STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4106

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January 3, 2006

E-Mail

TO: Bruce Pavalow

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. Pavalow:

I have received your letter in which you referred to a situation in which the Board of Education upon which you serve entered into an executive session "to discuss collective negotiations under the Taylor Law." When the executive session began, you wrote that "a grievance hearing was held with members from the teachers association." You have raised the following questions concerning the foregoing:

> "Is it appropriate to resolve to go into executive session to discuss collective negotiations under the Taylor Law when holding a teacher association grievance hearing? If not appropriate, how should the motion to go into executive session be worded in the matter of a teacher association grievance."

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

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

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

The other vehicle for excluding the public from a meeting involves "exemptions." Section 108 of the Open Meetings Law contains three exemptions. When an exemption applies, the Open Meetings Law does not, and the requirements that would apply 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.

Of possible relevance to the hearing of grievances by the Board of Education is §108(1) of the Open Meetings Law, which exempts from the coverage of that statute "judicial or quasi-judicial proceedings..." From my perspective, it is often difficult to determine exactly when public bodies are involved in a quasi-judicial proceeding, or where a line of demarcation may be drawn between what may be characterized as quasi-judicial, quasi-legislative or administrative functions. The holding of hearings and providing an opportunity to be heard does not in my opinion render a proceeding quasi-judicial in every instance. Those requirements may be present in a variety of contexts, many of which precede legislative action.

I believe that one of the elements of a quasi-judicial proceeding is the authority to take final action. While I am unaware of any judicial decision that specifically so states, there are various decisions that infer that a quasi-judicial proceeding must result in a final determination reviewable only by a court. For instance, in a decision rendered under the Open Meetings Law, it was found that:

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

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

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

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

Insofar as the proceedings to which you referred could be characterized as quasi-judicial, the Open Meetings Law, in my view, would not apply.

If a hearing is not quasi-judicial and a majority of the Board gathers to consider a grievance, the gathering, in my view, would constitute a "meeting" that falls within the coverage of the Open Meetings Law. The issue then becomes whether there is a basis for entry into executive session, and the attendant factual circumstances become pertinent in reaching a conclusion. Some grievances must, in my opinion, be discussed in public. In short, none of the grounds for entry into executive session may be applicable. In others, based on the terms of a collective bargaining agreement, some grievances may indeed involve collective negotiations, i.e., to ascertain and, therefore, negotiate with respect to the meaning of terms within the agreement. In that kind of situation, as well as others, a motion for entry into executive session should include sufficient detail to enable Board members and others present at the meeting to recognize that there is a valid basis for conducting the executive session. At a minimum, a motion should indicate that an executive session will be held to discuss collective negotiations involving the teachers' association, for example (see Doolittle v. Board of Education, Supreme Court, Chemung County, July 21, 1981). Another possible basis for conducting an executive session relates to §105(1)(f), which authorizes a public body to enter into executive session to discuss:

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

If, for instance, a grievance relates to a particular employee and his or her health or medical condition, I believe that an executive session could properly be held under §105(1)(f). If, on the other hand, a grievance pertains to an issue that does not involve collective bargaining and relates to staff generally, i.e., the bell ending fourth period sounds three minutes too early, I do not believe that there would be any basis for conducting an executive session.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
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January 3, 2006

E-Mail

TO: Carol Thompson

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. Thompson:

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

You asked first whether a political caucus to be held "for the purpose of inviting all Party members in a community" must be preceded by public notice. In this regard, the Open Meetings Law is applicable to meetings of public bodies. The phrase public body is defined to mean:

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

Further, a "meeting" for purposes of the Open Meetings Law involves a gathering of a quorum of a public body for the purpose of conducting public business [see §102(1)].

The kind of gathering that you described would not appear to be meeting of a public body or, therefore, that the Open Meetings Law would apply. Even if a majority of a public body, such as a town board or a county legislature, is present at a political caucus, it is unlikely that the Open Meetings Law would be applicable. By way of background, the Open Meetings Law provides two vehicles under which a public body may meet in private. One is the executive session, a portion of an open meeting that may be closed to the public in accordance with §105 of the Open Meetings Law. The other arises under §108 of the Open Meetings Law, which contains three exemptions from

the Law. When a discussion falls within the scope of an exemption, the provisions of the Open Meetings Law do not apply.

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

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

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

Based on the foregoing, in general, either the majority or minority party members of a legislative body may conduct closed political caucuses, either during or separate from meetings of the public body. When a political caucus is held, the Open Meetings Law does not apply, and there would be no requirement imposed by that law, or any other of which I am aware, concerning notice to the public.

You second question is whether "a board [may] hold a Republican caucus and have Democrats present." It is assumed that you are referring to republican and democrat members of a board and that a majority of the board would be present. If that is so, I do not believe that the gathering could be characterized as a political caucus that is exempt from the Open Meetings Law; on the contrary, that kind of gathering would in my view constitute a "meeting" subject to the Open Meetings Law. A political caucus by definition is in my opinion restricted to members or adherents of a single political party. Webster's New Collegiate Dictionary defines caucus as:

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

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

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
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January 4, 2006

Dr. Alice Sokolow
[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. Sokolow:

We are in receipt of your November 18, 2005 request for clarification of the Open Meetings Law, insofar as it pertains to notice of meetings of public bodies. Please note that while the Committee on Open Government is authorized to issue advisory opinions concerning the application of the Open Meetings Law, your reference to "Meeting Protocol" indicates that there may be rules pertaining to notice adopted by the Steuben County Industrial Development Agency. Any provision pertaining to notice as adopted in these rules would also have impact on the Agency's responsibilities, assuming that such provision is not inconsistent with 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 an industrial development agency. 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 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.

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

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

Lastly, we believe that every law, including the Open Meetings Law, must be implemented in a manner that gives reasonable effect to its intent. In that vein, to give effect to intent of the Open Meetings Law, we 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, we 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.

We hope this helps to clarify your understanding of the Freedom of Information Law.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

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January 4, 2006

Ms. Annmarie Reeb
Co-founder
Parents Fighting for a Healthy and
Safe School
[redacted]

Ms. Sara Siracuse
[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. Reeb and Ms. Siracuse:

We are in receipt of your November 16, 2005 correspondence requesting an advisory opinion pertaining to the Open Meetings Law and recent meetings of the Board of Education of the Starpoint Central School District.

With regard to the practice of meeting prior to the publicly noticed start time, it is emphasized that a public body cannot conduct an executive session prior to a meeting. Every meeting must be convened as an open meeting, for §102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. That being so, it is clear that an executive session is not separate and distinct from an open meeting, but rather that it is a part of an open meeting. Moreover, the Open Meetings Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, §105(1) states in relevant part that:

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

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 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 that there is an intent to enter into an executive session by means of a vote to be taken during a meeting. By indicating that an executive session is likely to be held (rather than *scheduled*), the public would implicitly be informed that there may be no overriding reason for arriving at the beginning of a meeting.

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

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.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

cc: Board of Education, Starpoint Central School District

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4110

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January 6, 2006

Mrs. Rose Mary Warren
[redacted]

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

Dear Mrs. Warren:

We are in receipt of your December 9, 2005 request for an advisory opinion concerning application of the Open Meetings Law to certain actions taken by the Board of Trustees of the Niagara County Community College. We have also received your Christmas card clarifying the facts. As you relate, when you arrived at a public hearing held by the Board, you were advised by a secretary that "they're in executive session," and when you were finally admitted to the public hearing, you were permitted three minutes to speak.

As you may know, there is a distinction between a "meeting" and a "hearing". The former involves a gathering of a majority of a public body for the purpose of conducting public business collectively, as a body. As such, meetings are ordinarily held for the purpose of discussion, deliberation, taking action and the like. A "hearing" typically is held to enable members of the public express their views on a particular subject, i.e., a budget, a change in zoning, etc. Requirements relating to meetings are prescribed in §104 of the Open Meetings Law, however, there are no general provisions of which we are aware that deal with hearings, and different statutes impose different requirements. For example, while boards of education, town boards and village boards of trustees must hold hearings prior to the adoption of their budgets, those requirements are separately imposed, respectively in the Education Law, the Town Law, and the Village Law; each of those statutes is unique.

Nevertheless, based on the secretary's indication that the Board was conducting an executive session, we 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 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, it cannot be known in advance of that vote that the motion will indeed be approved.

Relevant then, would be the Board's compliance with the notice provisions of the Open Meetings Law. Because we have no information on whether the meeting was properly noticed, we cannot offer an opinion as to the extent to which the Board complied with those requirements.

