalid based on a failure to provide adequate notice to all members, who may not have been able to participate in the deliberative process as a result.

The Council "is responsible for making recommendations concerning the content, implementation, and evaluation of an AIDS instruction program" pursuant to the Commissioner's regulations and is composed of "parents, school board members, appropriate school personnel, and community representatives, including representatives from religious organizations" [Subchapter G, Part 135.3(b)(2) and (c)(2)(i)]. We note that the Commissioner's regulations direct as follows:

> "In public schools, the board of education or trustees *shall* establish an advisory council which *shall* be responsible for making recommendations concerning the content, implementation, and evaluation of an AIDS instruction program" (id., emphasis added).

From our perspective, although the Council's duties are advisory in nature, we believe it would be required to comply with the Open Meetings Law, for the Board of Education is required to establish the Council and receive the Council's recommendations prior to adopting, implementing and/or evaluating the District's AIDS instruction program. In this regard, we offer the following comments.

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

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

The definition quoted above includes reference to a quorum requirement, and even though the action creating the Council might not refer to a quorum requirement, we believe that it is imposed by statute. Specifically, §41 of the General Construction Law, which has been in effect since 1909, states that:

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

Based upon the foregoing, a quorum is a majority of the total membership of a public body, notwithstanding absences or vacancies. Further, a public body cannot do what it is authorized or empowered to do except at a meeting during which a quorum is physically present.

Second, judicial decisions indicate generally that advisory bodies having no power to take final action, other than those consisting of members of a particular 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)].

While the Council does not have the ability to make determinations, according to the Commissioner's regulations, it performs a necessary and integral function in the development of AIDS instruction programs. The Council must, by law, be involved in the development of district plans. The regulations also indicate that "[e]ach board of education or trustees shall determine the content of the curriculum and approve its implementation, and shall be responsible for the evaluation of the district's AIDS instruction program."

In the decisions cited earlier, none of the entities were designated by law to carry out a particular duty and all had purely advisory functions. More analogous to the status of a Health Advisory Council 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).

Since an AIDS instruction program cannot be adopted or evaluated absent recommendations by the Council, we believe that the Council performs a governmental function and, therefore, is a public body subject to the Open Meetings Law.

In sum, where the Council has the authority to recommend, and the decision maker or decision making body must consider its recommendations as a condition precedent to taking action, we believe that the Council would constitute a public body subject to the Open Meetings Law, even if the recommendations need not be followed. Due to the necessary functions that a Health Advisory Council performs pursuant to the Commissioner's regulations and the plans adopted and evaluated in accordance with those regulations, I believe that a Health Advisory Council constitutes a "public body" subject to the requirements of the Open Meetings Law.

As you may be aware, the provisions of the Open Meetings Law are relatively straightforward; compliance with that statute by the Health Advisory Council should not be difficult to accomplish. However, in an effort to facilitate compliance, we offer the following general remarks.

Section 102(1) of the Open Meetings Law defines the term "meeting" to mean "the official convening of a public body for the purpose of conducting public business". It is emphasized that the definition of "meeting" has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals, 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 our 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 the purpose of conducting public business, collectively, as a body, but rather for the purpose of gaining education and training, for example, we do not believe that the Open Meetings Law would be applicable.

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

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

Stated differently, if a meeting is scheduled at least a week in advance, notice of the time and place must be given to the news media and to the public by means of posting in one or more designated public locations, not less than seventy-two hours prior to the meeting. If a meeting is scheduled less than a week an advance, again, notice of the time and place must be given to the news media and posted in the same manner as described above, "to the extent practicable", at a reasonable time prior to the meeting. Therefore, if, for example, there is a need to convene quickly, the notice requirements can generally be met by telephoning the local news media and by posting notice in one or more designated locations. Moreover, as indicated in subdivision (3) of §104, the notice given under the Open Meetings Law is not required to be a legal notice; therefore, there is no expense involved in providing notice under the Open Meetings Law.

If meetings of the Health Advisory Council were held without such notice, it is our opinion that a court would determine that it failed to comply with law.

Finally, at one point in your correspondence you express your frustration with the School Board's failure to publish an agenda prior to regularly scheduled meeting. Please note, there is nothing in the Open Meetings Law or any other law of which we are 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 agenda.

I trust this meets with your request. Should you have any further questions, please contact me directly.

CSJD:tt

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

OML-AO-4050

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October 3, 2005

E-MAIL

TO: Timothy Orvis

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. Orvis:

I have received your letter in which you asked whether a private citizen may tape record meetings of a village board of trustees.

In this regard, there is nothing in the Open Meetings Law that addresses the issue. However, there is a series of decisions pertaining to the use of recording equipment at meetings and in my opinion, they consistently apply certain principles. One is that a public body, such as a village board of trustees, has the ability to adopt reasonable rules concerning its proceedings. The other involves whether the use of the equipment would be disruptive.

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

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

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

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

Several years later, the Appellate Division unanimously affirmed a decision which annulled a resolution adopted by a board of education prohibiting the use of tape recorders at its meetings and directed the board to permit the public to tape record public meetings of the board [Mitchell v. Board of Education of Garden City School District, supra]. 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)], which involved a village board of trustees, 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).

More recently, Csorny v. Shoreham-Wading River Central School District [759 NYS 2d 513, 305 AD2d 83 (2003)] confirmed the advice rendered by this office.

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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October 3, 2005

E-MAIL

TO: Dorine A. Hanevy

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. Hanevy:

I have received your letter concerning the ability of a city council to conduct an executive session to discuss certain matters relating to an elected official, and you questioned the propriety of doing so.

In this regard, as you may be aware, paragraphs (a) through (h) of §105(1) of the Open Meetings Law specify and limit the subjects that may be considered during an executive session. From my perspective, the only pertinent ground for entry into executive session concerning the matter to which you referred is §105(1)f). That provision does not distinguish between elected officials and others, and it permits a public body, such as a city council, 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."

Without knowledge of the specific nature of the discussion, I cannot advise with certainty as to the propriety of the executive session, for I am unaware of the powers of the city council that may be conferred by charter or local law. If there is nothing in those kinds of provisions that authorizes the council to suspend or seek the removal of a mayor, it does not appear that an executive session could validly have been held.

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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OML-AO-4052

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October 3, 2005

E-MAIL

TO: Ryan Hoy

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. Hoy:

I have received your correspondence concerning a revision of a proposed law by the open space committee of the Town of New Paltz that was accomplished "in email rather than a public meeting." You have asked whether the foregoing would constitute "a violation of the open meetings laws."

In this regard, the initial issue is whether the open space committee is required to comply with the Open Meetings Law. That statute is applicable to meetings of public bodies, and §102(2) defines the phrase "public body" to mean:

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

Based on the foregoing, a public body is, in my view, an entity required to conduct public business by means of a quorum that performs a governmental function and carries out its duties collectively, as a body. The definition refers to committees, subcommittees and similar bodies of a public body, and judicial interpretations indicate that if a committee, for example, consists solely of members of a particular public body, it constitutes a public body [see e.g., Glens Falls Newspapers v. Solid Waste and Recycling Committee of the Warren County Board of Supervisors, 195 AD2d 898 (1993)]. For instance, in the case of a board of education consisting of seven members, four would constitute a quorum, and a gathering of that number or more for the purpose of conducting

public business would be a meeting that falls within the scope of the Law. If that board designates a committee consisting of three of its members, the committee would itself be a public body; its quorum would be two, and a gathering of two or more, in their capacities as members of that committee, would be a meeting subject to the Open Meetings Law.

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

In the context of your inquiry, if the committee has no authority to take any final and binding action for or on behalf of a government agency, it would not apparently constitute a public body or, therefore, would be obliged to comply with the Open Meetings Law.

If it is a public body, I believe that voting and action 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 Commission, or a convening that occurs through videoconferencing. I point out, too, that §103(c) of the Open Meetings Law states that "A public body that uses videoconferencing to conduct

its meetings shall provide an opportunity to attend, listen and observe at any site at which a member participates."

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

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

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

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

Conducting a vote or taking action via e-mail would, in my view, be equivalent to voting by means of a series of telephone calls, and in the only decision dealing with a vote taken by phone, the court found the vote to be a nullity. In Cheevers v. Town of Union (Supreme Court, Broome County, September 3, 1998), which cited and relied upon an opinion rendered by this office, the court stated that:

> "...there is a question as to whether the series of telephone calls among the individual members constitutes a meeting which would be

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

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

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

Lastly, I point out that the Freedom of Information Law is more expansive in scope than the Open Meetings Law. That statute pertains to all agency records, such as those of a town, and §86(4) defines the term "record" broadly to mean:

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

Based on the foregoing any email communications made by or on behalf of the Town would, in my view, constitute Town records that fall within the coverage of the Freedom of Information Law.

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

I hope that I have been of assistance.

RJF:tt

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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October 6, 2005

Mr. James Kurkowski
[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. Kurkowski:

On July 1st of this year, we received two requests from you for advisory opinions concerning (1) the ability of a village board to conduct meetings in private, and (2) the responsibility of a village attorney to formalize his opinions in writing.

In response to your first request, according to your letter, you have determined that although regular monthly meetings of the Village Board are advertised on the community bulletin board, "sometime during the month, no set schedule, the board and the departments meet in the Village Library and take care of the rest of the Village Affairs. These meetings are not advertised because as one Trustee stated we don't want interruptions from the public so we can get our business done." From our perspective, meetings held for that purpose would clearly fall within the Open Meetings Law.

In this regard, the Open Meetings Law applies to meetings of public bodies, and §102(1) of the Law defines the term "meeting" to mean "the official convening of a public body for the purpose of conducting public business". Inherent in the definition is the notion of intent. A chance gathering or a social function, for example, would not in our view constitute a meeting, for there would be no intent on the part of those present to conduct public business, collectively, as a body. Similarly, in situations in which members of a public body are part of a large audience and are present as members of the audience, and not to conduct business as a body, we do not believe that the Open Meetings Law would apply, even though a majority of a public body may be present.

Nevertheless, 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)].

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

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

In short, based upon the direction given by the courts, if a majority of the public body, such as a village board, gathers to conduct the business of the body, in their capacities as board members, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law. In addition, if it is true that the village board has approved the tentative budget at such a meeting, §106(1) specifically 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."

While a work session may be informal, and there may be no votes or action taken at such a gathering, it is clear that the subject matter described involves the consideration of public business and the development of public policy. Consequently, again, we believe that the kinds of gatherings to which you referred would constitute "meetings" that fall within the coverage of the Open Meetings Law.

In response to your second request, please be advised that the Freedom of Information Law pertains to existing records, and §89(3) of that statute provides in part that an agency need not create a record in response to a request. We would speculate that the Village Attorney has not prepared a written legal opinion in response to your request, and if that is so, your request would not involve existing records, and the Freedom of Information Law would not apply.

However, if you have submitted a request for records which you believe to exist, and if the appointed records access officer has not responded to your request in a timely fashion, it is our opinion that the Village would not have complied with the Freedom of Information Law. If that is so, we offer the following comments:

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

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

It is noted that new language was added to that provision on May 3 (Chapter 22, Laws of 2005) stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgement is given, it must include an approximate date within twenty business days indicating when it can be anticipated that a request will be granted or denied. However, if it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." From our perspective, every law must be implemented in a manner that gives reasonable effect to its intent, and we 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, when 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 delay in disclosure. As the Court of Appeals, the state's highest court, 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 concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "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"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

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 beyond the approximate date of less than twenty business days given in its acknowledgement, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, 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."

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, 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.

In an effort to enhance compliance with and understanding of the Open Meetings Law and the Freedom of Information Law, copies of this response will be forwarded to Village officials for consideration.

I trust this meets with your request. Should you have any further questions, please contact me directly.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJD:tt

OML-AO-4054

From: Robert Freeman
To: [redacted]
Date: 10/7/2005 3:43:00 PM
Subject: Hi Aimee - -

Hi Aimee - -

The Open Meetings Law, §106, requires that every meeting be preceded by notice of the time and place of the meeting. There is no requirement that an agenda be included, nor is there any reference in the law to agendas. That being so, although most public bodies prepare agendas, there is no legal obligation to do so. Further, even if an agenda is prepared, there is no state law that requires that the agenda be followed.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
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Allard

STATE OF NEW YORK
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OML-AO-4055

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October 12, 2005

E-Mail

TO: Ronald McLain

FROM: Camille S. Jobin-Davis CSJ

The staff of the Committee on 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. McLain:

As you know, we are in receipt of your July 9, 2005 request for an advisory opinion concerning public access to minutes of meetings of the Town of Caroga ("Town"). In this regard, we offer the following comments.

As you may be aware, §106(3) of the Open Meetings Law pertains to minutes of meetings of public bodies and states that:

> "Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such 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."

Subdivision (3) deals specifically with the time within which minutes must be prepared and made available, a period of two weeks with respect to minutes of open meetings, and one week when action is taken during executive sessions.

In keeping with these provisions, it is our opinion that the Town must make available minutes of a meeting which occurred in the recent past and more than two weeks ago (or more than one week ago concerning action taken in executive sessions), on demand. To do otherwise would, in our opinion, fail to comply with the Open Meetings Law.

There is nothing in the Open Meetings Law or any other statute of which we are aware that requires that minutes be approved. Nevertheless, as a matter of practice or policy, many public

bodies approve minutes of their meetings. In the event that minutes have been approved, to comply with the Open Meetings Law, it has consistently been advised that minutes be prepared and made available within two weeks, and that if the minutes have not been approved, they may be marked "unapproved", "draft" or "non-final", for example. By so doing within the requisite time limitations, the public can generally know what transpired at a meeting; concurrently, the public is effectively notified that the minutes are subject to change. If minutes have been prepared within less than two weeks, we believe that those unapproved minutes would be available as soon as they exist, and that they may be marked in the manner described above.

To the extent that you requested to review minutes from previous years, although it seems unlikely, it is possible that historical records are maintained in a manner or place which prevents the Town from making them available immediately. In this regard, the provisions of the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

It is noted that new language was added to that provision on May 3 (Chapter 22, Laws of 2005) stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgement is given, it must include an approximate date within twenty business days indicating when it can be anticipated that a request will be granted or denied. However, if it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

I trust this meets with your request. Should you have any further questions, please contact me directly.

CSJD:jm

STATE OF NEW YORK
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October 12, 2005

E-MAIL

TO: Christine Martin

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. Martin:

I have received your letter in which you asked whether a "village resident [must] ask permission of the village board to make an audio recording of open village board meetings to insure accuracy of the recorded minutes."

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

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

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

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

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

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

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

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

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

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

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

Based on the foregoing, I believe that you, or any person, would have the right to record open meetings of the board. Moreover, I do not believe that a person may be required to inform the board of the intent to use a tape recorder at an open meeting, so long as the recording device is used in a manner that is not disruptive.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
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OML-AO-4057

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October 19, 2005

E-Mail

TO: Ms. Flo Santini

FROM: Camille S. Jobin-Davis CJ

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

Dear Ms. Santini:

This is in response to your e-mail of October 3, 2005 in which you request an advisory opinion concerning two unrelated issues. The first is whether the presence of six school board members at a meeting of a committee of the board would constitute a board meeting subject to the Open Meetings Law. The second is what, if any, action can be taken by a school board member in regard to a motion pending before the school board which was not acknowledged by the president of the school board.

As we interpret your remarks, a committee consisting of three school board members, all of whom were present, scheduled a meeting of the committee. Three additional school board members arrived after the committee meeting began, and two of them joined the three committee members "at the same table."

Based upon your description of this gathering, it is our opinion that the meeting would have been subject to the Open Meetings Law. In that regard we offer the following comments.

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

Second, when a committee consists solely of members of a public body, such as the school board, we believe that the Open Meetings Law is also applicable, for a committee composed of three school board members constitutes a "public body."

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

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

Due to the determination rendered in Daily Gazette, supra, which was in apparent conflict with the stated intent of the sponsor of the legislation, a series of amendments to the Open Meetings Law were 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", we 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 school board, would fall within the requirements of the Open Meetings Law, assuming that a committee discusses or conducts public business collectively as a body [see Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984 (1981)]. Further, as a general matter, we believe that a quorum consists of a majority of the total membership of a body (see General Construction Law, §41). For example, in the case of a committee consisting of three, its quorum would be two.

When a committee is subject to the Open Meetings Law, we believe that it has the same obligations regarding notice, openness, and the taking of minutes, for example, as well as the same authority to conduct executive sessions, as a governing body [see Glens Falls Newspapers, Inc. v. Solid Waste and Recycling Committee of the Warren County Board of Supervisors, 195 AD 2d 898 (1993)].

If a majority of the committee met to conduct a meeting of the committee, and two other board members attended the meeting by sitting in the audience as observers, the gathering, in our view, would have constituted a meeting of the committee, but not a meeting of the board. On the other hand, if the two (or more members) joined the committee "at the same table to discuss school district business, a gathering of that nature in our opinion would have been a meeting of the board.

In regard to your second question concerning the procedural ramifications of a motion left pending at a school board meeting, please be advised that it is not within the jurisdiction of the Committee on Open Government to issue advisory opinions concerning meeting procedures, except to the extent that they are governed by the Open Meetings Law. Bylaws adopted by the school board which address meeting protocol and/or any formalized rules of procedure on which the board relies would likely be responsive to your question.

I hope this is helpful. Should you have any further questions, please contact me directly.

CSJD:jm

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

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October 19, 2005

E-MAIL

TO: Joseph Granchelli

FROM: Camille S. Jobin-Davis, Assistant Director CSJ

The staff of the Committee on 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. Granchelli:

We are in receipt of your July 15, 2005 e-mail request for an advisory opinion concerning public access to "work sessions" scheduled prior to publicly noticed meetings of the local planning board, village board and school board. You have been informed that such gatherings are not open to the public.

From our perspective, the "work session" begun prior to the publicly noticed start of the public meeting constitutes a "meeting" that must be held in accordance with the Open Meetings Law. In this regard, we offer the following comments.

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

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.).

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

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

I hope this is helpful. Should you have any further questions, please contact me directly.

CSJD:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
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October 20, 2005

E-MAIL

TO: Hon. Robert W. Engle

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. Engle:

As you are aware, I have received your letter. Please accept my apologies for the delay in response.

You serve as an elected justice in the Town of Madison, and you asked whether a town board may "discuss matters concerning another elected official in closed meetings." In my view, the answer is dependent on the specific nature of the discussion.

By way of background, as a general matter, the Open Meetings Law is based on a presumption of openness. Stated differently, meetings of public bodies, such as town boards, must be conducted open to the public, unless there is a basis for entry into executive session. Paragraphs (a) through (h) of §105(1) of that statute specify and limit the grounds for conducting an executive session. From my perspective, the only possible ground for entry into executive session in the situation that you described would be §105(1)(f), which permits a public body to conduct an executive session to discuss:

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

Although the provision quoted above is often cited in relation to "personnel matters", I note that its language does not refer to employees only; rather, it pertains to certain subjects as they relate to a "particular person." In the context of your inquiry, it would appear that §105(1)(f) could be asserted only to the extent that the Board discussed "matters leading to" your "discipline, suspension,

dismissal or removal." If that is so, a separate question arises concerning the authority of a town board. Since I am not an expert concerning the powers and duties of town boards, I cannot offer unequivocal guidance. The question involves whether a town board has the authority to seek to discipline, suspend, dismiss or remove a town justice. If it possesses authority of that nature, I believe that an executive session could properly be held under §105(1)(f). However, if no such authority exists, it does not appear that an executive session could properly be held to discuss the issues that you described.

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-4060

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October 24, 2005

Ms. Martha Krisel
Village Attorney
Village of Rockville Centre
P.O. Box 950
Rockville Centre, NY 11571-950

Dear Ms. Krisel:

I have received your memorandum and the correspondence relating to it. The issue involves "a meeting that apparently took place between two members of a five member Planning Board and a representative of a developer with an application that had been heard and voted upon by the Planning Board in November of 2004." In a letter addressed to the Mayor by Jeanne Farnan Mulry, a member of the Village Board of Trustees, she contended that "these talks are not subject to the 'executive session' exception or privilege exemption of the Open Meetings Law." The Mayor responded by indicating that he had been advised "that the law does not prohibit two members of a municipal board from meeting informally with an applicant in an attempt to move a project forward."

You have sought my opinion on the matter.

In this regard, the Open Meetings Law applies to meetings of public bodies. A "meeting", based on §102(1) and judicial decisions, is a gathering of a majority of the members of a public body, such as a planning board, for the purpose of conducting public business. If the Planning Board consists of five members, a gathering attended by two of the five members would not constitute a "meeting" and the Open Meetings Law would not be applicable. As stated by the Appellate Division in Mobil Oil Corporation v. City of Syracuse Industrial Development Agency: "In the absence of a quorum, the Open Meetings Law does not apply" [646 NYS2d 741, 752; 224 AD2d 16 (1996).

I note that the Mayor added in his letter that the two members of the Board who participated in the gathering "did not agree to anything and had no authority to agree to anything." I agree with his view that the Open Meetings Law did not apply, and that the two of the five members who met with the developer would have had no authority to act on behalf of the Board.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Hon. Eugene Murray
Hon. Jeanne Farnan Mulry

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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OML-AO-4106

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October 25, 2005

Mr. William J. McCoy
[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. McCoy:

We are in receipt of your July 15, 2005 request for an advisory opinion concerning the application of the Open Meetings and the Freedom of Information Laws to the proceedings and records of the County of Monroe Industrial Development Authority ("Authority"). For your information, in 1996 we issued an advisory opinion concerning some of the same issues you raise regarding the Authority (copy attached). In this regard, we offer the following comments.

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

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 Authority is present to discuss Authority business, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law.

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

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

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

Please note 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 an industrial development authority. 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.

The second issue you raise involves whether the Authority is required to maintain minutes of its proceedings. 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.

We note, too, that there is nothing in the Open Meetings Law or any other statute of which we are 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 remainder of your questions relate to the Freedom of Information Law, and specifically, public access to records including e-mails which may have been generated between Authority members, the charter creating the Industrial Development Corporation, and subsidy applications.

In this regard, the Freedom of Information Law pertains to all agency records, and §86(4) of that statute defines the term "record" expansively to include:

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

Based on the foregoing, we believe that e-mail communications between Authority board members, and the charter of the Industrial Development Authority would clearly constitute "records" that fall within the coverage of the Freedom of Information Law.

As a general matter, and perhaps most importantly, that law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Most pertinent is §87(2)(g), which enables an agency to withhold records that:

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

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

agency e-mails that are reflective of opinion, advice, recommendation and the like could be withheld; the charter, on the other hand, must be disclosed in its entirety, for it consists of factual information and final agency policy or determinations.

There does not appear to be an exception under the Freedom of Information Law which would exempt subsidy applications from disclosure in their entirety. It is emphasized that the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the exceptions that follow. In our view, the phrase quoted in the preceding sentence evidences a recognition on the part of the Legislature that a single record or report, for example, might include portions that are available under the statute, as well as portions that might justifiably be withheld. That being so, we believe that it also imposes an obligation on an agency to review records sought, in their entirety, to determine which portions, if any, might properly be withheld or deleted prior to disclosing the remainder.

The Court of Appeals expressed its general view of the intent of the Freedom of Information Law in Gould v. New York City Police Department [89 NY2d 267 (1996)], stating that:

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

Just as significant, the Court in Gould repeatedly specified that a categorical denial of access to records is inconsistent with the requirements of the Freedom of Information Law. In that case, the Department contended that certain 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 the provision that might apply in this instance. 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.).

It is unlikely that subsidy applications would be exempt from public access in their entirety. Rather, based on the direction given by the Court of Appeals in several decisions, the records must be reviewed by that agency for the purpose of identifying those portions of the records 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: "Indeed, the Police Department is entitled to withhold complaint follow-up reports, *or specific portions thereof*... as long as the requisite particularized showing is made" (id., 277; emphasis added).

The only ground of denial of significance is §87(2)(d), which permits an agency to withhold records or portions thereof 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 a substantial injury to the competitive position of the subject enterprise."

Therefore, the question under §87(2)(d) involves the extent, if any, to which disclosure would "cause substantial injury to the competitive position" of a commercial entity submitting the application. The concept and parameters of what might constitute a "trade secret" were discussed in Kewanee Oil Co. v. Bicron Corp., which was decided by the United States Supreme Court in 1973 (416 U.S. 470). Central to the issue was a definition of "trade secret" upon which reliance is often based. Specifically, the Court cited the Restatement of Torts, section 757, comment b (1939), which states that:

> "[a] trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers" (id. at 474, 475).

In its review of the definition, the court stated that "[T]he subject of a trade secret must be secret, and must not be of public knowledge or of a general knowledge in the trade or business" (id.). The phrase "trade secret" is more extensively defined in 104 NY Jur 2d 234 to mean:

> "...a formula, process, device or compilation of information used in one's business which confers a competitive advantage over those in similar businesses who do not know it or use it. A trade secret, like

> any other secret, is something known to only one or a few and kept from the general public, and not susceptible to general knowledge. Six factors are to be considered in determining whether a trade secret exists: (1) the extent to which the information is known outside the business; (2) the extent to which it is known by a business' employees and others involved in the business; (3) the extent of measures taken by a business to guard the secrecy of the information; (4) the value of the information to a business and to its competitors; (5) the amount of effort or money expended by a business in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. If there has been a voluntary disclosure by the plaintiff, or if the facts pertaining to the matter are a subject of general knowledge in the trade, then any property right has evaporated."

In our view, the nature of the record, the area of commerce in which a commercial entity is involved and the presence of the conditions described above that must be found to characterize records as trade secrets would be the factors used to determine the extent to which disclosure would "cause substantial injury to the competitive position" of a commercial enterprise. Therefore, the proper assertion of §87(2)(d) would be dependent upon the facts and, again, the effect of disclosure upon the competitive position of the entity to which the records relate.

Also relevant to the analysis is a decision rendered by the Court of Appeals, which, for the first time, considered the phrase "substantial competitive injury" Encore College Bookstores, Inc. v. Auxiliary Service Corporation of the State University of New York at Farmingdale, 87 NY2d 410(1995). In that decision, the Court reviewed the legislative history of the Freedom of Information Law as it pertains to §87(2)(d), and due to the analogous nature of equivalent exception in the federal Freedom of Information Act (5 U.S.C. §552), it relied in part upon federal judicial precedent.

In its discussion of the issue, the Court stated that:

> "FOIL fails to define substantial competitive injury. Nor has this Court previously interpreted the statutory phrase. FOIA, however, contains a similar exemption for 'commercial or financial information obtained from a person and privileged or confidential' (see, 5 USC § 552[b][4])...
>
> "As established in Worthington Compressors v Costle (662 F2d 45, 51 [DC Cir]), whether 'substantial competitive harm' exists for purposes of FOIA's exemption for commercial information turns on the commercial value of the requested information to competitors and the cost of acquiring it through other means. Because the submitting business can suffer competitive harm only if the desired material has commercial value to its competitors, courts must consider how valuable the information will be to the competing business, as well as

> the resultant damage to the submitting enterprise. Where FOIA disclosure is the sole means by which competitors can obtain the requested information, the inquiry ends here.
>
> "Where, however, the material is available from other sources at little or no cost, its disclosure is unlikely to cause competitive damage to the submitting commercial enterprise. On the other hand, as explained in Worthington:
>
> > Because competition in business turns on the relative costs and opportunities faced by members of the same industry, there is a potential windfall for competitors to whom valuable information is released under FOIA. If those competitors are charged only minimal FOIA retrieval costs for the information, rather than the considerable costs of private reproduction, they may be getting quite a bargain. Such bargains could easily have competitive consequences not contemplated as part of FOIA's principal aim of promoting openness in government (id., 419-420)."

Finally, we point out that the Committee on Open Government is authorized to issue advisory opinions concerning the application of the Open Meetings Law and the Freedom of Information Law. The Committee is not empowered to enforce that statute or compel an agency to grant or deny access to records. In that regard, we offer the following comments.

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".

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, which shall be reasonable under the circumstances of the request, when such request will be granted or denied..."