Second, 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. 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.

Third, 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, 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.

Again, we emphasize the distinction between a meeting of a public body, and a public hearing. Depending on the type and purpose of the public hearing, it would be governed by a particular statute, other than the Open Meetings Law.

We hope this is helpful to you. Thank you for your holiday wishes and recipes.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

STATE OF NEW YORK
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January 9, 2006

Ms. Dinah
[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. Miller:

I have received your letter in which you requested an opinion "on the usage of the Open Meetings Law during a scheduled public hearing by the Town of Clinton Town Board." You attached a copy of the "Town of Clinton Notice" which states as follows: "The Town Board of the Town of Clinton will hold a workshop on December 20th at 7:00 pm at the Churubusco Fire Station."

In consideration of the foregoing, you asked:

> "1. Is this a legal notice to discuss the State Environmental Quality Review Act?...
>
> 2. Should the public be allowed to speak and be treated equally since everyone else was allowed to speak at the public hearing except the public?"

In this regard, first, it is noted at the outset that this office has neither the jurisdiction nor the expertise to offer guidance concerning the State Environmental Quality Review Act.

Second, from my perspective, the notice concerning the gathering at issue did not involve a hearing, but rather a meeting of the Town Board. I point out that it has been held that "workshops", "work sessions" and similar gatherings of a majority of a public body constitute "meetings" that fall within the coverage of the Open Meetings Law, even if there is no intent to take action, and regardless of their characterization [see Orange County Publications v. City of Newburgh, 60 AD2d 409, affirmed, 45 NY2d 947 (1978)]. More importantly in view of the facts, there is a distinction between a "meeting" and a "hearing". The former involves a gathering of a majority of a public body for the purpose of conducting public business collectively, as a body [see

Open Meetings Law, §102(1)]. As such, meetings are ordinarily held for the purpose of discussion, deliberation, taking action and the like. A "hearing" typically is held to enable members of the public express their views on a particular subject, i.e., a budget, a change in zoning, etc. The notice requirements relating to meetings are prescribed in §104 of the Open Meetings Law, and as you know, that statute requires that every meeting be preceded by the posting of notice of the time and place of a meeting. I am unaware, however, of any general requirement that notices of hearings be posted. Similarly, there are no general provisions of which I am aware that deal with hearings, and different statutes impose different requirements. For example, while boards of education, town boards and village boards of trustees must hold hearings prior to the adoption of their budgets, those requirements are separately imposed, respectively in the Education Law, the Town Law, and the Village Law; each of those statutes is unique.

Based on the terms of the notice that you sent, again, it is my view that the gathering constituted a "meeting", not a public hearing during which members of the public would have the right to speak.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
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January 10, 2006

E-MAIL

TO: Thomas C. Newton

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. Newton:

I have received your letter and the article relating to it. You have questioned whether the Town of Clay Town Board, which consists in its entirety of members of one political party, may conduct closed political caucuses to discuss Town business.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I hope that I have been of assistance.

RJF:tt

cc: Town Board

STATE OF NEW YORK
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January 13, 2006

E-MAIL

TO: Arthur Norden

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, unless otherwise indicated.

Dear Mr. Norden:

We are in receipt of your December 29, 2005 request for an advisory opinion concerning the application of the Open Meetings Law in your capacity as a member of the Sullivan West Central School District Board of Education. In conjunction with your request, we received an e-mail from your colleague, Catherine Novak, in which she offered additional details. Accordingly, we have incorporated the information contained in both e-mails in our response.

In response to your first question, pertaining to Board Members who attended "parent meetings" and may have discussed Board business with the Superintendent, we offer the following comments.

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

Inherent in the definition and its judicial interpretation is the notion of intent. If there is an intent that a majority of a public body convene for the purpose of conducting public business, such a gathering would, in our opinion, constitute a meeting subject to the requirements of the Open Meetings Law. If there is no intent, however, that a majority of public body will gather for purpose of conducting public business, collectively, as a body, but rather for the purpose of gaining

education, training, to listen to a speaker or to attend a function as part of an audience or group, we do not believe that the Open Meetings Law would be applicable.

You indicate that "a quorum of the board attended the meeting and proceeded to discuss various school issues with the school superintendent." Ms. Novak wrote, however, that:

> "for the most part, [the members] just listened to parent concerns and the Superintendent's responses to those concerns. To my ears any speaking done by any of the board members present was pretty much from their perspective/concerns as parents attending a parent meeting with the Superintendent. It was not a two way discussion.... At no time did the 5 members have a group discussion of any kind."

If Board members present were situated as part of the group and did not function as a body, the gathering, in our view, would not have constituted a "meeting." We note, however, that the absence of verbal deliberation would not necessarily remove the gathering from the coverage of the Open Meetings Law. If, for example, a consultant makes a presentation to a board of education, and board members listen and do not speak, the gathering would nonetheless in our opinion constitute a "meeting" of a public body.

Related questions have arisen at workshops and seminars during which our Executive Director has spoken and which were attended by many, including perhaps a majority of the membership of several public bodies. Some of those persons have asked whether their presence at those gatherings fell within the scope of the Open Meetings Law. In brief, we have responded that, since the members of those entities did not attend for the purpose of conducting public business as a body, the Open Meetings Law, in our opinion, did not apply. It would appear that the same conclusion could be reached with respect to the matter that you and Ms. Novak described.

In response to your second question, 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. However, a series of communications between individual members or telephone calls among the members which results in a collective decision, a meeting held by means of telephone calls, or a vote taken by mail or e-mail would in 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. As suggested earlier, 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" in its entirety 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 Board of Education, 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, 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 a series of telephone calls or, for example, by e-mail.

In an early 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 as formal votes (see, Matter of Orange County Publs. v. Council of City of Newburgh, 60 AD2d 309, 415 Affd 45 NY2d 947).
>
> "The issue was the Town's policy concerning tax assessment reductions, clearly a matter of public business. There was no physical gathering, but four members of the five member board discussed the issue in a series of telephone calls. As a result, a quorum of members of the Board were 'present' and determined to publish the Dear Resident article. The failure to actually meet in person or have a telephone conference in order to avoid a 'meeting' circumvents the intent of the Open Meetings Law (see e.g., 1998 Advisory Opns Committee on Open Government 2877). This court finds that telephonic conferences among the individual members constituted a meeting in violation of the Open Meetings Law..."

Most recently, the Appellate Division confirmed that to be so in Eastchester v. New York State Board of Real Property Services, 2005 NY Slip Op 08732 (2nd Dept, November 14, 2005) in light of a recent amendment to the above-cited provision of the General Construction Law. In 2000, §41 was amended to specifically define the quorum and voting requirements in terms of a majority of the board gathered together in the presence of each other or through the use of videoconferencing (L. 2000, ch. 289, § 5, eff. August 23, 2000). Accordingly, the court held,

> "Because General Construction Law §41 contains no provision authorizing participation by telephone conference call, only the votes cast by the members actually present at the meeting can be counted towards a majority vote." Id.

We 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 this section, 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.

It is our opinion that this analysis would apply to your question about telephone calls from the Superintendent in which he apparently solicited responses from Board members concerning the salary range offered for a new position, as well as the e-mails from the District Clerk concerning whether to invite the architect to make a presentation to the Board. We understand from Ms. Novak, that e-mails from the District Clerk were in follow up to a request made by the Superintendent during the previous public board meeting.

> "We had been requested (in public) to let the district clerk know if we wanted the presentation or not - her e-mail was a follow up/reminder as many of us had apparently not responded."

Assuming these facts to be accurate, it is our opinion that the Board's collective determination of the answer to this question, what the salary range should be, should have occurred during an open meeting held in accordance with the provisions of the Open Meetings Law. Because a decision to offer a certain salary range was made, it is also our opinion that this action should be memorialized in minutes.

Section 106 of the Open Meetings Law provides that:

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

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

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

If a public body reaches a consensus upon which it relies, case law indicates 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, we believe that minutes must be prepared that indicate its action, as well as the manner in which each member voted [see FOIL, §87(3)(a)].

We hope that we have been of assistance.

CSJ:jm

cc: Board of Education
Catherine M. Novak

STATE OF NEW YORK
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January 17, 2006

E-MAIL

TO: Julie Menin, Chairperson

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 Chairperson Menin:

As you are aware, I have received a variety of material from you concerning an aspect of a draft Memorandum of Understanding (MOU) between Community Board # 1 and The Goldman Sachs Group, Inc. From my perspective, the terms of the MOU would not be inconsistent with the Open Meetings Law.