New language was added to that provision on May 3 (Chapter 22, Laws of 2005) stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgement is given, it must include an approximate date within twenty business days indicating when it can be anticipated that a request will be granted or denied. However, if it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." It is our perspective that every law must be implemented in a manner that gives reasonable effect to its intent, and we 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, when 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 delay in disclosure. As the Court of Appeals, the state's highest court, 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 concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "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"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

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 beyond the approximate date of less than twenty business days given in its acknowledgement, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, 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."

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance,

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.

I trust this meets with your request. Should you have any further questions, please contact me directly.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJD:tt

cc: County of Monroe Industrial Development Authority

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4062

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October 25, 2005

Mr. Thomas Sheppard
[redacted]

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

Dear Mr. Sheppard:

We are in receipt of your July 16, 2005 request for an advisory opinion concerning the application of the Open Meetings Law to the scheduling of monthly business meetings of the Cornwall Central School District's Board of Education.

Based on the information you provided, the Board of Education schedules its monthly business meetings to begin with an executive session at 7 PM, and publishes notices that the public meetings begin at 7:30 PM. You ask whether this practice is in conformance with the Open Meetings Law.

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

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

In consideration of this voting requirement, 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 our 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. 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 indicate that there is intent to enter into an executive session by means of a vote to be taken during a meeting. While we imagine that the intent of publishing notice of the beginning of the meeting at 7:30 was to be considerate to the public, by indicating the correct beginning of the meeting (7 PM), and that an executive session is likely to be held (rather than *scheduled*), the public would implicitly be informed that there may be no overriding reason for arriving at the beginning of a meeting.

I trust this meets with your request. Should you have any further questions, please contact me directly.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJD:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-15590
OML-AO-4063

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October 26, 2005

E-MAIL

TO: Barry E. Lamb

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. Lamb:

I have received your letter concerning actions of the Village of Bayville Zoning Board of Appeals. You indicated that the Board on May 25 "heard an application" for a variance and thereafter approved a motion "to close the hearing and reserve judgement." On June 10, a "Notice of Decision granting the variance was issued, stating that the motion to grant the variance was made and unanimously approved at this same meeting." You wrote that you "FOILed the transcript for this case and none was provided, and that it is your belief "that whether they reserved decision and then approved without a public vote or closed the case and then re-opened it after all opposition had left, that they have violated the Open Meetings Law."

From my perspective, the facts as you presented them are unclear. However, I offer the following general remarks.

First, the Freedom of Information Law pertains to existing records, and §89(3) provides in part that an agency is not required to create a record in response to a request. If there is no transcript of the hearing, there would be no obligation to prepare such a record on your behalf.

Second, in my view, the Board's decision could only have been made in public at a meeting held in accordance with the Open Meetings Law.

Lastly, I note that numerous problems and conflicting interpretations arose under the Open Meetings Law as originally enacted with respect to the deliberations of zoning boards of appeals. In §108(1), the Law had exempted from its coverage "quasi-judicial proceedings". When a zoning board of appeals deliberated toward a decision, its deliberations were often considered "quasi-judicial" and, therefore, outside the requirements of the Open Meetings Law. As such, those

deliberations could be conducted in private. Nevertheless, in 1983, the Open Meetings Law was amended. In brief, the amendment to the Law indicates that the exemption regarding quasi-judicial proceedings may not be asserted by a zoning board of appeals. As a consequence, zoning boards of appeals are required to conduct their meetings pursuant to the same requirements as other public bodies subject to the Open Meetings Law.

Due to the amendment, a zoning board of appeals must deliberate in public, except to the extent that a topic may justifiably be considered during an executive session or in conjunction with an exemption other than §108(1). Paragraphs (a) through (h) of §105(1) of the Open Meetings Law specify and limit the grounds for entry into an executive session. Unless one or more of those topics arises, a zoning board of appeals must conduct its business in public.

I hope that I have been of assistance.

RJF:tt

cc: Zoning Board of Appeals
Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4064

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October 27, 2005

Mr. Donald Carpentier
[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. Carpentier:

I have received your letter concerning a gathering of three members of the Nassau Town Board.

You wrote that, according to various sources, "three members of our five member town council met at the home of one of those members, Barbara Fausner on at least one occasion." Others present included the president of a company that has applied to build a new development, the town attorney and two members of the Town's Board of Assessment Review.

In this regard, first, the Open Meetings Law applies to meetings of public bodies, such as town boards, and §102(1) 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.

Second, the Open Meetings Law does not specify where a public body must conduct its meetings. However, the Law does provide direction concerning the site of meetings. Section 103(b) of the 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 of the public buildings law."

Based upon the language quoted above, the Open Meetings Law, in my opinion, imposes 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.

From my perspective, a member's home would generally not be an appropriate location for a meeting of a public body. Aside from the issue of barrier-free access to physically handicapped persons, a home is not a public facility, and many have suggested that entry into a home to attend a meeting involves a sense of intrusion or intimidation. In my view, every law, including the Open Meetings Law, should be implemented in a manner that gives effect to its intent. Holding a meeting at a member's home would, in my opinion, be unreasonable and inconsistent with the intent of the law.

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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October 27, 2005

Ms. Cheryl Holmes
Citizens for True and Honest Government
[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. Holmes:

As you are aware, I have received your letter in which you raised questions pertaining to the Open Meetings Law and its implementation by the 1st Fire District in the Town of Granby.

The initial issue involves the procedure for entry into executive session. The other concerns your ability to record meetings of its governing body. In this regard, I offer the following comments.

First, 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.

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

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

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

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

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

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

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

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

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

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

In Peloquin 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).

It is noted that the foregoing was confirmed in a more recent decision rendered by 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: 1st Fire District

OML-AO-4066

From: Robert Freeman
To: [redacted]
Date: 10/31/2005 8:34:41 AM
Subject: Re: WHAT QUALIFIES AS AN OFFICIAL BOARD OF EDUCATION MEETING

Since I have received copies of correspondence relating to the matter, I note that a "meeting" involves any gathering of a quorum of a public body, such as a board of education, for the purpose of conducting public business, collectively, as a body, even if there is no intent to take action, and regardless of the manner in the gathering is characterized.

Every meeting must be preceded by notice of the time and place given to the news media and posted. With respect to minutes, the Open Meetings Law, §106, provides minimum requirements concerning the content of minutes. At a minimum, they must consist of a record or summary of motions, proposals, resolutions, action taken, and the vote of each member. They may be more expansive, but there is no requirement that they must be detailed or identify those who spoke.

Robert J. Freeman
Executive Director
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October 31, 2005

Mr. Anthony J. Camesano
[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. Camesano:

We are in receipt of your July 31, 2005 request for "input" regarding commentary published in the *Amherst Record* concerning a certain meeting conducted by the Town Supervisor.

In her July 29, 2005 opinion piece, Carlene Peterson describes a meeting which took place at the Supervisor's invitation concerning an investigation of criminal activity at the town's wastewater treatment facility, at which the Chief of Police, various attorneys working for the Town, and two Town board members were present. She observed, "[b]y only inviting two council members, there wasn't a quorum. Without a quorum, there's no need to alert the press." And further, "it could have been about a public employee, which means the meeting would have been held in closed session."

The Committee on Open Government is authorized to issue advisory opinions concerning the application of the Freedom of Information Law and the Open Meetings Law. Accordingly, to the extent that the Open Meetings Law may have applied to the actions described by Ms. Petersen, we offer the following comments.

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

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

> control over those who are their public servants. It is the only climate under which the commonweal will prosper and enable the governmental process to operate for the benefit of those who created it."

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

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.).

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

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

As a general matter, we believe Ms. Peterson is correct; we we do not believe that the Open Meetings Law applies unless a quorum is present. Even when a meeting is scheduled and reasonable notice is given to all the members in a manner consistent with the requirements of §41 of the General Construction Law, but less than a majority attends, the gathering would not constitute a "meeting" and the public would have no right to attend. Section 41 of the General Construction Law, entitled "Quorum and majority", states in relevant part that:

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

The issue in the context of your inquiry involves the application of the Open Meetings Law to a situation in which the Supervisor invited only two Board members to conduct public business. Since the Town Board consists of seven members no quorum was present, and the Open Meetings Law would not have applied.

When there is an intent to ensure the presence of less than a quorum at any given time in order to evade the Open Meetings Law, there is a judicial decision that infers that such activity would contravene that statute. As stated in Tri-Village Publishers v. St. Johnsville Board of Education:

> "It has been held that, in order for a gathering of members of a public body to constitute a 'meeting' for purposes of the Open Meetings Law, a quorum must be present (*Matter of Britt v County of Niagara*, 82 AD2d 65, 68-69). In the instant case, there was never a quorum present at any of the private meetings prior to the regular meetings.

> Thus, none of these constituted a 'meeting' which was required to be conducted in public pursuant to the Open Meetings Law.
>
> "We recognize that a series of less-than-quorum meetings on a particular subject which together involve at least a quorum of the public body could be used by a public body to thwart the purposes of the Open Meetings Law...However, as noted by Special Term, the record in this case contains no evidence to indicate that the members of respondent engaged in any attempt to evade the requirements of the Open Meetings Law" [110 AD 2d 932, 933-934 (1985)].

In Tri-Village, the Court found no evidence indicating an intent to circumvent the Open Meetings Law when a series of meetings were held, each involving less than a quorum of a board of education. Nevertheless, as we interpret the passage quoted above, when there is an intent to evade the Law by ensuring that less than a quorum is present, such an intent would violate the Open Meetings Law. If there is or has been an intent to circumvent the Open Meetings Law in the context of the situation of your concern, it is likely that a court would find that the Open Meetings Law has been infringed.

In regard to Ms. Peterson's observation about a "closed" meeting, or an executive session, we agree with her contention that the Supervisor "would have had to alert the press a closed meeting was taking place", and we offer the following comments to elaborate.

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 this voting requirement, 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 our 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. 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 indicate that there is intent to enter into an executive session by means of a vote to be taken during a meeting.

Although it is used as a ground for entering into executive session 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 our 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 our 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), we 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, we 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), we 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 our opinion have to identify the person or persons who may be the subject of a discussion. By means of the kind of motion suggested above, members of a public body and others in attendance would have the ability to know that there is a proper basis for entry into an executive session. Absent such detail, neither the members nor others may be able to determine whether the subject may properly be considered behind closed doors.

I trust this meets with your request. Should you have any further questions, please contact me directly.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJD:tt

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November 1, 2005

E-MAIL

TO: Joseph DiMattina

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. DiMattina:

I have received your inquiry concerning the propriety of conducting an executive session following a workshop.

In this regard, there is no legal distinction between a "meeting" and a "workshop." 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. 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. Therefore, an executive session should not be held following a meeting, but rather as a part of a meeting or "workshop."

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

RJF:tt

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November 1, 2005

E-MAIL

TO: Bill Murawski

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. Murawski:

I have received your letter concerning the status of the Humane Society of New York under the Freedom of Information and Open Meetings Laws. You wrote that the Society is a not-for-profit organization and a member of the Mayor's Alliance for New York City Animals.

In this regard, the Freedom of Information and Open Meetings Laws apply to governmental entities. Specifically, the former 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."

Since the Society 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 Society. As such, although the Society may choose to disclose records, it would not be required to do so by the Freedom of Information Law.

Similarly, 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."

Again, based upon my understanding of the Society, it would not constitute a public body, for it does not perform a governmental function. Therefore, meetings of the Society and its Board would not be governed by the Open Meetings Law and the Board could, in its discretion, choose to conduct public or private meetings.

Lastly, while the Society may not be required to give effect to the Freedom of Information Law, that statute includes all agency records within its scope, and §86(4) defines the term "record" to include:

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

Based on the foregoing, records transmitted by or pertaining to the Society that are maintained by or for an agency fall within the coverage of the Freedom of Information Law.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
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OML-AO-4070

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November 3, 2005

Ms. Ann Adams
[redacted]

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

Dear Ms. Adams:

We are in receipt of your August 10, 2005 request for an advisory opinion concerning the application of the Open Meetings Law to the proceedings of the NYS Board of Elections.

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

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

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

Although it is used frequently, the term "personnel" appears nowhere in the Open Meetings Law. While one of the grounds for entry into executive session often relates to personnel matters, from our 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 our 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. The Committee consistently advised, however, 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), we believe that a discussion of "personnel" may be considered in an executive session only when the subject involves a particular person or persons, and only when at least one of the topics listed in §105(1)(f) is considered.

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

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

> "...the public body must identify the subject matter to be discussed (See, Public Officers Law § 105 [1]), and it is apparent that this must be accomplished with some degree of particularity, i.e., merely

reciting the statutory language is insufficient (see, Daily Gazette Co. v Town Bd., Town of Cobleskill, 111 Misc 2d 303, 304-305). Additionally, the topics discussed during the executive session must remain within the exceptions enumerated in the statute (see generally, Matter of Plattsburgh Publ. Co., Div. of Ottaway Newspapers v City of Plattsburgh, 185 AD2d §18), and these exceptions, in turn, 'must be narrowly scrutinized, lest the article's clear mandate be thwarted by thinly veiled references to the areas delineated thereunder' (Weatherwax v Town of Stony Point, 97 AD2d 840, 841, quoting Daily Gazette Co. v Town Bd., Town of Cobleskill, supra, at 304; see, Matter of Orange County Publs., Div. of Ottaway Newspapers v County of Orange, 120 AD2d 596, lv dismissed 68 NY 2d 807).

"Applying these principles to the matter before us, it is apparent that the Board's stated purpose for entering into executive session, to wit, the discussion of a 'personnel issue', does not satisfy the requirements of Public Officers Law § 105 (1) (f). The statute itself requires, with respect to personnel matters, that the discussion involve the 'employment history of a particular person" (id. [emphasis supplied]). Although this does not mandate that the individual in question be identified by name, it does require that any motion to enter into executive session describe with some detail the nature of the proposed discussion (see, State Comm on Open Govt Adv Opn dated Apr. 6, 1993), and we reject respondents' assertion that the Board's reference to a 'personnel issue' is the functional equivalent of identifying 'a particular person'" [Gordon v. Village of Monticello, 620 NY 2d 573, 575; 207AD 2d 55, 58 (1994)]

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

I trust this meets with your request. Should you have any further questions, please contact me directly.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

cc: Board of Elections

OML-AO-4071

From: Robert Freeman
To: [redacted]
Date: 11/7/2005 1:08:20 PM
Subject: http://www.dos.state.ny.us/coog/otext/o3368.htm

http://www.dos.state.ny.us/coog/otext/o3368.htm

Dear Mr. Greif:

I have received your letter concerning notice of meetings of a village board of trustees and the absence of detail concerning the subjects to be considered during upcoming meetings.