By way of brief background, Goldman Sachs has proposed to develop a site within the geographical bounds of the Community Board as its headquarters, and the Board has requested that Goldman Sachs consider several issues relative to the area in which its headquarters would be located, including the "Integration of the project with the vibrant residential neighborhood to the north." The MOU contains several elements, including funding by Goldman Sachs in the amount of $3.5 million for a branch of the New York Public Library, and $1 million for a community youth recreation center. The issue presented relates to Section 10 of the MOU, entitled "Confidentiality", which would provide in relevant part as follows:

> "(a) CB#1 agrees that neither it, nor any of its affiliates, agents, contractors or representatives, shall, without the prior written consent of Goldman Sachs in each instance...
>
> (iii) discuss with, or comment to unrelated third parties or members of the press or other media, regarding any of Goldman Sach's obligations or activities under this Agreement.
>
> (b) Notwithstanding Section 10(a) of this Agreement, Goldman Sachs hereby acknowledges (i) the existence of the Open Meetings Law, N.Y. Pub. Off. L., Art. 7, §100-110, (ii), CB #1's obligation to comply with such law, and (iii)

> that activities of CB#1 to comply with such obligation shall not constitute a breach of Section 10(a) of this Agreement, provided such activities are not for a purpose other than to comply with such obligation."

One of the members of the Board indicated that he would want me in an opinion "to reflect [the] view that Board members would legally be free to discuss Goldman's performance under the agreement with members of the press or any other members of the public, outside of community Board meetings." I could not so advise. However, I offer the following comments.

First, there is nothing in the Open Meetings Law that requires that members of public bodies, such as community boards, speak with representatives of the news media or others outside the context of meetings held in accordance with the Open Meetings Law. Similarly, there is no obligation imposed by that statute to respond to questions. While members of public bodies frequently do so, there is no requirement that they must.

Second, the portion of the Agreement pertaining to confidentiality is not unique in its thrust or intent. Several situations have arisen in which the parties to an agreement or stipulation of settlement have consented by means of a contract to refrain from speaking about or disclosing the terms of the agreement or stipulation on their own initiative. In my view, it is likely that the parties may validly agree not to speak about an agreement.

In Paul Smith's College of Arts and Sciences v. Cuomo, the matter pertained to a complaint made to the State Division of Human Rights, which agreed to a settlement requiring confidentiality applicable to the agreement itself, as well as any disclosure concerning the agreement. The Division of Human Rights issued a press release regarding the agreement. The Court found that issuance of the press release violated the agreement, but that the agreement itself is accessible to the public. The issue before the Court related to the Freedom of Information Law, the statutory companion of the Open Meetings Law, and it was held that:

> "Although exceptions to disclosure are provided in §§87 and 89, plaintiff has not met his burden of demonstrating that the financial provisions of this agreement fit within one of these statutory exceptions (see Matter of Washington Post v New York State Ins. Dept. 61 NY2d 557, 566). While partially recognized in Matter of LaRocca v Bd. of Education, 220 AD2d 424, those narrowly defined exceptions are not relevant to defendants' disclosure of the terms of a financial settlement (see Matter of Western Suffolk BOCES v Bay Shore Union Free School District, ___AD2d___ 672 NYS2d 776). There is no question that defendants lacked the authority to subvert FOIL by exempting information from the enactment by simply promising confidentiality (Matter of Washington Post, supra p567).
>
> "Therefore, this Court finds that the disclosure made by the defendant Supervisor was 'required by law', whether or not the contract so

provided" (Hansen v. Town of Wallkill, Supreme Court, Orange County, December 9, 1998).

Stated differently, the issuance of a press release constituted a violation of the agreement, but the agreement could not serve to restrict or diminish rights of access conferred by the Freedom of Information Law, which required disclosure of the agreement itself.

In the context of the matter that you have presented, subdivision (b) of Section 10 appears to evidence a recognition of the Board's need to comply with the Open Meetings Law. That being so, I believe that the Board may comply with the Open Meetings Law and the portion of the agreement relating to that law. The agreement, in short, would not effect the Board's obligation to comply with the Open Meetings Law.

For the reasons expressed above, I do not believe that Section 10 of the Agreement would be contrary to law.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
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January 17, 2006

E-MAIL

TO: Michelle Cohen

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. Cohen:

I have received your letter concerning the possibility that a village board of trustees could approve a local enactment that reduces rights of access to meetings conferred by the Open Meetings Law.

You referred to §110, which provides that:

> "1. 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.
>
> 2. Any provision of general, special or local law or charter, administrative code, ordinance, or rule or regulation less restrictive with respect to public access than this article shall not be deemed superseded hereby.
>
> 3. Notwithstanding any provision of this article to the contrary, a public body may adopt provisions less restrictive with respect to public access than this article."

Based on the foregoing, a local enactment or rule may permit greater public access than required by the Open Meetings Law, for in that circumstance, it would be "less restrictive with respect to public access" than the Open Meetings Law. However, based on subdivision (1) of §110, a village board or other public body could not adopt a provision that is more restrictive with respect to public access

than the Open Meetings Law. Any such provision would be "deemed superseded" by the Open Meetings Law.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4116

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

January 17, 2005

E-Mail

TO: Marcus Ramsey

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. Ramsey:

I have received your letter concerning the content of minutes of meetings of a town board and the responsibilities of a town clerk.

In this regard, §106 of the Open Meetings Law pertains to minutes of meetings and prescribes what might be characterized as minimum requirements concerning the content of minutes. Subdivision (1) pertains to minutes of open meetings and states that:

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

Based upon the foregoing, it is clear that minutes need not consist of an expansive or verbatim account of what transpired at a meeting. However, at a minimum, the minutes must consist of a record or summary of the items and actions referenced in subdivision (1).

I hope that I have been of assistance.

RJF:jm

4117

From: Robert Freeman
To: [redacted]
Date: 1/18/2006 9:29:43 AM
Subject: Dear Mr. Ramsey:

Dear Mr. Ramsey:

I have received your letter concerning your request at a town board meeting to have a member of the board censured. The request, however, was rejected and the matter was not the subject of a vote, nor was there reference to your request in the minutes.

As indicated in my previous response to you, motions must be included, at least in summary form, in minutes of a meeting. Since no motion was made nor was any other action taken in response to your request, I do not believe that the minutes were required to include reference to your request or comments. If a motion had been made, even if it was defeated, reference to the motion, including the manner in which each member cast his or her vote, would have been required to be included in minutes. Again, however, since, in the words of the Open Meetings Law, there were no "motions, proposals, resolutions [or] any other matter formally voted upon", I do not believe that there would have been any requirement to have included the material of your interest in the minutes.

I hope that the foregoing serves to clarify your understanding.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
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(518) 474-2518 - Phone
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4118

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

January 18, 2006

E-MAIL

TO: Sarah Blackmer

FROM: Robert J. Freeman, Executive Director

Dear Ms. Blackmer:

I have received your letter concerning the propriety of "workshops" held by the Honeoye Central School District Board of Education at a location different from its "board meetings."

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

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 board of education, 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.

As you are likely aware, the Open Meetings Law requires that notice of the time and place be given prior to every meeting of a public body. Specifically, §104 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."

Section 104 imposes a dual requirement, for notice must be posted in one or more designated conspicuous, public locations, and in addition, notice must be given to the news media. The term "designated" in my opinion involves a requirement that a public body, by resolution or through the

adoption of policy or a directive, must select one or more specific locations where notice of meetings will consistently and regularly be posted.

So long as every meeting is preceded by notice of the time and place, I believe that the Board may conduct its meetings, whether they are characterized as "workshops" or "board meetings", at more than one location.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4119

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

January 18, 2006

E-MAIL

TO: Ronald M. Melquist

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. Melquist:

I have received your letter in which asked whether "public agencies are required to keep minutes of executive sessions."

In this regard, 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 also 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 changes against a public employee that have not yet been proven or admitted, 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 the foregoing serves to clarify your understanding and that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4120

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

January 20, 2006

E-Mail

TO: Hon. Frank Coccho

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 Mayor Coccho:

I have received your correspondence in which you sought clarification concerning the status of a "citizen's committee" under the Open Meetings Law.

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

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

Based on the foregoing, a public body is, in my view, an entity required to conduct public business by means of a quorum that performs a governmental function and carries out its duties collectively, as a body. The definition refers to committees, subcommittees and similar bodies of a public body, and judicial interpretations indicate that if a committee, for example, consists solely of members of a particular public body, it, too, constitutes a public body [see e.g., Glens Falls Newspapers v. Solid Waste and Recycling Committee of the Warren County Board of Supervisors, 195 AD2d 898 (1993)]. For instance, in the case of a legislative body consisting of seven members, four would constitute a quorum, and a gathering of that number or more for the purpose of conducting public business would be a meeting that falls within the scope of the Law. If that entity designates a committee consisting of three of its members, the committee would itself be a public body; its quorum would be two, and a gathering of two or more, in their capacities as members of that committee, would be a meeting subject to the Open Meetings Law.

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

In the context of your inquiry, assuming that the committee has no authority to take any final and binding action for or on behalf of the City, and that it does not consist solely of members of an existing public body, i.e., a city council, I do not believe that it constitutes a public body or, therefore, is obliged to comply with the Open Meetings Law.

It is emphasized that the foregoing is not intended to suggest that a citizen's committee cannot hold open meetings. On the contrary, it may choose or be directed to conduct meetings in public, and similar entities have done so, even though the Open Meetings Law does not require that they do so.

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

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4121

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

January 20, 2006

E-MAIL

TO: Arthur J. Norden

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. Norden:

We are in receipt of your January 13, 2006 e-mail request for clarification of a recent advisory opinion written to you, and a corollary e-mail from Angela Daley, also a member of the Sullivan West School District Board of Education. We note your contrasting viewpoints on the intent and actions of Board of Education members who gathered at a recent "parent meeting" and offer these additional comments in an effort to clarify our advisory opinion addressed to you.

As you know, this office has neither the resources nor the authority to conduct a fact-finding investigation. As indicated in the underlined text at the top of the first page of every opinion, each opinion is only as valuable as the strength of the facts presented to the Committee, and our authority involves issuing advisory opinions based on the facts presented.

Attached to your original request was an e-mail from Board member Daley referencing the parent meeting in which she stated: "it would be great if some board members could attend the meetings." She then stated, "It is a good opportunity to hear the concerns and interest of our constituents prior to budget planning time." You were not present at the meeting, however, Board member Novak, who was present, related her belief that Board member contributions were made in their capacities as parents.

You have pointed out language from other opinions issued by the Committee on Open Government in which we delineated the differences between formal and "informal" meetings. Based on the facts as you and Ms. Novak and Ms. Daley have presented them in this case, it does not appear that the intent or the actions of the Board members rose to the level of a meeting as defined by the Open Meetings Law.

In a decision involving Planning Board members conducting a site visit, Riverkeeper v. The Planning Board of the Town of Somers (Supreme Court, Westchester County, June 14, 2002), it was concluded that a site visit by a Planning Board does not constitute a meeting subject to the Open Meetings Law so long as its purpose is not "for anything other than to 'observe and acquire information.'" The court in that decision cited and apparently relied on advisory opinion rendered by this office in which it was suggest that:

> "...site visits or tours by public bodies should be conducted solely for the purpose of observation and acquiring information, and...any discussions or deliberations regarding such observations should occur in public during meetings conducted in accordance with the Open Meetings Law."

If Board members attended as parents and did not function or situate themselves as a body, the gathering at issue, in our view, would not have constituted a "meeting." We point out, however, that it has been held that "briefing sessions" conducted with a majority of a public body present have been found to be "meetings" falling within the coverage of the Open Meetings Law [see Goodson Todson Enterprises v. City of Kingston, 53 Ad2d 103 (1990); Binghamton Press v. Board of Education, 67 AD2d 797 (1979)]. In short, without additional information regarding the event, we cannot offer an unequivocal response. We hope, however, that the preceding remarks are of value to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 4122

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

January 23, 2006

E-Mail

TO: Hon. Judy Gravino

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. Gravino:

I have received your letter in which you wrote that the Town Board in the Town of Macedon has "always required names and addresses of individuals speaking at our public hearings", and that those details are included in minutes, which are posted on the Town's website. You have asked whether the names and addresses should be included in the "original minutes" but remove them "from the copy on the web."

In this regard, I offer the following comments.

First, while the Open Meetings Law includes provisions concerning minutes of meetings, I know of no law that specifies that there must be minutes of public hearings or that provides direction concerning their content. As you may be aware, the Open Meetings Law provides what might be characterized as minimum requirements pertaining to the content of minutes of open meetings. Subdivision (1) of §106 states that:

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

Based on the foregoing, minutes need not consist of a verbatim account of what is said at a meeting, and there is no requirement that minutes identify those who speak by name or by name and address.

Second, 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 Town

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. Additionally, instances have arisen in which those who would like to speak during a meeting have been reluctant to do so when they are required to identify themselves. Battered spouses and others in similar situations have contended that identifying themselves could place them in jeopardy.

In short, I do not believe that individuals can be required to identify themselves at meetings, or that if they do so, their identities must be included in minutes.

Lastly, while I do not believe that it would be contrary to law to include speakers' names and addresses in minutes of meetings and to place those minutes on the Town's website, I question the wisdom of doing so. 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. If there is a desire to include speakers' identities in minutes, those portions of the minutes might be removed prior to placing the minutes on the Town's website.

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

RJF:jm

OML-AO- 4123

From: Robert Freeman
To: [redacted]
Date: 1/23/2006 12:21:49 PM
Subject: Dear Mr. Silvis:

Dear Mr. Silvis:

I have received your inquiry in which you asked whether meetings of the board of directors of a chapter of the Safari Club is subject to the "sunshine law". You indicated that the organization receives state funding.

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 deringed in section sixty-six of the general construction law..." A public corporation is defined in §66 to mean a county, city, town, school district, public authority, etc.

In consideration of the foregoing, as a general matter, the Open Meetings Law applies to governmental entities. That a private organization receives government funding does not bring that organization within the coverage of the Open Meetings Law. It is clear in my opinion that the entity to which you referred is not a public body and, therefore, is not subject to the Open Meetings Law.

I hope that I have been of assistance.

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

OML-AO-4124

From: Janet Mercer
To: [redacted]
Date: 1/24/2006 2:03:17 PM
Subject: Advisory Opinion

At your request, and because all documents sent to and maintained by the Committee on Open Government are available for public inspection, we have attached a copy of Ms. Daley's January 13th e-mail.

As previously advised, 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.

We hope this is of assistance to you.

Camille S. Jobin Davis
Assistant Director
NYS Committee on Open Government
41 State Street
Albany, NY 12231
(518) 474-2518

cc: Board members

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-15784
OML-AO-4125

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

January 31, 2006

E-Mail

TO: Joe Vescovi

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. Vescovi:

I have received your letter in which you asked whether you may request a copy of minutes of a meeting of your town board "before the next month's board meeting (even though they have not yet been approved). You also asked whether you can be required to seek unapproved minutes under the Freedom of Information Law.

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

First, that a document is characterized as a draft or unapproved is not determinative of rights of access, for the Freedom of Information Law is applicable to all agency records. Section 86(4) of that statute defines the term "record" to include:

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

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

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

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.

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

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

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

Third, returning to the Freedom of Information Law, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my view, minutes of open meetings are clearly available; any person could have been present at the meetings to which the minutes relate, and none of the grounds for denial would apply.

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

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

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

appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

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

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

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

The Court also dealt with the issue of what constitutes "factual data" that must be disclosed under §87(2)(g)(i). In its consideration of the matter, the Court found that:

> "...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][i]. Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182)" (id., 276-277).

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

Lastly, in consideration of the preceding commentary, I do not believe that there would be any valid reason for delaying disclosure of the records in question. In my view, every law must be

implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, although an agency may require that a request be made in writing [see §89(3)], if records are clearly available to the public under the Freedom of Information Law, and if they are readily retrievable, there may be no basis for a lengthy delay in disclosure. As the Court of Appeals has asserted:

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

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

I hope that I have been of assistance.

RJF:jm

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February 3, 2006

Ms. Signe Brousseau
Taconic Hills Secondary School
Rte. 11A
Craryville, NY 12521

The staff of the Committee 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. Brousseau:

I have received your letter and the materials relating to it. As I hope you are aware, your NEA representative asked that I delay preparing an advisory opinion until receiving word that an opinion would be necessary or desirable. She recently called to ask that I do so.

By way of background, you referred to the Taconic Hills School District Liaison Committee and its duty to "assist the District in formulating the school calendar." Following the Committee's preparation of a draft calendar, you were informed by a member of the Board of Education that the calendar was discussed by the Board in executive session. As I interpret the minutes that you forwarded, it appears that the calendar was considered during an executive session "for the purpose of discussion on specific personnel matters." You asked whether discussion of the school calendar "would be appropriate for executive session."