In this regard, the only requirements in the Open Meetings Law involve notice of the time and place of meetings. There is nothing in that statute that pertains to agendas or that requires that agendas be prepared, nor is there a legal obligation to include reference in the notice preceding a meeting to the subjects to be considered at the meeting.

Attached is an opinion dealing with the notice requirements imposed by the Open Meetings Law.

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

Robert J. Freeman
Executive Director
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STATE OF NEW YORK
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OML-AO-4072

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November 7, 2005

Ms. Frances J. Thompson
[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. Thompson:

We are in receipt of your August 18, 2005 request for an advisory opinion concerning the application of the Open Meetings Law to meetings of the Board of Trustees of the New York City Employees' Retirement System. In that regard, we offer the following comments.

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

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

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

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.).

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

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

On the other hand, we know of no provision in the law which requires that all offices utilized by a public entity be open to the public. The Open Meetings Law only mandates access to buildings and/or office space to the extent they are meetings subject to the requirements of the Open Meetings Law.

I trust this meets with your request. Should you have any further questions, please contact me directly.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJD:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
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OML-AO-4073

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November 7, 2005

Ms. Molly M. Roach
[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. Roach:

We are in receipt of your August 18, 2005 request for an advisory opinion concerning the applicability of the Open Meetings and Freedom of Information Laws to your local board of education meetings and records.

In particular, you seek advice concerning the grounds for entering into an executive session, the accessibility of records evidencing spending by the school district and district policies, and statistical information which may be maintained by the district. In that regard, we offer the following comments.

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

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

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

In our opinion, it is likely that a court would find that the ground cited by your local school board for entering into executive session, "the structure of high school and middle school departments" would not qualify for discussion in an executive session. Further, we offer additional remarks concerning one of the grounds for entry into executive session that arises frequently.

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

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

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

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

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

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

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

Further, due to the insertion of the term "particular" in §105(1)(f), it has been advised that a motion describing the subject to be discussed as "personnel" is inadequate, and that the motion should be based upon the specific language of §105(1)(f). For instance, a proper motion might be: "I move to enter into an executive session to discuss the employment history of a particular person (or persons)". Such a motion would not in our 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.

With regard to your requests for records, the Freedom of Information Law is applicable to all agency records and §86(4) of that statute defines the term "record" expansively to include:

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

Whether records are accessible or deniable, an agency is required to respond to a request, and the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

New language was added to that provision on May 3 (Chapter 22, Laws of 2005) stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgment is given, it must include an approximate date within twenty business days

indicating when it can be anticipated that a request will be granted or denied. However, if it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." It is our perspective that every law must be implemented in a manner that gives reasonable effect to its intent, and we 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, when 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 delay in disclosure. As the Court of Appeals, the state's highest court, 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 measure" taken to bring them about permeate the body politic that 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 concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "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"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

If neither a response to a request nor an acknowledgment of the receipt of a request is given within five business days, if an agency delays responding for an unreasonable time beyond the approximate date of less than twenty business days given in its acknowledgment, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, 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."

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, 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.

Finally, with regard to your question about the accessability of records reflecting the number of student suspensions and the number of students suspended in a particular school year, it is not known whether the district maintains such records, and a school district is not required to create a record in response to a request. Further, it is important to remember that statistical records maintained by a school district which would otherwise be accessible pursuant to §87(2)(g)(I) of the Freedom of Information Law, may be made confidential in part due to the application of the Family Educational Rights and Privacy Act (20 USC §1232g; "FERPA").

In brief, as you may be aware, FERPA applies to all educational agencies or institutions that participate in funding, loan or grant programs administered by the United States Department of Education. As such, FERPA includes within its scope virtually all public educational institutions and many private educational institutions. The focal point of the Act is the protection of privacy of students. It provides, in general, that any "education record," a term that is broadly defined, that is personally identifiable to a particular student or students is confidential, unless the parents of students under the age of eighteen waive their right to confidentiality, or unless a student eighteen years or over similarly waives his or her right to confidentiality. The federal regulations promulgated under FERPA define the phrase "personally identifiable information" to include:

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

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

Based upon the foregoing, references to students' names or other aspects of records that would make a student's identity easily traceable must in our view be withheld from the public in order to comply with federal law. Accordingly, insofar as disclosure of the statistics or other records pertaining to the numbers of suspensions you have identified above would make a student's identity easily traceable, the records cannot be disclosed to the public.

I trust this meets with your request. Should you have any further questions, please contact me directly.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJD:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
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FOIL-AO-4074

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November 8, 2005

Ms. Michaelene E. Comerford, IAO
[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. Comerford:

We are in receipt of your August 24, 2005 request for an advisory opinion concerning the application of the Open Meetings Law to various proceedings of the Village of Fredonia. Mr. Freeman thanks you for your kind words.

In particular, you request our advice concerning the Board's use of executive session, workshops and special meetings to characterize meetings of the Village Board. In this regard, we offer the following comments.

First, with respect to the Village Board's characterization of the meetings as "workshops" or "special meetings" or regularly scheduled monthly meetings, from our perspective, there is no legal distinction between the three.

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)].

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 our 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.

We have reviewed the provisions of the Village Law and found no specific provision concerning special meetings held by a Village Board of Trustees. It is noted, however, that the current law represents a recodification of the old Village Law and that §23-2202 of the Village Law preserves special or local laws, ordinances, and provisions of village charters. Consequently, if the Village had adopted specific requirements concerning special meetings, such requirements would remain in effect. If, on the other hand, there is no provision regarding special meetings that has been adopted by the Village, there are in our view no restrictions placed on the subject matter that may be discussed at such meetings, and notice of the subject matter need not be given prior to such meetings.

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

> "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be

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

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

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

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

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

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

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

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

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

In response to your request, we offer additional remarks concerning two of the grounds for entry into executive session that arise frequently.

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

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

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

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

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

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

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

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

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

The other ground for entry into executive session that is often cited involves "litigation" or "legal matters". In our opinion, those minimal descriptions of the subject matter to be discussed would be insufficient to comply with the Law. The provision that deals with litigation is §105(1)(d)

of the Open Meetings Law, which permits a public body to enter into an executive session to discuss "proposed, pending or current litigation". In construing the language quoted above, it has been held that:

> "The purpose of paragraph d is "to enable 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, we believe that the exception is intended to permit a public body to discuss its litigation strategy behind closed doors, rather than issues that might eventually result in litigation. Since "legal matters" or possible litigation could be the subject or result of nearly any topic discussed by a public body, an executive session could not in our view be held to discuss an issue merely because there is a possibility of litigation, or because it involves a legal matter.

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].

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

I trust this meets with your request. Should you have any further questions, please contact me directly.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

cc: Village Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4025

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November 8, 2005

Mr. Richard K. Carpenter
Advanced Group Financial Services
One Clinton Plaza
Utica, NY 13501

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

Dear Mr. Carpenter:

We are in receipt of your request for an advisory opinion concerning the application of the Open Meetings Law to various proceedings of the Town Board of Newport. In particular, you inquire about the grounds for entering into an executive session.

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

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

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

One of the grounds for entry into executive session that is often cited involves "litigation" or "legal matters". In our opinion, those minimal descriptions of the subject matter to be discussed

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

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

Based upon the foregoing, we believe that the exception is intended to permit a public body to discuss its litigation strategy behind closed doors, rather than issues that might eventually result in litigation. Since "legal matters" or possible litigation could be the subject or result of nearly any topic discussed by a public body, an executive session could not in our view be held to discuss an issue merely because there is a possibility of litigation, or because it involves a legal matter.

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].

It is our opinion, therefore, that a court would not find it permissible to enter into executive session to discuss litigation strategy without mentioning the particular litigation. To the extent that you inquire as to whether it would be permissible for the Town Board to disclose the name of the person(s) who may be suing/sued by the Town, or whether it would be permissible for the Town Board to disclose the reason for entry into executive session, we believe that a court would require the Town Board to specify the reason for entry into an executive session, during the public meeting, prior to voting on closing the public meeting for such purposes.

Finally, please note that the existence of a lawsuit pending against a municipality is a matter of public record and there is no reason why a Town official would be prohibited from disclosing such information.

I trust this meets with your request. Should you have any further questions, please contact me directly.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

From: Robert Freeman
To: [redacted]
Date: 11/9/2005 1:07:16 PM
Subject: http://www.dos.state.ny.us/coog/otext/o2982.htm

http://www.dos.state.ny.us/coog/otext/o2982.htm

Hi Laura - -

The meetings of zoning boards of appeals are subject to the Open Meetings Law. The issue had been a matter of controversy, and arguably, the deliberations of zba's could at one time have been conducted in private, outside the scope of the Open Meetings Law, on their ground that they were quasi-judicial. However, as explained more fully in the attached opinion, amendments to the Open Meetings Law enacted more than twenty years ago removed the ability to deliberate in private and clearly brought zba's within the coverage of that statute.

With respect to "workshops" and similar gatherings, they fall within the scope of the Open Meetings Law. Again, years ago, it was determined judicially that workshops, work sessions and similar gatherings during which a majority of a government body gathers to conduct public business constitute "meetings" subject to the Open Meetings Law, even if there is no intent to take action, and regardless of their characterization.

I hope that this will be of assistance to you.

All the best.
Bob

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
Albany, NY 12231
(518) 474-2518 - Phone
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4077

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November 15, 2005

E-MAIL

TO: Mr. Jim Dello

FROM: Camille S. Jobin-Davis, Assistant Director CSJ

The staff of the Committee on 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. Dello:

We are in receipt of your September 28, 2005 e-mail request for an advisory opinion concerning the application of the Open Meetings Law to certain proceedings of the Wellsville Central School District Board of Education.

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

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

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

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.).

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

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

As a general matter, we believe you are correct; we do not believe that the Open Meetings Law applies unless a quorum is present. Even when a meeting is scheduled and reasonable notice is given to all the members in a manner consistent with the requirements of §41 of the General Construction Law, but less than a majority attends, the gathering would not constitute a "meeting"

and the public would have no right to attend. Section 41 of the General Construction Law, entitled "Quorum and majority", states in relevant part that:

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

The issue in the context of your inquiry involves the application of the Open Meetings Law to a situation in which the board, at a properly noticed open meeting, broke into two groups of four to discuss goals. Because the school board consists of nine members no quorum was present at the "break out" sessions, and the Open Meetings Law would not have applied.

We note that when there is an intent to ensure the presence of less than a quorum at any given time in order to evade the Open Meetings Law, there is a judicial decision that infers that such activity would contravene that statute. As stated in Tri-Village Publishers v. St. Johnsville Board of Education:

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

In Tri-Village, the Court found no evidence indicating an intent to circumvent the Open Meetings Law when a series of meetings were held, each involving less than a quorum of a board of education. Nevertheless, as we interpret the passage quoted above, when there is an intent to evade the Law by ensuring that less than a quorum is present, such an intent would violate the Open Meetings Law. Here, because the "break out" sessions were held during the course of a publicly noticed open meeting, we believe it is likely that a court would find that the Open Meetings Law has not been infringed.

With regard to your question about the vote to move into executive session, we offer the following comments. 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 this voting requirement, 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 our 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. 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 indicate that there is intent to enter into an executive session by means of a vote to be taken during a meeting.

Although it is used as a ground for entering into executive session 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 our 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 our 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. The Committee has consistently advised, however, 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), we 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, we 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), we 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 our 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.

We hope this helps clarify your understanding of the Open Meetings Law.

CSJ:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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November 15, 2005

E-MAIL

TO: Michele Roberts

FROM: Camille S. Jobin-Davis, Assistant Director CSJ

The staff of the Committee on 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. Roberts:

We are in receipt of your September 29, 2005 e-mail request for an advisory opinion concerning the application of the Open Meetings Law to certain proceedings of your local town board.

In response, please note that while individuals may have the right to express themselves and to speak, we do not believe that they necessarily have the right to do so at meetings of public bodies. By way of background, the right to attend meetings of public bodies is not constitutional, but 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.

In New York, 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, however, 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, we do not believe that it would be obliged to do so. Nevertheless, a public body may choose to answer questions and permit public participation, and many do so. When a public body does permit the public to speak, it has been advised that it should do so based upon rules that treat members of the public equally.

Although public bodies have the right to adopt rules to govern their own proceedings [see e.g., County Law, §153; Town Law, §63; Village Law, §4-412; Education Law, §1709(1)], the courts have found in a variety of contexts that such rules must be reasonable. For example, although a board of education may "adopt by laws and rules for its government and operations", in a case in

which a board's rules prohibited the use of tape recorders at its meetings, the Appellate Division found that the rule was unreasonable, stating that the authority to adopt rules "is not unbridled" and that "unreasonable rules will not be sanctioned" [see Mitchell v. Garden City Union Free School District, 113 AD 2d 924, 925 (1985)]. Similarly, if by rule, a public body chose to permit certain citizens to address it for ten minutes while permitting others to address it for three, or not at all, such a rule, in our view, would be unreasonable.

In sum, in our view, the public does not have the right to speak at meetings of public bodies. The Town Board, however, has the authority to permit such contributions.

Because you mention the State Environmental Quality Review Act ("SEQR"), which mandates public hearings at certain junctures, it is important to note that there is a distinction in the law between "meetings" and "hearings". The former involves a gathering of a majority of a public body for the purpose of conducting public business collectively, as a body. As such, meetings are ordinarily held for the purpose of discussion, deliberation, taking action and the like. A "hearing" typically is held to enable members of the public express their views on a particular subject, i.e., a budget, a change in zoning, etc. Notice requirements relating to meetings are prescribed in the Open Meetings Law, while public hearings imposed by SEQR are governed by provisions contained within that law.

We hope this helps to clarify your understanding of the Open Meetings Law.

CSJ:tt

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

OML-AO-4079

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November 16, 2005

Ms. Ruth Ann Gunter
Deputy Supervisor
Town of Wawarsing
7 Carnation Avenue
Ellenville, NY 12428

The staff of the Committee on 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. Gunter:

We are in receipt of your September 7, 2005 request for an advisory opinion concerning the application of the Open Meetings Law to certain proceedings of the Town Board of Wawarsing.