From my perspective, there would have been no basis for discussion of the school calendar by the Board during an executive session. Moreover, the motion for entry into executive session, based on the language of the Open Meetings Law and its judicial construction, was inadequate. 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, such as boards of education, must be conducted open to the public, unless there is a basis for entry into executive session. Moreover, the Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, §105(1) states in relevant part that:

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

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. Therefore, a public body cannot conduct an executive session to discuss the subject of its choice. In the context of the matter that is the subject of your correspondence, I do not believe that consideration of a school calendar could properly have been discussed during an executive session, for none of the grounds for entry into executive session would have applied.

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

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

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

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

In my view, again a discussion held to consider the development of a school calendar would not fall within the scope of §105(1)(f). In short, consideration of an issue of that nature would apparently not focus on a "particular person" in relation to the topics listed in §105(1)(f).

Further, even when §105(1)(f) may be validly asserted, it has been advised that a motion describing the subject to be discussed as "personnel" or "specific personnel matters" is inadequate, and that the motion should be based upon the specific language of §105(1)(f). For instance, a proper

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

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

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

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Steven Tiger
Cindy Polinsky

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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February 6, 2006

Mr. Ronald J. Sesnie
Tonawanda Education Association
P.O. Box 11
Tonawanda, NY 14150-0011

The staff of the Committee on 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. Sesnie:

I have received your letter of January 3 in which you "register[ed] a complaint pertaining to the Open Meetings Law, specifically the posting requirements, against the Board of Education for the City of Tonawanda School District."

According to your letter, the Board held "an unscheduled special meeting" on November 29. Although the President of the Board indicated that "the meeting notification was sent to the local paper"and posted on the District website, notice was not posted at the site of the meeting or at any other school building.

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 high school or 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.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

STATE OF NEW YORK
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February 6, 2006

Ms. Teresa Merlucci
[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. Merlucci:

I have received your letter and the materials relating to it. You have sought an advisory opinion concerning requests made pursuant to the Freedom of Information Law to the Lindenhurst Public Schools.

In one of the requests, you sought:

> "All environmental, moisture, mold, soil, air quality testing requested, results, reports done in any and all Lindenhurst Public Schools from 1990 till [sic] present."

The Schools' records access officer acknowledged the receipt of the request, explaining that the records sought are voluminous and must be reviewed to determine the extent to which they must be disclosed. She indicated that records required to be disclosed would be made available "on or about February 6, 2006."

In this regard, as you may be aware, based on recent amendments to§89(3) of the Freedom of Information Law, when it is known that granting a request in whole or in part will involve more than twenty business days from the acknowledgment of the receipt of a request, an agency is required to explain the reason for the delay and provide a "date certain" within which it will grant the request in whole or in part. In my view, the records access officer's response is reflective of substantial compliance with that aspect of the Freedom of Information Law.

I point out that several other issues may be pertinent in relation to that request.

First, the Freedom of Information Law pertains to existing records [see §89(3)]. Because the request relates to records that may involve activities that occurred as long as sixteen years ago,

many records that once were maintained by or for the Schools may have been legally destroyed. Insofar as records no longer exist, the Freedom of Information Law would not apply.

Second, also relevant may be the extent to which the request "reasonably describes" the records sought as required by §89(3) of the Freedom of Information Law. I point out that it has been held by the Court of Appeals, the state's highest court, that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

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

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

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

While I am unfamiliar with the recordkeeping systems of the Schools, to extent that the records sought can be located with reasonable effort, I believe that the request would have met the requirement of reasonably describing the records. On the other hand, if the records are not maintained in a manner that permits their retrieval except by reviewing perhaps hundreds or even thousands of records individually in an effort to locate those falling within the scope of the request, to that extent, the request would not in my opinion meet the standard of reasonably describing the records.

Third, insofar as records continue to exist and can be located with reasonable effort, 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." Some of the records may be exempt from disclosure

based on the assertion of the attorney-client privilege, which is codified in §4503 of the Civil Practice Law and Rules (CPLR). Additionally, §3101(c) and (d) of the CPLR authorize confidentiality regarding, respectively, the work product of an attorney and material prepared for litigation. Those kinds of records remain confidential in my opinion only so long as they are not disclosed to an adversary or a filed with a court, for example. I do not believe that materials that are served upon or shared with an adversary could be characterized as confidential or exempt from disclosure.

Section 3101 pertains 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(c), states that "[t]he work product of an attorney shall not be obtainable." The other provision at issue pertains to material prepared for litigation, and §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."

Both of those provisions are intended to shield from an adversary records that would result in a strategic advantage or disadvantage, as the case may be. Reliance on both in the context of a request made under the Freedom of Information Law is in my 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)].

In my view, insofar as the records in question have been communicated between the Schools and an adversary have been filed with a court, or have been disclosed to a third party, 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 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 is also noted that it has been determined judicially 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)].

Also relevant is §87(2)(g) of the Freedom of Information Law, which pertains to communications between or among government agency officers or employees. The cited 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.

The same kind of analysis would apply with respect to records prepared by consultants for agencies, for the Court of Appeals has held that:

> "Opinions and recommendations prepared by agency personnel may be exempt from disclosure under FOIL as 'predecisional materials, prepared to assist an agency decision maker***in arriving at his decision' (McAulay v. Board of Educ., 61 AD 2d 1048, aff'd 48 NY 2d 659). Such material is exempt 'to protect the deliberative process of government by ensuring that persons in an advisory role would be able to express their opinions freely to agency decision makers (Matter of Sea Crest Const. Corp. v. Stubing, 82 AD 2d 546, 549).
>
> "In connection with their deliberative process, agencies may at times require opinions and recommendations from outside consultants. It would make little sense to protect the deliberative process when such reports are prepared by agency employees yet deny this protection when reports are prepared for the same purpose by outside consultants retained by agencies. Accordingly, we hold that records may be considered 'intra-agency material' even though prepared by an outside consultant at the behest of an agency as part of the agency's deliberative process (see, Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD 2d 546, 549, supra; Matter of 124 Ferry St. Realty Corp. v. Hennessy, 82 AD 2d 981, 983)" [Xerox Corporation v. Town of Webster, 65 NY 2d 131, 132-133 (1985)].

Based upon the foregoing, records prepared by a consultant for an agency may be withheld or must be disclosed based upon the same standards as in cases in which records are prepared by the staff of an agency. It is emphasized that the Court in Xerox specified that the contents of intra-agency materials determine the extent to which they may be available or withheld, for it was held that:

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

Therefore, a record prepared by a consultant for an agency would be accessible or deniable, in whole or in part, depending on its contents.

With respect to a contention that the records are "predecisional" or "non-final", I note that in Gould v. New York City Police Department, one of the contentions was that certain reports could be withheld because they were not final and because they related to incidents for which no final determination had been made. The Court rejected that finding and stated that:

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

In short, that the records are "predecisional" or "non-final" would not represent an end of an analysis of rights of access or an agency's obligation to review the entirety of their contents to determine rights of access.

The other request involves minutes of meetings of the Board of Education from October 6, 2005 to December 15, 2005. The records access officer indicated that the minutes would be made available "when completed."

In my opinion, that response is inconsistent with the requirements of the Open Meetings Law. Section 106 of that statute pertains to minutes of meetings and states that:

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

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

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

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

Based on the foregoing, it is clear that minutes must be prepared and made available within two weeks of the meetings to which they relate.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Mary Lou Gates

STATE OF NEW YORK
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February 6, 2006

Mr. Michael P. Nolan
[redacted]

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

Dear Mr. Nolan:

I have received your letter, which was transmitted to this office on January 7.

You wrote that three members of the Irondequoit Town Board met "with the command structure of the Irondequoit Police Department and discussed structure, finances and overtime" relating to the Department. It is your view that [this] meeting appears to be "illegal", and you have sought my views on the matter.

In this regard, it is emphasized that the Committee on Open Government is authorized to render advisory opinions concerning the Open Meetings Law. Although it is our hope that opinions rendered by this office are educational and that they encourage compliance with law, the Committee cannot determine that activity may have been "illegal." That being so, the following remarks should be considered advisory.

By way of background, 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)].

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 majority 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 gathers to conduct public business, any such gathering would, in our opinion, constitute a "meeting" subject to the Open Meetings Law. 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.

With respect to chance meetings, it was found that:

> "We agree that not every assembling of the members of a public body was intended to be included within the definition. Clearly casual encounters by members do not fall within the open meetings statutes. But an informal 'conference' or 'agenda session' does, for it permits 'the crystallization of secret decisions to point just short of ceremonial acceptance'" (id. at 416).

In view of the foregoing, if members of a public body meet by chance or at a social gathering, for example, I do not believe that the Open Meetings Law would apply, for there would be no intent to conduct public business, collectively, as a body. Further, if less than a quorum is present, the Open Meetings Law would not, in my opinion, be applicable.

Lastly, it is my understanding that there are several newly elected Board members. In an effort to enhance their understanding of and future compliance with the Open Meetings Law, a copy of this response will be sent to the Board.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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February 6, 2006

Mr. Dominick J. Siani
[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. Siani:

I have received your letter of January 4 in which you sought an advisory opinion by raising the following questions:

> "• Are SUNY College foundations subject to the provisions of both FOIL and OML?
>
> • If the foundations are subject to OML, are they also required to post their meeting schedules and provide them to the media?
>
> • If the foundations are subject to FOIL, where should FOIL applications be directed? Is it the responsibility of the campus records access officer to arrange for records or does the responsibility rest with the related foundation.
>
> • Relative to the foundation compliance with FOIL and OML, in an Article 78 Proceeding, who are the named respondents? Would it by SUNY Farmingdale alone or would both entities be named in the action?"

In this regard, first, I believe that the records of SUNY college foundations fall within the requirements of the Freedom of Information Law, irrespective of whether a foundation has an independent responsibility to comply with that statute.

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

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

While the status of a SUNY college foundation has not been the subject of any judicial decision, it is clear that the State University is an "agency" required to comply with the Freedom of Information Law. As indicated later in this response, it has been determined that a foundation associated with CUNY is subject to the Freedom of Information Law.

Pertinent with respect to rights of access is §86(4), which defines the term "record" expansively to include:

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

Based on the foregoing, the Court of Appeals, the state's highest court, found that documents maintained by a not-for-profit corporation providing services for a branch of the State University were kept on behalf of the University and constituted agency "records" falling within the coverage of the Freedom of Information Law. I point out that the Court rejected "SUNY's contention that disclosure turns on whether the requested information is in the physical possession of the agency", for such a view "ignores the plain language of the FOIL definition of 'records' as information kept or held 'by, with or for an agency'" [see Encore College Bookstores, Inc. v. Auxillary Services Corporation of the State University of New York at Farmingdale, 87 NY 2d 410, 417 (1995)]. Therefore, if a document is produced for an agency, it constitutes an agency record, even if it is not in the physical possession of the agency. In the context of the question that you raised, irrespective of whether the SUNY college foundation is an "agency", its records appear to be maintained for SUNY. If that is so, its records would, based on Encore, constitute agency records subject to the Freedom of Information Law.

Second, while profit or not-for-profit corporations would not in most instances be subject to the Freedom of Information Law because they are not governmental entities, there are several judicial determinations in which it was held that certain not-for-profit corporations, due to their functions and the nature of their relationship with government, are "agencies" that fall within the scope of the Freedom of Information Law.

In the first decision in which it was held that a not-for-profit corporation may be an "agency" required to comply with the Freedom of Information Law, [Westchester-Rockland Newspapers v. Kimball [50 NYS 2d 575 (1980)], a case involving access to records relating to a lottery conducted by a volunteer fire company, the Court of Appeals found that volunteer fire companies, despite their

status as not-for-profit corporations, are "agencies" subject to the Freedom of Information Law. In so holding, the State's highest court stated that:

> "We begin by rejecting respondent's contention that, in applying the Freedom of Information Law, a distinction is to be made between a volunteer organization on which a local government relies for performance of an essential public service, as is true of the fire department here, and on the other hand, an organic arm of government, when that is the channel through which such services are delivered. Key is the Legislature's own unmistakably broad declaration that, '[a]s state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (emphasis added; Public Officers Law, §84).
>
> For the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objections cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" (id. at 579].

In the same decision, the Court noted that:

> "...not only are the expanding boundaries of governmental activity increasingly difficult to draw, but in perception, if not in actuality, there is bound to be considerable crossover between governmental and nongovernmental activities, especially where both are carried on by the same person or persons" (id., 581).

In Buffalo News v. Buffalo Enterprise Development Corporation [84 NY 2d 488 (1994)], the Court of Appeals found again that a not-for-profit corporation, based on its relationship to an agency, was itself an agency subject to the Freedom of Information Law. The decision indicates that:

> "The BEDC principally pegs its argument for nondisclosure on the feature that an entity qualifies as an 'agency' only if there is substantial governmental control over its daily operations (see, e.g., Irwin Mem. Blood Bank of San Francisco Med. Socy. v American

> Natl. Red Cross, 640 F2d 1051; Rocap v Indiek, 519 F2d 174). The Buffalo News counters by arguing that the City of Buffalo is 'inextricably involved in the core planning and execution of the agency's [BEDC] program'; thus, the BEDC is a 'governmental entity' performing a governmental function for the City of Buffalo, within the statutory definition.
>
> "The BEDC's purpose is undeniably governmental. It was created exclusively by and for the City of Buffalo...In sum, the constricted construction urged by appellant BEDC would contradict the expansive public policy dictates underpinning FOIL. Thus, we reject appellant's arguments," (id., 492-493).

As inferred earlier, perhaps most analogous to the issue described is a decision in which it was held that a community college foundation associated with a CUNY institution was subject to the Freedom of Information Law, despite its status as a not-for-profit corporation. In so holding, it was stated that:

> "At issue is whether the Kingsborough Community College Foundation, Inc (hereinafter 'Foundation') comes within the definition of an 'agency' as defined in Public Officers Law §86(3) and whether the Foundation's fund collection and expenditure records are 'records' within the meaning and contemplation of Public Officers Law §86(4).
>
> "The Foundation is a not-for-profit corporation that was formed to 'promote interest in and support of the college in the local community and among students, faculty and alumni of the college' (Respondent's Verified Answer at paragraph 17). These purposes are further amplified in the statement of 'principal objectives' in the Foundation's Certificate of Incorporation:
>
> > '1 To promote and encourage among members of the local and college community and alumni or interest in and support of Kingsborough Community College and the various educational, cultural and social activities conducted by it and serve as a medium for encouraging fuller understanding of the aims and functions of the college'.
>
> "Furthermore, the Board of Trustees of the City University, by resolution, authorized the formation of the Foundation. The activities of the Foundation, enumerated in the Verified Petition at paragraph 11, amply demonstrate that the Foundation is providing services that are exclusively in the college's interest and essentially in the name of the College. Indeed, the Foundation

> would not exist but for its relationship with the College" (Eisenberg v. Goldstein, Supreme Court, Kings County, February 26, 1988).

As in the case of the foundation in Eisenberg, that entity, and, in this instance, a SUNY college foundation, would not exist but for its relationships with SUNY. Due to the similarity between the issue you have raised and that presented in Eisenberg, as well as the functions of the foundations and their relationship to the University, I believe that they are subject to the Freedom of Information Law.

I believe that the direction provided by a SUNY "policy item" entitled "Campus-related Foundation Guidelines" can be cited to reach the same conclusion. In its summary of the functions of campus-related foundations, the policy states that:

> "As part of a coordinated fundraising effort led by the campus president, each campus-related foundation (foundation) supports the fundraising efforts of the campus. The foundation and the State University of New York provide the campus with mechanisms to receive and manage gifts and make these resources available to the campus to support approved campus programs and activities. The foundation is also the primary entity that manages real property and other assets not managed by the campus. Foundations play an important role with activities and functions no specifically vested with the campus or other entities on campus."

The policy states that "The charter or certificate of incorporation of the foundation should relate to the University campus it will benefit in terms of purposes, objectives and programs."

As in the Eisenberg decision, based on SUNY policy, it is clear that a SUNY foundation exists and maintains its records solely for the SUNY campus to which it relates.

In sum, to reiterate, I believe records of a SUNY college foundation fall within the coverage of the Freedom of Information Law either because they are maintained for SUNY, or because those foundations are "agencies" that have an independent obligation to give effect to that statute.

If it is contended that a SUNY college foundation's records are kept for SUNY, but that a foundation is not an "agency", it is recommended that a request for records of a given foundation be made to the records access officer at the SUNY college with which the foundation is associated. The records access officer has the duty of coordinating an agency's response to requests for records (see 21 NYCRR §1401.2), and I believe that a records access officer has been designated at each SUNY college.