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

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

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

It is our opinion that a court would not uphold the Town's basis for entering into executive session which you relay, namely "to discuss the State Comptrollers Exit Report". Any further

discussion, concerning newspaper articles and/or any alleged activity on your part would, in our opinion, have to occur outside an executive session.

We would like to offer additional remarks concerning one of the grounds for entry into executive session that arises frequently.

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

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

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

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

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

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

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

Further, due to the insertion of the term "particular" in §105(1)(f), it has been advised that a motion describing the subject to be discussed as "personnel" is inadequate, and that the motion should be based upon the specific language of §105(1)(f). For instance, a proper motion might be: "I move to enter into an executive session to discuss the employment history of a particular person (or persons)". Such a motion would not in our 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.

Lastly, it is noted that the Executive Director has discussed the status of "exit conferences" with representatives of the Department of Audit and Control on various occasions. They contend that those gatherings are convened by an auditor, that there is no intent on the part of municipal officials to deliberate or take action and that, therefore, they are not subject to the requirements of the Open Meetings Law. The issue, to the best of our knowledge, has not been reviewed by any court.

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

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

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

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

> decision-making process that the Legislature intended to affect by the enactment of this statute" (60 AD 2d 409, 415).

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

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

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

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

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

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

From our perspective, the policy of the Office of the State Comptroller places municipal bodies in an anomalous position. When the members constituting a quorum of such a body want to attend an exit conference or meet with an auditor, if they accede to the policy of the Office of the State Comptroller, they are faced with the possibility of violating the Open Meetings Law.

Additionally, since the municipality is the subject of the audit, any criticism or embarrassment that might arise if an exit conference is held in public would likely be directed to the municipality rather than an auditor or the office that person represents. If municipal officials are willing to subject themselves to openness, it is difficult to understand why the Department of Audit and Control would object. It has been suggested by officials of that agency that if the meetings are held in public, auditors will not attend, and municipal officials would, therefore, be unable to gain the benefit of an auditor's explanation of findings or expertise. Consequently, while we disagree with the position taken by the Department of Audit and Control, it appears that the only sure method of avoiding a controversy regarding the Open Meetings Law would involve ensuring that less than quorum of the Board be present.

We hope this is helpful to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4079A

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November 16, 2005

Mr. Thomas Koehler
[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. Koehler:

We are in receipt of your e-mail request for an advisory opinion concerning limits placed on public participation at a hearing conducted by Fairport Central School District.

Based on the information you provided, the District held a "Public Scope Hearing for the District 2005 Capital Improvement Project .... as part of the State Environmental Quality Review Act process." You noted that the Superintendent directed that those making public comments limit their comments to five minutes. You specifically inquired about the Superintendent's ability to limit the number of times a member of the public could speak, albeit, in your estimation, still within the five minute limit.

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

Here, the Superintendent permitted you to speak, as he did everyone else who wished to do so. Since you were given the opportunity to speak for up to five minutes, but chose not to do so, it does not appear that your treatment would have been unreasonable.

We hope this helps clarify the matter.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJD:tt

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November 18, 2005

E-Mail

TO: Lawrence Slomin

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. Slomin:

I have received your letter in which you questioned the ability of the public to speak at meetings of a board of education and asked that we "reference the distinction between a public meeting and a meeting conducted in public."

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

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

Although public bodies have the right to adopt rules to govern their own proceedings [see e.g., County Law, §153; Town Law, §63; Village Law, §4-412; Education Law, §1709(1)], the courts have found in a variety of contexts that such rules must be reasonable. For example, although a board of education may "adopt by laws and rules for its government and operations", in a case in

which a board's rules prohibited the use of tape recorders at its meetings, the Appellate Division found that the rule was unreasonable, stating that the authority to adopt rules "is not unbridled" and that "unreasonable rules will not be sanctioned" [see Mitchell v. Garden City Union Free School District, 113 AD 2d 924, 925 (1985)]. Similarly, if by rule, a public body chose to permit certain citizens to address it for ten minutes while permitting others to address it for three, or not at all, such a rule, in my view, would be unreasonable.

In sum, in my view, the public does not have the right to speak at meetings of public bodies. Nevertheless, a public body may choose to permit the public to participate in conjunction with reasonable rules that treat members of the public equally.

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

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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November 21, 2005

Mr. Peter Henner
Attorney and Counselor at Law
P.O. Box 326
Clarksville, NY 12041-0326

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

Dear Mr. Henner:

I have received your letter in which you sought an advisory opinion concerning the adequacy of notice given by the Town Board of the Town of Fairfield prior to its meetings.

In this regard, as you may be aware, two statutes may be pertinent in relation to the situations that you described. 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." The requirements imposed by §62 are separate from those imposed by the Open Meetings Law.

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

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

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

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

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

In an effort to enhance compliance with and understanding of applicable laws, a copy of this response will be sent to the Town Board.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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November 22, 2005

E-MAIL

TO: Pam Farino

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. Farino:

As you are aware, I have received your inquiry concerning the Open Meetings Law.

If indeed you were told that notice of meetings of a board of education need not be given to the news media, I believe that you would have been misinformed. In this regard, §104 of the Open Meetings Law pertains to notice of meetings of public bodies, such as boards of education, and states that:

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

In consideration of the foregoing, first, I point out that a public body is required only to provide notice of the time and place of a meeting. There is nothing in the Open Meetings Law that requires that notice of a meeting include reference to the subjects to be discussed. Similarly, there is nothing in that statute that pertains to or requires the preparation of an agenda.

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

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

In my view, 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.

With respect to the ability to close meetings, I point out that 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.

The only direct reference to "negotiations" is found in §105(1)(e), which authorizes a public body to enter into executive session to discuss collective bargaining negotiations involving a public employee union.

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

RJF:tt

STATE OF NEW YORK
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OML-AO-4083

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November 22, 2005

Mr. Donald N. Thompson
Member
Cato Meridian School Board
[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. Thompson:

We are in receipt of your September 8, 2005 request for an advisory opinion pertaining to the application of the Open Meetings Law to a recent meeting of the Board of Education of the Cato-Meridian School District, of which you are a member.

Although we are not able to discern your specific questions from your letter, we note two issues of concern and offer the following comments.

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

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.).

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

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

Here, however, it does not appear that there was a quorum of members present at any alleged meeting with the new attorney, if indeed there was a meeting separate and apart from the previous month's meeting.

Second, since you questioned whether or how action might have been taken outside of a meeting, we note that there is nothing in the Open Meetings Law that would preclude members of a public body from conferring individually, by telephone, via mail or e-mail. 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, however, would in our opinion be inconsistent with law.

From our perspective, voting and action by a public body may be carried out only at a meeting during which a quorum has physically convened, or during a meeting held by videoconference. It is noted that the Open Meetings Law pertains to public bodies, and §102(2) defines the phrase "public body" to mean:

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

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

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

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

In view of that definition and others, we believe that a meeting, i.e., the "convening" of a public body, involves the physical coming together of at least a majority of the total membership of such a body, i.e., the Commission, or a convening that occurs through videoconferencing. We 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 our view, those amendments clearly indicate that there are only two ways in which a public body may validly conduct a meeting. Any other means of conducting a meeting, i.e., by telephone conference, by mail, or by e-mail, would be inconsistent with law.

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

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

> which the board, commission, body or other group of persons or officers would have were there no vacancies and were none of the persons or officers disqualified from acting."

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

Conducting a vote or taking action via e-mail would, in our view, be equivalent to voting by means of a series of telephone calls, and in the only decision dealing with a vote taken by phone, the court found the vote to be a nullity. In Cheevers v. Town of Union (Supreme Court, Broome County, September 3, 1998), which cited and relied upon an opinion rendered by this office, the court stated that:

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

> finds that telephonic conferences among the individual members constituted a meeting in violation of the Open Meetings Law..."

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

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

Fourth, 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.

Lastly, although it is used frequently, the term "personnel" appears nowhere in the Open Meetings Law. Although one of the grounds for entry into executive session often relates to personnel matters, from our 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 our 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. The Committee consistently advised, however, 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), we 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.

In the context of the situation at issue, we do not believe that an executive session "to meet the new attorney" would have fallen within the coverage of §105(1)(f), and, we believe that the personnel matter that was discussed during the executive session should have been delineated in the motion to enter into 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 our 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)]

We hope that this helps to clarify your understanding of the Open Meetings Law.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

OML-AO-4084

From: Robert Freeman
To: [redacted]
Date: 11/23/2005 9:39:43 AM
Subject: Hi - -

Hi - -

Hope all is well and that you will have or have had a terrific Thanksgiving.

As for your questions, I have never believed that a meeting must be held in order schedule a meeting; certainly we don't do so here at the Committee on Open Government. My secretary generally phones the members with possible dates, and we choose a date that's most convenient. With respect to the agenda issue, there is simply nothing in the OML or any other statute of which I am aware that focuses on or refers to agendas. From my perspective, so long as a public body's rule or procedure is reasonable and not inconsistent with law, it would be valid.

If you'd like to discuss the issues further, you know where I am!
Bob

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
Albany, NY 12231
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November 28, 2005

Mr. Dennis B. McAlpine, Chair
Village of Scarsdale CATV Commission
Office of the Village Manager
Scarsdale, NY 10583

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

Dear Mr. McAlpine:

As you are aware, I have received your letter in which you wrote that you serve as Chair of the Village of Scarsdale CATV Committee. I note, too, that I attempted to reach you by phone unsuccessfully.

You wrote that you are beginning to negotiate the renewal of an existing cable television franchise with Cablevision Systems Corp. And a new franchise with Verizon Communications, Inc. It is your view that the "interim negotiations between the Village and franchisee" are not required to be conducted in public, and you have sought an opinion concerning the matter.

In this regard, I offer the following comments.

First, the composition and authority of the CATV Committee were not described in your letter. Here I point out that the Open Meetings Law is applicable to meetings of public bodies, and that §102(2) defines the phrase "public body" to mean:

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

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 board designates a committee consisting of three of its members, the committee would itself be a public body; its quorum would be two, and a gathering of two or more, in their capacities as members of that committee, would be a meeting subject to the Open Meetings Law.

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

In the context of your inquiry, if the Committee has no authority to take any final and binding action for or on behalf of the Village, it appears that it does not constitute a public body or, therefore, is obliged to comply with the Open Meetings Law.

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

Assuming that the Committee is a public body or that a decision has been made to give effect to the Open Meetings Law if it is not, as you suggested, some elements of its meetings could likely be conducted in executive session. Specifically, §105(1)(f) states that a public body may enter into executive session to discuss:

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

Insofar at the Committee's discussions focus on either of the entities to which you referred in relation to the topics appearing in §105(1)(f), i.e., consideration of a corporation's financial history, I believe that an executive session could properly be held. However, when none of the qualifying topics included within that provision apply, and if the Committee is a public body required to comply with the Open Meetings Law, its meetings must, in my view, be conducted open to the public.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

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November 29, 2005

E-MAIL

TO: Thomas Koehler

FROM: Robert J. Freeman, Executive Director

Dear Mr. Koehler:

I have received your letter in which you referred to a public hearing during which members of the public were permitted to speak for up to five minutes. You spoke for less than the allotted time, and after others spoke, you asked to speak a second time based on the fact that you had taken less than five minutes. Your request to do so was rejected, and you wrote that you "feel aggrieved....because the rules for participation....did not specify you could only speak once but you should limit your comments to five minutes."

In this regard, the Committee on Open Government is authorized to provide advice and opinions pertaining to the Open Meetings Law. Here I point out that there is a distinction between a "meeting" subject to that statute, and a hearing. The former involves a gathering of a majority of the members of a public body for the purpose of conducting public business, to discuss, deliberate and perhaps take action. The latter involves a situation in which members of the public are given the opportunity to express their views concerning a particular subject. Public hearings are typically preceded by the publication of a legal notice; the Open Meetings Law specifies that no legal notice is required.

Because the issue that you raised pertains to a hearing rather than a meeting, I cannot offer unequivocal advice. However, in a variety of situations, it has been held that a public body has the right to establish rules or procedures to govern its own proceedings, and that so long as those rules or procedures are reasonable and treat members of the public equally, they are valid. In the context of your question, you had the opportunity to speak for up to five minutes. In my view, a court would likely find that, because you chose not to speak for the maximum time permitted, that choice would not give you the right to speak for a second time to complete the maximum amount of time for addressing the public body, unless other persons were given the same opportunity to do so.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
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November 29, 2005

Mr. Burt J. Valvo
[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. Valvo:

We are in receipt of your recent correspondence requesting an "investigation" into the alleged actions of the Town of Hanover Town Board. Please note that while the Committee on Open Government is authorized to issue advisory opinions concerning the application of the Open Meetings Law, this office has no authority to enforce the law or compel an entity to comply with its provisions.

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

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

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

Although it is used often as a ground for entering into executive session, the word "personnel" appears nowhere in the Open Meetings Law. Further, although one of the grounds for entry into executive session often relates to personnel matters, the language of that provision is

precise. By way of background, in its original form, §105(1)(f) of the Open Meetings Law permitted a public body to enter into an executive session to discuss:

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

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

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

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

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

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

Further, due to the insertion of the term "particular" in §105(1)(f), it has been advised that a motion describing the subject to be discussed as "personnel" is inadequate, and that the motion should be based upon the specific language of §105(1)(f). For instance, a proper motion might be: "I move to enter into an executive session to discuss the employment history of a particular person (or persons)". Such a motion would not in our 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.

If your allegation is accurate, that the Board did not vote on a motion to enter into executive session, but the Deputy Supervisor merely informed the public: "You must leave as we are going into executive session", we believe that a court would find that such activity failed to comply with the Open Meetings Law.

As you note, however, the resolution, which was adopted, was voted on during the course of the regular meeting. While it is not within our jurisdiction to advise as to the applicability of the Fourteenth Amendment, there is no requirement in the Open Meetings Law or any other law that we are aware of that would require the Board to discuss the resolution prior to its adoption.

We hope that this helps clarify your understanding of the functions of the Committee on Open Government and the operation of the Open Meetings Law.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

STATE OF NEW YORK
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November 30, 2005

E-MAIL

TO: Steve Ruelke

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. Ruelke:

I have received your letter concerning an executive session held by Newburgh City Council to discuss "the budget." You wrote that "[t]here was no motion per se and no vote" prior to entry into the executive session.