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

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

By breaking the definition into components, I believe that each condition necessary to a finding that the board of a SUNY college foundation is a "public body" may be met. It is an entity for which a quorum is required pursuant to the provisions of the Not-for-Profit Corporation Law. It consists of more than two members. In view of the degree of governmental control exercised by and its nexus with the State University, I believe that it conducts public business and performs a governmental function for a governmental entity.

In Smith v. City University of New York [92 NY2d 707 (1999)], the Court of Appeals held that a student government association carried out various governmental functions on behalf of CUNY and, therefore, that its governing body is subject to the Open Meetings Law. In its consideration of the matter, the Court found that:

> "in determining whether the entity is a public body, various criteria or benchmarks are material. They include the authority under which the entity is created, the power distribution or sharing model under which it exists, the nature of its role, the power it possesses and under which it purports to act, and a realistic appraisal of its functional relationship to affected parties and constituencies" (id., 713).

In consideration of those criteria and applying them to the matter at hand, a SUNY college foundation would not exist but for its relationship with the University; it carries out a variety of functions that the University would otherwise perform; the University has substantial control over a foundation board in the terms of membership, for the description of the composition of such a board indicates that a majority of its members are officials of or chosen by SUNY

.

Based on the foregoing, I believe that the governing bodies of SUNY college foundations are "public bodies" required to comply with the Open Meetings Law.

If that is so, those entities are required to provide notice of their meetings in accordance with §104 of the Open Meetings Law. That provision states that:

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

conspicuously posted in one or more designated public locations at a reasonable time prior thereto.

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

Lastly, you asked "who...the named respondents" would be in an Article 78 proceeding initiated to compel compliance with the Freedom of Information Law or the Open Meetings Law. In this regard, the advisory jurisdiction of the Committee on Open Government is limited, and this office does not have the authority to advise with respect to Article 78.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Stacey Hengsterman
Wendy Kowalczyk

STATE OF NEW YORK
DEPARTMENT OF STATE
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February 8, 2006

E-MAIL

TO: Hon. Debra Denz

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. Denz:

I have received your letter in which, in your capacity as Town Clerk of the Town of Victor, you asked the following question:

> "When public, developers, etc. give me feedback/comments/opinions verbally on the telephone, in person, in a meeting, what is my responsibility to track and disclose to the public and/or have available if a foil request is received"?

In this regard, the Freedom of Information Law pertains to records, and §89(3) states in part that agency, such as a town, is not required to create a record to comply with that statute. I know of no provision of law that requires you or the Town to prepare records or notations concerning every element of feedback, comment or opinion that is expressed verbally. If there is no record, the Freedom of Information Law does not apply.

On the other hand, if a notation or similar material is prepared, it constitutes a "record" that falls within the coverage of the Freedom of Information Law, for §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."

Notes, telephone logs and other documentary materials constitute records, and their content is the key factor in determining the extent to which they must be disclosed.

As you are aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. There may be privacy considerations relative those identified in notes or similar materials. Further, they would consist of intra-agency materials falling within the scope of §87(2)(g). Under that provision, those portions of the materials consisting of town officials' expressions of opinions, for example, may be withheld. Other portions, such as those consisting of factual information, must be disclosed.

Lastly, since you referred to meetings, I point out that the Open Meetings Law provides what might be characterized as minimum requirements concerning the contents of minutes. Section 106(1) pertains to minutes of open meetings and states that:

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

Based on the foregoing, it is clear that minutes need consist of a verbatim account of what is expressed at a meeting, and there is no obligation to include reference to comments made during a meeting. So long as they consist of a record or summary of motions, proposals, resolutions, action taken and the vote of the members, I believe that the obligations imposed by the Open Meetings Law would be met.

I hope that I have been of assistance.

RJF:tt

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February 9, 2006

E-MAIL

TO: Rosalind Lind

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. Lind:

I have received your letter concerning the ability of the budget committee of a school board to conduct a closed meeting to review "the budget line by line", during which "there will be personnel salaries discussed in the process."

In this regard, I offer the following comments.

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

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

Due to the determination rendered in Daily Gazette, supra, which was in apparent conflict with the stated intent of the sponsor of the legislation, a series of amendments to the Open Meetings Law 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", 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 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, I 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, it has the same obligations regarding notice, openness, and the taking of minutes, for example, as well as the same authority to conduct executive sessions, as a governing body [see Glens Falls Newspapers, Inc. v. Solid Waste and Recycling Committee of the Warren County Board of Supervisors, 195 AD 2d 898 (1993)].

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

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

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

When a discussion involves consideration of the budget, in general, I believe that it must be conducted in public. Often a discussion concerning the budget has an impact on personnel. Nevertheless, despite its frequent use, the term "personnel" appears nowhere in the Open Meetings Law. It is true that one of the grounds for entry into executive session often relates to personnel matters. From my perspective, however, the term is overused and is frequently cited in a manner that is misleading or causes unnecessary confusion. To be sure, some issues involving "personnel" may be properly considered in an executive session; others, in my view, cannot. Further, certain matters that have nothing to do with personnel may be discussed in private under the provision that is ordinarily cited to discuss personnel.

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

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

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

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

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

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

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

In the context of the situation that you described, insofar as the committee discusses salaries accorded to positions, irrespective of who might hold those positions, in my view, there would be no basis for conducting an executive session. On the other hand, to the extent that its discussion involves the performance of particular employees, an executive session could properly be held. 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)].

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
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February 13, 2006

E-MAIL

TO: Charles Knapp

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. Knapp:

I have received your letter, and in your capacity as Supervisor of the Town of Conquest, you asked whether the meetings of a volunteer fire company should be held open to the public.

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

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

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

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

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

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

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

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

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

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

> extend public accountability wherever and whenever feasible' (emphasis added; Public Officers Law, §84).
>
> "True, the Legislature, in separately delineating the powers and duties of volunteer fire departments, for example, has nowhere included an obligation comparable to that spelled out in the Freedom of Information statute (see Village Law, art 10; see, also, 39 NY Jur, Municipal Corporations, §§560-588). But, absent a provision exempting volunteer fire departments from the reach of article 6-and there is none-we attach no significance to the fact that these or other particular agencies, regular or volunteer, are not expressly included. For the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objections cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" (id. at 579].

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

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

> "Section 1402 of the Not-for-Profit Corporation Law is directly applicable to the plaintiffs and pertains to how volunteer fire companies are organized. Section 1402(e) provides:
>
> > '...a fire corporation, hereafter incorporated under this section shall be under the control of the city, village, fire district or town authorities having by law, control over the prevention or extinguishment of fires therein. Such authorities may adopt rules and regulations for the government and control of such corporations.'

> "These fire companies are formed by consent of the Colonie Town Board. The Town has control over the membership of the companies, as well as many other aspects of their structure, organization and operation (section 1402). The plaintiffs' contention that their relationship with the Town of Colonie is solely contractual is a mischaracterization. The municipality clearly has, by law, control over these volunteer organizations which reprovide a public function.
>
> "It should be further noted that the Legislature, in enacting FOIL, intended that it apply in the broadest possible terms. '...[I]t is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (Public Officers Law, section 84).
>
> "This court recognizes the long, distinguished history of volunteer fire companies in New York State, and the vital services they provide to many municipalities. But not to be ignored is that their existence is inextricably linked to, dependent on, and under the control of the municipalities for which they provide an essential public service."

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

I hope that I have been of assistance.

RJF:tt

OML-AO- 4134

From: Robert Freeman
To: craigfox@fltimes.com
Date: 2/13/2006 12:56:22 PM
Subject: Hi Craig - -

Hi Craig - -

Who is expected to be at the gathering? Will there be a majority of the City Council? If so, what would be the basis for entry into executive session? If there is a majority, I believe that the gathering would constitute a "meeting" that falls within the coverage of the Open Meetings Law, and that the only possible ground for entry into executive session would be §105(1)(f).

That provision 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." To the extent that the discussion might focus on the financial, credit or employment history of a particular corporation, it would appear that an executive session could be justified. Conversely, to the extent that those topics are not the focus, it does not appear that an executive session could properly be held, if in fact the Open Meetings Law applies.

I hope that I have been of assistance.

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OML-AO - 4135

From: Robert Freeman
To: jamie konkoski
Date: 2/14/2006 8:04:49 AM
Subject: Re: Question from Saranac Lake

Good morning - -

In a board consisting of five members, three would constitute a quorum. I note, too, that action may be taken only by means of an affirmative vote of a majority of the total membership. Therefore, in a five person board, if two are absent, and the vote on a motion is two to one, it would not carry; there must be three affirmative votes to enable the board to do what it is empowered to do.