From my perspective, the Council failed to comply with the procedural requirements imposed by the Open Meetings Law. Further, it is unlikely that an executive session could properly have been held. 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, I point out that often a discussions concerning a budget have an impact on personnel. Nevertheless, despite its frequent use, the term "personnel" appears nowhere in the Open Meetings Law. It is true that one of the grounds for entry into executive session often relates to personnel matters. From my perspective, however, the term is overused and is frequently cited in a manner that is misleading or causes unnecessary confusion. To be sure, some issues involving "personnel" may be properly considered in an executive session; others, in my view, cannot. Further, certain matters that have nothing to do with personnel may be discussed in private under the provision that is ordinarily cited to discuss personnel.

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

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

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

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

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

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

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

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

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

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

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

As you suggested, a copy of this response will be sent to the City Council.

I hope that I have been of assistance.

RJF:tt

cc: City Council

OMC-AO-4089

From: Robert Freeman
To: [redacted]
Date: 12/1/2005 1:31:20 PM
Subject: Dear Mr. Chittenden:

Dear Mr. Chittenden:

I have received your correspondence concerning whether an agenda must include the name of a person who may be the subject of a discussion during an executive session. You expressed the belief that I had advised that the name must be included in the agenda.

That is not so.

First, there is nothing in the Open Meetings Law that deals with agendas. A public body, such as a city council, may choose to prepare an agenda, but there is no obligation to do so. Further, the degree of detail within an agenda would involve a matter within the discretion of a public body.

Second, it has consistently been advised that motion for entry into executive session need not identify the person who is the subject of the discussion, and that advice has been confirmed by the Appellate Division in Gordon v. Village of Monticello, 207 AD2d 55 (1994).

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

cc: City Council, City of Rye

Robert J. Freeman
Executive Director
NYS Committee on Open Government
41 State Street
Albany, NY 12231
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Website - www.dos.state.ny.us/coog/coogwww.html

OML-AO-4090

From: Robert Freeman
To: Debra Cohen, Esq.
Date: 12/2/2005 1:11:47 PM
Subject: Re: [FOI-L] Publish the names of people who attend public meetings

We have advised that a person cannot be forced to provide his or her name or address as a condition precedent to speaking at an open meeting. Anyone has the right to be present, whether the person resides in Yonkers or Timbuktu, and anyone present should have the same opportunity to speak.

What if a person is a battered woman and does not want the batterer to know where she lives or that she attends City Council meetings? A rule requiring persons to identify themselves by name and address would, in my view, be found by a court to be unreasonable in that and other circumstances.

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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 4091

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December 2, 2005

E-Mail

TO: Barbara Schatzman

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. Schatzman:

I have received your letter in which you referred to my opinion concerning Education Commissioner Mills' decision in Application of Nett and Raby in which the Commissioner determined, in brief, that a member of a board of education may be removed from office if he or she discloses information acquired during an executive session. As a new member of your board of education, you have questioned the direction given by your district's attorney. You wrote that:

> "We have been told by our attorney that ALL personnel, litigation, and negotiation issues MUST be discussed in executive session ONLY" (emphasis yours).

In my opinion, very simply, if the statement attributed to the district's attorney was accurately expressed, it is erroneous. Additionally, while I would not suggest that a member of a board of education should knowingly fail to comply with law, I have attached an advisory opinion (OML-AO 3449) that describes in detail the rationale for my disagreement with the Commissioner.

With respect to your question, §105(1) of the Open Meetings Law prescribes a procedure that must be accomplished by a public body, such as a board of education, before an executive session may be held. Specifically, the introductory language of that provision 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..." (emphasis mine).

Based on the foregoing, although a matter *may* be discussed in executive session, there is no requirement that it *must* be discussed in executive session. In this regard, both the Open Meetings Law and the Freedom of Information Law are permissive. While the Open Meetings Law authorizes public bodies to conduct executive sessions in circumstances described in paragraphs (a) through (h) of §105(1), there is no requirement that an executive session must be held even though a public body has the right to do so. 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 of access, it has been held by the Court of Appeals, the state's highest court, that the exceptions are permissive rather than mandatory, and that an agency may choose to disclose records even though the authority to withhold exists [Capital Newspapers v. Burns], 67 NY 2d 562, 567 (1986)].

I note, too, that the descriptions of the subjects for consideration in executive session to which you referred would, according to judicial decisions, be inadequate to comply with the Open Meetings Law. As indicated in §105(1), a motion to conduct an executive session must include reference to the subject or subjects to be discussed, and the motion must be carried by majority vote of a public body's membership before such a session may validly be held. The ensuing provisions of §105(1) specify and limit the subjects that may appropriately be considered during an executive session.

It is emphasized that the term "personnel" appears nowhere in the Open Meetings Law and, in my view, is greatly overused. While some discussions relating to personnel may properly be discussed in executive session, many others must be discussed in public. 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 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.

In discussing §105(1)(f) in relation to a matter involving the establishment and functions of a position, the Appellate Division 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.

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

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

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

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

> "It is insufficient to merely regurgitate the statutory language; to wit, 'discussions regarding proposed, pending or current litigation'. This boilerplate recitation does not comply with the intent of the statute. To validly convene an executive session for discussion of proposed, pending or current litigation, the public body must identify with particularity *the* pending, proposed or current litigation to be

> discussed during the executive session" [Daily Gazette Co., Inc. v. Town Board, Town of Cobleskill, 44 NYS 2d 44, 46 (1981), emphasis added by court].

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

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

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

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

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

I hope that the foregoing serves to clarify your understanding of the Open Meetings Law and that I have been of assistance. If you would like to discuss these matters further, please feel free to contact me. Also, please feel free to share this opinion as well the opinion attached to this response as you see fit.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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OML-AO-4092

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December 12, 2005

Ms. Eileen Haworth Weil
[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. Weil:

We are in receipt of your October 6, 2005 request for an advisory opinion concerning various requests for records made to the Town of Mamakating.

If your contention is accurate, that the Town has failed to respond to your specific requests for access to minutes and a draft Findings Statement from a recent Zoning Board of Appeals meeting, it has constructively denied your request. In addition, the Town has denied access to a letter from the Chair of the ZBA to the Attorney for the ZBA, citing "personnel matters."

In this regard, we offer the following comments.

First, when records are accessible under the Freedom of Information Law, they must be made available for inspection and copying. Further, §89(3) of that statute requires that an agency prepare copies of accessible records on request upon payment of the appropriate fee.

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 our 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 we are aware that requires that minutes be approved. Nevertheless, as a matter of practice or policy, many public bodies approve minutes of their meetings. In the event that minutes have been approved, to comply with the Open Meetings Law, it has consistently been advised that minutes be prepared and made available within two weeks, and that if the minutes have not been approved, they may be marked "unapproved", "draft" or "non-final", for example. By so doing within the requisite time limitations, the public can generally know what transpired at a meeting; concurrently, the public is effectively notified that the minutes are subject to change. If minutes have been prepared within less than two weeks, we believe that those unapproved minutes would be available as soon as they exist, and that they may be marked in the manner described above.

Viewing the issue from a different vantage point, the Freedom of Information Law makes no distinction between drafts as opposed to "final" documents. The Law pertains to all 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."

Due to the breadth of the language quoted above, once a document exists, it constitutes a "record" subject to rights of access, even if the record is characterized as "draft" or is unapproved. Further, as a general matter, minutes consist of a factual rendition of what transpired at an open meeting. On that basis, we believe that they are accessible [see Freedom of Information Law, section 87(2)(g)(i)]. Further, minutes often reflect final agency determinations, which are available under section 87(2)(g)(iii), irrespective of whether minutes are "approved". Additionally, in the case of an open meeting, during which the public may be present and, in fact, may tape record the meeting [see Mitchell v. Board of Education of the Garden City Union Free School District, 113 AD 2d 924 (1985)], there would appear to be no valid basis for withholding minutes, whether or not they have been approved.

Based on our understanding of the nature of a Findings Statement, it too, whether in "draft" or "final" form, constitutes a record which reflects factual matters upon which the ZBA makes its

legal findings and conclusions. Because Findings Statements are not required to be maintained separately from the meeting minutes, it is not uncommon for a zoning board to adopt minutes as their Findings Statements. It is our opinion, therefore, that Findings Statements, similar in most respects to minutes, are subject to rights of access under the Freedom of Information Law.

To the extent that you still may not have received a response from the Town regarding portions of your request, we offer the following comments.

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

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

It is noted that new language was added to that provision on May 3 (Chapter 22, Laws of 2005) stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period, depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgement is given, it must include an approximate date within twenty business days indicating when it can be anticipated that a request will be granted or denied. If it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, however, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless

it is reasonable to do so based upon "the circumstances of the request." It is our perspective that every law must be implemented in a manner that gives reasonable effect to its intent, and we 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, when 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 delay in disclosure. As the Court of Appeals, the state's highest court, 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 concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "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"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

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 beyond the approximate date of less than twenty business days given in its acknowledgement, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, 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."

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, 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.

Finally, with regard to the denial of your request for a copy of a letter between the ZBA Chair and the ZBA Attorney, while we are unaware of the contents of the letter, the Town's description indicates "this is a personnel matter", and your description indicates "it was discussed at length at the September 8, 2005 meeting."

By way of background, there is nothing in the Freedom of Information Law that deals specifically with personnel records or personnel files. Further, the nature and content of so-called personnel files may differ from one agency to another, and from one employee to another. In any case, neither the characterization of documents as "personnel records" nor their placement in personnel files would necessarily render those documents "confidential" or deniable under the Freedom of Information Law (see Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980). On the contrary, the contents of the documents serve as the relevant factors in determining the extent to which they are available or deniable under the Freedom of Information Law. It may be that there are one or more grounds for denial which could justify a denial of access, however, without further information, we are unable to issue an opinion on this matter.

Perhaps of greatest significance is the provision cited earlier, §87(2)(b), concerning unwarranted invasions of personal privacy.

While the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public officers employees. It is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public officers and employees are required to be more accountable than others. With regard to records pertaining to public officers and employees, the courts have found that, as a general rule, records that are relevant to the performance of 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 our view be withheld. Insofar as a request involves a final agency determination, we believe that such a determination must be disclosed, again, unless a different ground for denial could be asserted.

We hope this helps to clarify your understanding of the Freedom of Information Law.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

cc: Linda Franck

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4093

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December 14, 2005

Mr. Michael Abbott
Director
Office of Audit Services, Room 524 EB
The State Education Department
89 Washington Avenue
Albany, NY 12234

The staff of the Committee on 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. Abbott:

I have received your letter in which you asked whether meetings of audit committees created pursuant to legislation recently enacted are subject to the Open Meetings Law. If they do fall within the coverage of that statute, you asked what the "advertising requirements" might be.

In this regard, the audit committee to which you referred is required to be created pursuant to §2116-c of the Education Law, which states in part that "Every school district, except those employing fewer than eight teachers, shall establish by a resolution of the trustees or board of education an audit committee to oversee and report to the trustees or board on the annual audit of th district records..." and that the audit committee "shall consist of at least three members." Although subdivision (4) of §2116-c states that the "role of an audit committee shall be advisory", subdivisions (5) and (6) describe a series of responsibilities imposed on the committee that are integral to the audit process.

The Open Meetings Law applies to public bodies, and from my perspective, an audit committee is clearly a public body required to comply with the Open Meetings Law. Section 102(2) of that statute defines the phrase "public body" to mean:

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

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

In this instance, however, an audit committee performs critical and necessary functions in the implementation of §2116-c of the Education Law.

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

Again, according to §2116-c, since an audit committee carries out necessary functions in the implementation of legislation, I believe that it performs a governmental function and, therefore, is a public body subject to the Open Meetings Law.

I note, too, that subdivision (7) of §2116-c refers to the ability of an audit committee to conduct executive session to discuss certain matters. That reference in my view indicates a recognition by the State Legislature that such a committee is subject to the Open Meetings Law.

With respect to "advertising" prior to a meeting, I point out that the Open Meetings Law requires that every meeting of a public body be preceded by notice, but specifies that there is no obligation to pay to place a legal notice in a newspaper or to "advertise" a 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.

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

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

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

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, as an alternative method of achieving the desired result that would comply with the letter of the law, rather than scheduling an executive session, a public body on its agenda or notice of a meeting could refer to or schedule a motion to enter into executive session to discuss certain subjects. Reference to a motion to conduct an executive session would not represent an assurance that an executive session would ensue, but rather that there is an intent to enter into an executive session by means of a vote to be taken during a meeting.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
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December 16, 2005

Ms. Karen A. Hoffman
[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. Hoffman:

We are in receipt of your October 24, 2005 e-mail request for an advisory opinion concerning actions taken by the Board of Education of the Greece Central School District on October 15, 2005. Based on your description, the Board President closed a meeting to the public, indicating that it was a "closed study session" for the Board only. Notice of the meeting had not been posted, but two consultants were present and presumably discussed their recently completed report, an "Educational Audit of the District and the Board of Education."

First, as you correctly point out, there is no such gathering characterized in law as a "closed study session". In this regard, §102(1) of the Open Meetings Law defines the term "meeting" to mean "the official convening of a public body for the purpose of conducting public business". It is emphasized that the definition of "meeting" has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be convened open to the public, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

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

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

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

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

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

Based upon the direction given by the courts, if a majority of the Board gathers to discuss District business, collectively as a body and in their capacities as Board members, any such gathering, in our 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, we do not believe that the Open Meetings Law would apply, for there would be no intent to conduct public business, collectively, as a body. Further, if less than a quorum is present, the Open Meetings Law would not, in our opinion, be applicable.

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

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

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

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

Relevant to your inquiry may be §108(3), which exempts from the Open Meetings Law:

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

While 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 may be applicable, it is unlikely that they apply in this case.

Accordingly, a meeting at which the report was discussed, in our opinion, would be subject to the Open Meetings Law, and should have been properly noticed. This is especially true in light of the accessibility of audit reports pursuant 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.

Although §87(2)(g) potentially serves as a basis for a denial of access, due to its structure, it often requires substantial disclosure. Specifically, that provision states that an agency may withhold records that:

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

iii. final agency policy or determinations; or

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

While opinions, advice and recommendations may be withheld in many instances when found within inter-agency or intra-agency materials, that is not so in the case of an external audit. As indicated by subparagraph (iv) of §87(2)(g), the State Legislature specified that external audits must be disclosed, even though they typically consist of statistical or factual information, as well as opinions or recommendations.

In short, in consideration of the clear direction provided by §87(2)(g)(iv), we believe that the record at issue must be disclosed. We note, too, that §87(2)(g)(iv) was enacted initially as part of the "Governmental Accountability, audit and Internal Control Act of 1987." The provisions of that act "sunset" periodically but have been renewed several times to ensure, in part, that external audits remain accessible to the public.

In an effort to enhance their understanding of the Open Meetings and the Freedom of Information Laws, copies of this opinion will be forwarded to the Board.

I hope that I have been of assistance.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJD:jm

cc: Ken Walsh, President

STATE OF NEW YORK
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December 19, 2005

E-Mail

TO: Teresa

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 Teresa:

I have received your inquiry in which you asked whether there is a time limit within which minutes must be made available and/or approved.

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

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

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

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

I hope that I have been of assistance.

RJF:jm

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December 20, 2005

E-MAIL

TO: Mary Brusoe

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. Brusoe:

I have received your letter concerning " an emergency meeting" of the Greater Amsterdam School District Board of Education. You wrote that notice of the meeting was given only to District officials, that the Board took action during the meeting to reassign three building principals and that "[t]he moves were precipitated by the untimely heart attack of the middle school principal..." You have asked whether the Superintendent and the Board "had an obligation under the Open Meetings Law to make the public aware of their intentions."

In this regard, I offer the following comments.

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

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

> 3. The public notice provided for by this section shall not be construed to require publication as a legal notice."

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

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

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

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

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

Second, 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.

From my perspective, the only ground for entry into executive session in the circumstance that you described would have been pertinent is §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."

Certainly the Board would have had the authority to discuss the stricken principal's medical condition during an executive session. However, if a portion of its discussion involved the procedural steps to be taken (i.e., whether a search should be made for a new principal, whether the District can function effectively with the position of principal in the middle school temporarily vacant, whether an effort should be made to carry out the functions of the principal with existing staff), those and similar aspects of the discussion would not have focused on a "particular person", and discussions of that nature, if they occurred, should have been conducted in public. When the procedural issues had been resolved, I would conjecture that the next element of the discussion might have involved the qualifications, experience, strengths and weaknesses of existing staff and which staff persons might be reassigned. If that is so, that aspect of the meeting could in my opinion have validly been conducted in executive session, for the focus would have involved the employment history of a particular person or persons.

In short, while some aspects of the process in the situation as you presented could properly have been carried out in executive session, others might properly have been discussed in public.

Lastly, with respect to the enforcement of the Open Meetings Law, §107(1) of the Law states in part that:

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

However, the same provision states further that:

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

As such, when a legal challenge is initiated relating to a failure to provide notice, a key issue is whether a failure to comply with the notice requirements imposed by the Open Meetings Law was "unintentional".

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

I hope that I have been of assistance.

RJF:tt

cc: Board of Education

STATE OF NEW YORK
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December 21, 2005

Wayne D. Esannason, Esq.
Village Attorney
Village of Scarsdale
1001 Post Road
Scarsdale, NY 10583

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

Dear Mr. Esannason:

I have received your letter and apologize for the delay in response. You wrote that the Village of Scarsdale has received proposals from Verizon and Cablevision in which they sought the opportunity to negotiate a cable television franchise agreement with the Village. The Village has created a Cable Commission by local law, and you asked whether the franchise renewal negotiations between the Commission and either of those entities "are subject to the Open Meetings Law and required to be open to the public." You also asked whether proposals submitted by Verizon and Cablevision are subject to the Freedom of Information Law.

In this regard, please note that the issue involving the application of the Open Meetings Law was raised recently by Dennis B. McAlpine, Chair of the entity in question, and that he referred to it as the "commission" and the "committee" and did not indicate that it is a creation of law. With that additional information that you provided, that the Commission is a creation of law, it would appear that the Commission is a "public body" required to comply with the Open Meetings Law.

Based on the assumption that the entity in question is subject to the Open Meetings Law, as suggested to Mr. McAlpine, there appears to be only one ground for entry into executive that would be pertinent. 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 the Commission's discussions involve either Verizon or Cablevision in relation to the subjects listed in §105(1)(f), e.g., consideration of a corporation's financial history, I believe that

an executive session could properly be held. However, when none of the qualifying subjects included within that provision apply, the Commission must, in my view, conduct its meetings open to the public.

With respect to proposals received by either of the companies, the Freedom of Information Law is broad in its coverage, for it pertains to all government agency records and defines the term "record" 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."

Based on the foregoing, proposals or any other materials received from Verizon or Cablevision constitute agency records subject to rights of access conferred by the Freedom of Information Law when they come into the possession of the Village.

I have been informed that in analogous situations, Verizon has requested that its submissions be kept confidential. Here I point out that the Court of Appeals has held that a request for or a promise of confidentiality is all but meaningless; unless one or more of the grounds for denial appearing in the Freedom of Information Law may appropriately be asserted, the record sought must be made available. In Washington Post v. Insurance Department [61 NY2d 557 (1984)], the controversy involved a claim of confidentiality with respect to records prepared by corporate boards furnished voluntarily to a state agency. The Court of Appeals reversed a finding that the documents were not "records" subject to the Freedom of Information Law, thereby rejecting a claim that the documents "were the private property of the intervenors, voluntarily put in the respondents' 'custody' for convenience under a promise of confidentiality" [Washington Post v. Insurance Department, 61 NY 2d 557, 564 (1984)]. Moreover, it was determined that:

> "Respondent's long-standing promise of confidentiality to the intervenors is irrelevant to whether the requested documents fit within the Legislature's definition of 'records' under FOIL. The definition does not exclude or make any reference to information labeled as 'confidential' by the agency; confidentiality is relevant only when determining whether the record or a portion of it is exempt (see *Matter of John P. v Whalen*, 54 NY2d 89, 96; *Matter of Fink v Lefkowitz,* 47 NY2d 567, 571-572, *supra*; *Church of Scientology v State of New York*, 61 AD2d 942, 942-943, affd 46 NY2d 906; *Matter of Belth v Insurance Dept.*, 95 Misc 2d 18, 19-20). Nor is it relevant that the documents originated outside the government.... Such a factor is not mentioned or implied in the statutory definition of records or in the statement of purpose...."

It is also emphasized that the Freedom of Information Law is permissive. In brief, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. 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. As stated in that unanimous decision: "...while an agency is permitted to restrict access to those records falling within the statutory exemptions, the language of the exemption provision contains permissive rather than mandatory language, and it is within the agency's discretion to disclose such records, with or without identifying details, if it so chooses" [Capital Newspapers v. Burns, 67 NY2d 562, 567 (1986)].

In most situations in which commercial entities are involved in negotiations leading to the award of a contract or franchise, two of the grounds for denial are most relevant.

The first, §87(2)(c), permits an agency to withhold records to the extent that disclosure "would impair present or imminent contract awards..." As I understand its application, §87(2)(c) generally encompasses situations in which an agency or a party to negotiations maintains records that have not been made available to others. For example, if an agency seeking bids or proposals has received a number of bids, but the deadline for their submission has not been reached, premature disclosure for the bids to another possible submitter might provide that person or firm with an unfair advantage vis a vis those who already submitted bids. Further, disclosure of the identities of bidders or the number of bidders might enable another potential bidder to tailor his bid in a manner that provides him with an unfair advantage in the bidding process. In such a situation, harm or "impairment" would likely be the result, and the records could justifiably be denied. However, after the deadline for submission of bids or proposals are available after a contract has been awarded, and that, in view of the requirements of the Freedom of Information Law, "the successful bidder had no reasonable expectation of not having its bid open to the public" [Contracting Plumbers Cooperative Restoration Corp. v. Ameruso, 105 Misc. 2d 951, 430 NYS 2d 196, 198 (1980)]. Similarly, if an agency is involved in collective bargaining negotiations with a public employee union, and the union requests records reflective of the agency's strategy, the items that it considers to be important or otherwise, its estimates and projections, it is likely that disclosure to the union would place the agency at an unfair disadvantage at the bargaining table and, therefore, that disclosure would "impair" negotiating the process.

It is noted that the Court of Appeals sustained the assertion of §87(2)(c) in a case that did not clearly involve "contract awards" or collective bargaining negotiations. In Murray v. Troy Urban Renewal Agency [56 NY2d 888 (1982)], the issue pertained to real property transactions where appraisals in possession of an agency were requested prior to the consummation of a transaction. Because premature disclosure would have enabled the public to know the prices the agency sought, thereby potentially precluding the agency from receiving optimal prices, the agency's denial was upheld [see Murray v. Troy Urban Renewal Agency, 56 NY 2d 888 (1982)].

In each of the kinds of the situations described earlier, there is an inequality of knowledge. In the bid situation, the person who seeks bids prior to the deadline for their submission is presumably unaware of the content of the bids that have already been submitted; in the context of

collective bargaining, the union would not have all of the agency's records relevant to the negotiations; in the appraisal situation, the person seeking that record is unfamiliar with its contents. As suggested above, premature disclosure of bids would enable a potential bidder to gain knowledge in a manner unfair to other bidders and possibly to the detriment of an agency and, therefore, the public. Disclosure of an records regarding collective bargaining strategy or appraisals would provide knowledge to the recipient that might effectively prevent an agency from engaging in an agreement that is most beneficial to taxpayers.

I point out that a situation that may be similar to that present in the Village was considered in Verizon New York, Inc. v. Bradbury [803 NYS2d 409 (2005)] in which the court found that "where more than one entity is involved in the negotiation process and an inequality of knowledge exists, thereby giving one entity an unfair advantage, impairment is likely to result and disclosure of records can justifiably be denied" (id., 420). The court concluded its consideration of §87(2)(c) by stating that:

> "The bottom line is that Rye Brook is currently negotiating with both Verizon and Cablevision to provide cable television services for the residents of Rye Brook. Premature disclosure of the Documents would enable Cablevision to obtain an unfair advantage over Verizon. Certainly, this unfair advantage may be to the ultimate detriment of Rye Brook and its cable television consumers" (id.).

I am unaware of the extent to which the facts in Scarsdale may be analogous to those considered in Verizon. However, the thrust of the decision may be useful to you.

The other provision of significance, §87(2)(d), 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..."

As in the case of §87(2)(c), the application of the provision quoted above relates to the effects of disclosure and the extent to which disclosure would, in this instance, cause substantial injury to the competitive position of either Verizon or Cablevision. In Verizon, it was determined that contentions concerning the possibility of harm were conclusory in nature and were inadequate to sustain a denial of access based on an assertion of §87(2)(d). Assuming that the submissions to the Village are analogous to those considered in the litigation, the outcome concerning that provision would likely be the same.

As you may be aware, the courts have consistently held that the Freedom of Information Law is designed to foster disclosure, and the Court of Appeals has held that:

> "Exemptions are to be narrowly construed to provide maximum access, and the agency seeking to prevent disclosure carries the

> burden of demonstrating that the requested material falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access" [Capital Newspapers v. Burns, 67 NY 2d 562, 566 (1986); see also, Farbman & Sons v. New York City, 62 NY 2d 75, 80 (1984); and Fink v. Lefkowitz, 47 NY 2d 567, 571 (1979)].

Moreover, in the same decision, in a statement regarding the intent and utility of the Freedom of Information Law, it was 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" (id., 565-566).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

OML-AO-4098

From: Robert Freeman
To: anevens@greatnecklibrary.org
Date: 12/22/2005 9:39:16 AM
Subject: http://www.dos.state.ny.us/coog/otext/o2459.htm

http://www.dos.state.ny.us/coog/otext/o2459.htm

Dear Ms. Nevens:

Attached is an opinion that may be useful to you. The issue, in my view, is whether the "consensus" to which you referred is in actuality a final action taken by the Board. If it is, I believe that it should be recorded as an action and that the manner in which each member cast his or her vote must also be recorded.

I point out that a public body is permitted to take action during an executive session, unless the action is to appropriate public moneys, in which case, it must return to an open meeting for the purpose of voting. If action is taken in executive session, the law requires that minutes indicating the nature of the action taken and the vote of the members be prepared and made available to the public, to the extent required by the Freedom of Information Law, within one week.

I hope that I have been of assistance.

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

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December 27, 2005

Mr. David M. Klein, P.E.
[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. Klein:

We are in receipt of your November 21, 2005 request for an advisory opinion concerning the application of the Freedom of Information and Open Meetings Laws to various responses from and actions taken by the Town of Fort Ann.

Your first concern involves what you consider to be the Town's delayed responses to your requests. The Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

It is noted that new language was added to that provision on May 3 (Chapter 22, Laws of 2005) stating that:

> "If circumstances prevent disclosure to the person requesting the record or records within twenty business days from the date of the acknowledgement of the receipt of the request, the agency shall state, in writing, both the reason for the inability to grant the request within twenty business days and a date certain within a reasonable period,

> depending on the circumstances, when the request will be granted in whole or in part."

Based on the foregoing, an agency must grant access to records, deny access in writing, or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgement is given, it must include an approximate date within twenty business days indicating when it can be anticipated that a request will be granted or denied. If it is known that circumstances prevent the agency from granting access within twenty business days, or if the agency cannot grant access by the approximate date given and needs more than twenty business days to grant access, however, it must provide a written explanation of its inability to do so and a specific date by which it will grant access. That date must be reasonable in consideration of the circumstances of the request.

The amendments clearly are intended to prohibit agencies from unnecessarily delaying disclosure. They are not intended to permit agencies to wait until the fifth business day following the receipt of a request and then twenty additional business days to determine rights of access, unless it is reasonable to do so based upon "the circumstances of the request." It is our perspective that every law must be implemented in a manner that gives reasonable effect to its intent, and we 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, when 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 delay in disclosure. As the Court of Appeals, the state's highest court, 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 concerning the reasonableness of a delay in disclosure that cited and confirmed the advice rendered by this office concerning reasonable grounds for delaying disclosure, it was held that:

> "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"(Linz v. The Police Department of the City of New York, Supreme Court, New York County, NYLJ, December 17, 2001).

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 beyond the approximate date of less than twenty business days given in its acknowledgement, if it acknowledges that a request has been received, but has failed to grant access by the specific date given beyond twenty business days, or if the specific date given is unreasonable, a request may be considered to have been constructively denied [see §89(4)(a)]. In such a circumstance, the denial may be appealed in accordance with §89(4)(a), which states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, 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."

Section 89(4)(b) was also amended, and it states that a failure to determine an appeal within ten business days of the receipt of an appeal constitutes a denial of the appeal. In that circumstance, 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.

With respect to your second concern, that often responses are not complete, 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.

In response to your third concern, as general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. The first ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." While §3101(d) of the Civil Practice Law and Rules (CPLR) authorizes confidentiality regarding material prepared for litigation, those kinds of records remain confidential in our opinion only so long as they are not disclosed to an adversary or filed with a court, for example. We do not believe that materials that are served upon or shared with an adversary could be characterized as confidential or exempt from disclosure.

CPLR §3101 pertains to disclosure in a context related to litigation, and subdivision (a) reflects the general principle that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action..." The Advisory Committee Notes pertaining to §3101 state that the intent is "to facilitate disclosure before trial of the facts bearing on a case while limiting

the possibilities of abuse." The prevention of "abuse" is considered in the remaining provisions of §3101, which describe narrow limitations on disclosure. One of those limitations, §3101(d)(2), states in relevant part that:

> "materials otherwise discoverable under subdivision (a) of this section and prepared in anticipation of litigation or for trial by or for another party, or by or for the other party's representative (including an attorney, consultant, surety, indemnitor, insurer or agent), may be obtained only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of the materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation."

This provision is intended to shield from an adversary records that would result in a strategic advantage or disadvantage, as the case may be. Reliance on this provision in the context of a request made under the Freedom of Information Law is in our view dependent upon a finding that the records have not been disclosed, particularly to an adversary. In a decision in which it was determined that records could justifiably be withheld as attorney work product, the "disputed documents" were "clearly work product documents which contain the opinions, reflections and thought process of partners and associates" of a law firm "which have not been communicated or shown to individuals outside of that law firm" [Estate of Johnson, 538 NYS 2d 173 (1989)]. In another decision, the relationship between the attorney-privilege and the ability to withhold the work product of an attorney was discussed, and it was found that:

> "The attorney-client privilege requires some showing that the subject information was disclosed in a confidential communication to an attorney for the purpose of obtaining legal advice (*Matter of Priest v. Hennessy*, 51 N.Y.2d 62, 68-69, 431 N.Y.S.2d 511, 409 N.E.2d 983). The work-product privilege requires an attorney affidavit showing that the information was generated by an attorney for the purpose of litigation (*see, Warren v. New York City Tr. Auth.*, 34 A.D.2d 749, 310 N.Y.S.2d 277). The burden of satisfying each element of the privilege falls on the party asserting it (*Priest v. Hennessy, supra*, 51 N.Y.2d at 69, 431 N.Y.S. 2d 511, 409 N.E.2d 983), and conclusory assertions will not suffice (*Witt v. Triangle Steel Prods. Corp.*, 103 A.D.2d 742, 477 N.Y.S.2d 210)" [Coastal Oil New York, Inc. v. Peck, [184 AD 2d 241 (1992)].

In a discussion of the parameters of the attorney-client relationship and the conditions precedent to its initiation, it has been 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 proceeding, 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)].

The thrust of case law concerning material prepared for litigation is consistent with the preceding analysis, in that §3101(d) may properly be asserted as a means of shielding such material from an adversary.

In our view, whether the records in question have been communicated between the Town and an adversary, or have been filed with a court, any claim of privilege or its equivalent would be effectively waived. Once records in the nature of attorney work product or material prepared for litigation are transmitted to an adversary, i.e., from the Town to its adversary and *vice versa*, we believe that the capacity to claim exemptions from disclosure under §3101(c) or (d) of the CPLR or, therefore, §87(2)(a) of the Freedom of Information Law, ends. Conversely, however, if the records have not been disclosed to a person other than a client or clients, it appears that the assertion of the privilege would be proper.

It has been judicially determined that if records are prepared for multiple purposes, one of which includes eventual use in litigation, §3101(d) does not serve as a basis for withholding records; only when records are prepared solely for litigation can §3101(d) be properly asserted to deny access to records [see e.g., Westchester-Rockland Newspapers v. Mosczydlowski, 58 AD 2d 234 (1977)].

Your fourth concern is whether the Town's Engineer can attend an executive session of the Town Board. Relevant 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 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, we 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, such as an engineer.

Finally, in response to your fifth concern about the difficulty of identifying and tracking documents to which you are not provided access, there is nothing in the Freedom of Information Law or any judicial decision construing that statute that would require that a denial at the agency level identify every record withheld or include a description of the reason for withholding each document. Such a requirement has been imposed under the federal Freedom of Information Act, which may involve the preparation of a so-called "Vaughn index" [see Vaughn v. Rosen, 484 F.2D 820 (1973)]. Such an index provides an analysis of documents withheld by an agency as a means of justifying a denial and insuring that the burden of proof remains on the agency. Again, we are unaware of any decision involving the New York Freedom of Information Law that requires the preparation of a similar index.

Further, one decision suggests the preparation of that kind of analysis might in some instances subvert the purpose for which exemptions are claimed. In that decision, an inmate requested records referring to him as a member of organized crime or an escape risk. In affirming a denial by a lower court, the Appellate Division found that:

> "All of these documents were inter-agency or intra-agency materials exempted under Public Officers Law section 87(2)(g) and some were materials the disclosure of which could endanger the lives or safety of certain individuals, and thus were exempted under Public Officers Law section 87(2)(f). The failure of the respondents and the Supreme Court, Westchester County, to disclose the underlying facts contained in these documents so as to establish that they did not fall 'squarely within the ambit of [the] statutory exemptions' (Matter of Farbman & Sons v. New York City Health and Hosps. Corp., 62 NY 2d 75, 83; Matter of Fink v. Lefkowitz, 47 NY 2d 567, 571), did not constitute error. To make such disclosure would effectively subvert the purpose of these statutory exemptions which is to preserve the confidentiality of this information" [Nalo v. Sullivan, 125 AD 2d 311, 312 (1987)].

We hope that this helps to clarify your understanding of the Freedom of Information and Open Meetings Laws.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

cc: Hon. Mary Jane Godfrey
Ruth Earl

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 27, 2005

E-MAIL

TO: James McCauley

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. McCauley:

I have received your letter concerning the adequacy of a motion to enter into executive session to discuss "personnel."

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

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

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

Although it is used frequently, the term "personnel" appears nowhere in the Open Meetings Law. Although one of the grounds for entry into executive session often relates to personnel matters, from my perspective, the term is overused and is frequently cited in a manner that is misleading or causes unnecessary confusion. To be sure, some issues involving "personnel" may be properly considered in an executive session; others, in my view, cannot. Further, certain matters that have

nothing to do with personnel may be discussed in private under the provision that is ordinarily cited to discuss personnel.

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

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

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

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

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

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

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

It is noted that the Appellate Division 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)].

In short, a motion for entry into executive session should be sufficiently detailed to enable those in attendance to ascertain whether the subject to be considered in fact falls within one or more of the grounds for conducting an executive session.

I hope that I have been of assistance.

RJF:tt

cc: Board of Education

There is not a OMB-4101

STATE OF NEW YORK
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December 27, 2005

Ms. Ann M. Perron
[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. Perron:

I have received your letter and apologize for the delay in response. You described a series of events in the Village of Ossining pertaining to the development of its waterfront.

By way of brief background, the Village Board of Trustees held a public hearing concerning a proposed development, as well as several meetings. The latest action to which you referred occurred at Board meeting held on November 1, and you wrote that:

> "...the resolution regarding the LADA, land acquisition and disposition agreement, some 20 pages long appeared on the agenda. Those residents attending the meeting were up in arms, as they had no idea this was to be on the agenda. When questioned, the Town Clerk stated that she sent the notice to the newspaper and responded by saying, 'I have no control over what the newspaper prints.' The next morning I called the newspaper and a Mr. Walsh at the Journal News told me that she had listed this Oct. 31 meeting as an Executive Session meeting and he said that she, the Town Clerk, knew that they do not publish the Executive Session meetings as the public is not privy to these meetings."

It is your view that:

> "...this was a deliberate attempt on the part of our elected officials to usurp the law and in their haste I believe that they are in direct violation of the Sunshine Laws regarding open meetings. They did not want the residents to know about what they were attempting to do. That is why I believe they never announced the Oct 31 Executive [session] at any prior meeting or work session."

You have asked whether the Village's elected officials have "broken any laws." In this regard, it is noted that this office is authorized to provide advice and opinions concerning the Open Meetings Law; it is not a court. However, in consideration of the facts as you presented them, I offer the following comments.

First, there is nothing in the Open Meetings Law that requires the preparation of an agenda. While it is typical for a public body, such as a village board of trustees, to develop an agenda prior to a meeting, there is no obligation to do so. Further, when an agenda is prepared, there is nothing in the law that requires that the agenda be followed.

Second, although the Open Meetings Law requires that a public body provide notice prior to every meeting, the notice is required to include only the time and place of a 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."

In consideration of the foregoing, although a public body may choose to indicate the topics to be considered at a meeting in its notice of a meeting, the law does not require that reference to the topics to be discussed be included in the notice. Moreover, notice must merely be *given* to the news media. Once in receipt of notice of a meeting, a newspaper, for example, may choose inform the public of a meeting, but it is not required to do so. Further, even if an agenda or an indication of the topics to be discussed at a meeting is included with notice of the time and place, the recipient of the notice is not required to include those items in a publication.

And third, as I understand your comments, it appears to be your belief, and it may be that Town or Village officials as well, that there is a requirement that the public be informed in advance of a meeting that an executive session will be held. In this regard, based on the language of the Open Meetings Law and the ensuing remarks, a public body cannot schedule an executive session in advance of a meeting.

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

open meeting. The Law also contains a procedure that must be accomplished during an open meeting before an executive session may be held. Specifically, §105(1) states in relevant part that:

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

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

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

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

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Trustees
Hon. Sandy Galef

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4103

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December 29, 2005

E-Mail

TO: Paul J. Feldman

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. Feldman:

I have received your letter in which you asked whether you have the right to videotape a meeting of a board of education.

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 board of education, so long as the use of the recording device is not disruptive or obtrusive. In this regard, I offer the following comments.

By way of background, I note 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).

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).

I hope that I have been of assistance.

RJF:jm

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OML-AO-4104

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December 29, 2005

E-Mail

TO: Steven Taras

FROM: Camille S. Jobin-Davis, Assistant Director CSJ

The staff of the Committee on 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. Taras:

We are in receipt of your November 15, 2005 e-mail request for an advisory opinion pertaining to the Freedom of Information Law. In response, please be advised of the following:

First, it is emphasized that the Freedom of Information Law pertains to existing records. Section 89(3) of that statute provides in relevant part that an agency is not required to create a record in response to a request. It may be that the State Liquor Authority ("Authority") does not publish a list of all meetings, or a list of all meetings by type. If a list of meetings has not been previously compiled, the Authority would not be obliged to prepare such a list on your behalf.

Nevertheless, when and if the Authority notifies the Community Board of the individual meetings, it may be that the Authority creates a record of the notification. Any record memorializing the notification would, in our opinion, be accessible to the public, for it would consist of factual information within an "inter-agency" communication.

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.

While one of the grounds for denial is pertinent, due to its structure, we believe that it would require disclosure in this instance. Relevant is §87(2)(g), which permits an agency to withhold records that:

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

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in our view be withheld. Again, an indication of the date of a meeting would be factual in nature and, therefore, would be available under subparagraph (i) of §87(2)(g).

Second, we appreciate your frustration communicating with the New York City Department of Consumer Affairs. To the extent that you seek access to records from the Department, we recommend you direct written requests for records to the Department's records access officer.

By way of background, §89(1) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural implementation of that statute (21 NYCRR Part 1401). In turn, §87(1) requires the governing body of a public corporation to adopt rules and regulations consistent with those promulgated by the Committee and with the Freedom of Information Law. Further, §1401.2 of the regulations provides in relevant part that:

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

In short, we believe that the Commissioner of the Department has the overall responsibility of ensuring compliance with the Freedom of Information Law and that the records access officer has the duty of coordinating responses to requests.

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

"The records access officer is responsible for assuring that agency personnel...

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

Based on the foregoing, again, the records access officer must "coordinate" an agency's response to requests. Therefore, we believe that when an official receives a request, he or she, in accordance with the direction provided by the records access officer, must respond in a manner consistent with the Freedom of Information Law or forward the request to the records access officer.

Finally, while the Department of Consumer Affairs is an agency of the City of New York, it is not a public body regulated by the Open Meetings Law. Unless there is a rule or regulation requiring the Department to hold public hearings in conjunction with the issuance of sidewalk permits, it would not be required to permit the public to attend the kind of gathering to which you referred.

In contrast both the State Liquor Authority Board and the Community Board are public bodies required to provide notice prior to their meetings pursuant to §104 of the Open Meetings Law. While that statute requires only that notice of the time and place of meetings be given, public bodies often prepare agendas. It may be worthwhile to seek agendas prepared by or for the Community Board prior to its meetings.

We hope this helps to clarify your understanding of the Freedom of Information and Open Meetings Laws.

CSJD:jm

STATE OF NEW YORK
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December 29, 2005

E-Mail

TO: Karen Hindenlang

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. Hindenlang:

I have received your communication concerning an upcoming meeting of the Village of Aurora Board of Trustees during which the public will not be given the opportunity to speak.

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

It is suggested that you contact the Village Clerk to ascertain whether the Board of Trustees has adopted rules or policies concerning the public's ability to speak at meetings. If any such directives exist, you could likely determine whether prohibiting public participation would be inconsistent with the Board's own rule or policy. In that event, you might remind the Board of its responsibility to comply with its own rules and policies.

If no such rule or policy exists, assuming that the matter to be considered is one of significance to the public, it is suggested that you encourage as many residents as possible to attend, and that you contact the local news media.

I regret that I cannot be of greater assistance.

RJF:jm