I hope that I have been of assistance.

[redacted]

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OML-AO-4136

From: Robert Freeman
To: townclerk@lewisborogov.com
Date: 2/14/2006 9:08:48 AM
Subject: Dear Ms. Cory:

Dear Ms. Cory:

You have asked whether the attorney for a planning board may "legally withhold a transcript of a public meeting because it is an "intra-agency' document."

In short, it is clear that a transcript of an open meeting must be disclosed. In a decision rendered years ago, it was held that a tape recording of an open meeting is accessible under the Freedom of Information Law (see Zaleski v. Hicksville Union Free School District Board of Education, Supreme Court, Nassau County, December 27, 1978). Since a transcript of an open meeting is the equivalent of a tape recording, there would be no basis for denying access. Very simply, there is nothing secret about what is expressed at a meeting during which any member of the public had the right to attend. Further, as you are likely aware, it has been held in many instances that any person present at an open meeting may record the meeting with his or her own recording device, so long as the device is neither disruptive nor obtrusive.

I hope that I have been of assistance.

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Name -
Kathleen Cory
Local

OML-AO-4137

From: Robert Freeman
To: augustine@hws.edu
Date: 2/17/2006 9:45:25 AM
Subject: Hi Jackie - -

Hi Jackie - -

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

I have a question: having attended the executive session, do you believe that the closed session was, in its entirety, properly held?

As for your question, you are correct in suggesting that some of your peers misunderstand the law. In short, the Open Meetings Law provides the public with the right to attend meetings of a public body, such as a city council. The law is silent, however, concerning the public's right to speak or participate during meetings. Therefore, if a public body does not want to authorize the public to speak at meetings, it is not obliged to do so. On other hand, most public bodies permit some sort of limited public participation. When they choose to do so, it has been suggested that they do so by means of reasonable rules that treat members of the public equally.

I hope that I have been of assistance.

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February 22, 2006

E-Mail

TO: Kay S. Ackerman

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. Ackerman:

I have received your letter in which you asked whether a board of education and its committees are required to comply with the Open Meetings Law.

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

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

Based on the foregoing, it is clear that a board of education constitutes a "public body" required to comply with the Open Meetings Law. In short, it is the governing body of a school district, which is a kind of public corporation.

Second, the last clause of the definition refers to any "committee or subcommittee or similar body of [a] public body." Based on that language and judicial decisions, when a public body, such as a board of education, creates or designates its own members to serve as a committee or subcommittee, the committee or subcommittee would constitute a public body subject to the requirements of the Open Meetings law. Therefore, committees of a Board consisting solely of two or more of its own members would have the same obligations regarding notice and openness, for example, as well as the same authority to conduct executive sessions as the governing body [see

Glens Falls Newspapers. Inc. v. Solid Waste and Recycling Committee of the Warren County Board of Supervisors, 195 AD2d 898 (1993)]. If, for example, a board of education consists of seven members, a quorum of the board would be four. If a standing committee consists of three members, because the committee is a public body separate and distinct from the board, its quorum would be two.

When an entity is subject to the Open Meetings, it is required to provide notice of the time and place of its meetings to the news media and by means of posting in accordance with §104. Requirements concerning minutes of meetings are prescribed in §106 of the Open Meetings Law.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
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OML-AO-4139

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February 22, 2006

E-Mail

TO: Hon. Jim Zecca, Council Member, City of Utica

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. Zecca:

As you are aware, I have received your letter in which you questioned the propriety of an executive session held by the Utica City Council "to discuss who would be president pro tempore." You added that the action taken to do so occurred "behind closed doors with a secret ballot."

In this regard, I offer the following comments.

A public body, such as a city council, cannot enter into an executive session without accomplishing the procedure described in §105(1) of the Open Meetings Law. That provision states in relevant part that:

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

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

The only provision that appears to be relevant, §105(1)(f), 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..."

Insofar as the Council considered the criteria inherent in the position of president pro tempore or the attributes or qualifications of any person who might serve in that position, I do not believe that §105(1)(f) could be asserted. That kind of discussion would not focus on any "particular person" but rather on the functions associated with the position and characteristics that any person who fulfills that role should or perhaps should not possess. However, if and when the discussion does pertain to a particular person, the language of §105(1)(f) may become applicable.

The first clause authorizes an executive session to consider the "medical, financial, credit or employment history of a particular person." There may be instances in which one or more of those subjects may be discussed regarding a candidate. The physical ability of an individual to hold the position could be an issue, particularly if that person has a history of health problems. In view of the time consuming nature of the position, it is possible that a discussion might involve an individual's financial history, i.e., consideration of whether that person can afford to spend the time needed to carry out the duties of chancellor. One's employment history might also be considered in an effort to determine whether a candidate's work or professional experience renders that person suitable for the position. In short, to the extent that the Council discussed the medical, financial or employment history of a particular person, I believe that the initial clause of §105(1)(f) may clearly have been invoked as a basis for conducting an executive session.

The second clause pertains to "matters leading to the appointment, employment, promotion" etc. "of a particular person". Discussion of the issue might pertain to the "appointment...of a particular person". If that is so, to that extent, an executive session could properly have been held. On the other hand, the Council's action involved an *election*, rather than an appointment, I do not believe that §105(1)(h) would have applied. Often that issue should be considered in relation to an entity's charter or rules, and it is suggested that any such provision be reviewed.

Lastly, I point out that §87(3)(a) of the Freedom of Information Law requires an agency, including a city council, to maintain a record indicating the manner in which the members of the City Council voted (see Perez v. City University of New York, 2005 Slip Opinion 06765, November 17, 2005, __ NY3d __). That being so, the Freedom of Information Law prohibits secret ballot voting by members of public bodies. It is also noted that it has been held that secret ballot voting is not permitted regarding the election of officers (Wallace v. City University of New York, Supreme Court, New York County, NYLJ, July 7, 2000).

I hope that I have been of assistance.

RJF:jm

cc: Charles Brown

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February 22, 2006

E-Mail

TO: Geraldine Richter

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. Richter:

I have received your letter sent to this office in your capacity as a member of the Hauppauge School District Board of Education. You wrote that the Board is planning a meeting during which the members will receive "an overview of our total security systems and procedures", as well as recommendations for changes. You added that the District's security officer is reluctant to share "specific information about [y]our security systems" in public, for that "would compromise the ability of [y]our systems to deter wrongdoing." By means of example, you referred to the possibility of having 100 security cameras, only of 20 of which would be "actually monitored real time", and that you "count on the presence of those cameras to deter unlawful activity." Your question is whether that kind of discussion could be conducted during an executive session.

From my perspective, the ability to enter into executive session would be dependent on the specific nature of the matters discussed and the effects of disclosure.

As you are likely aware, the Open Meetings Law is based on a presumption of openness. Stated differently, meetings of public bodies, such as boards of education, must be conducted open to the public, unless there is a basis for entry into executive session. Paragraphs (a) through (h) of §105(1) specify and limit the grounds for entry into executive session. Two of those grounds appear to be pertinent to the issues that you raised.

Paragraphs (a) and (c) respectively permit a public body to enter into executive session to discuss "matters which will imperil the public safety if disclosed" and "information relating to current or future investigation or prosecution of a criminal offense which would imperil effective law enforcement if disclosed."

Again, the extent to which those provisions would apply would be dependent on the actual nature of the discussion. For instance, if the intent is to have hidden cameras, discussion regarding their placement could enable students and perhaps others to evade effective law enforcement or endanger life or safety. On the other hand, if the cameras are situated in plain sight, public discussion would likely have no harmful effect. Similarly, if it is known which twenty cameras are monitored, a public discussion indicating those locations would enable individuals to evade detection. In that instance, I believe that an executive session could properly be held. Conversely, it if is known that twenty of one hundred cameras will be operating at a given time, but the public is unaware of which twenty will indeed be monitoring activity, public discussion may in actuality discourage activity that may be unlawful or contrary to the District's rules of conduct or behavior. The possibility of being monitored may deter such behavior and encourage compliance with rules.

In short, insofar as public discussion could enable individuals to evade enforcement of rules of behavior or the law or enable individuals to place themselves or others in jeopardy, I believe that an executive session could properly be held. However, insofar as public discussion would serve to encourage compliance with rules or law, or result in no harm, public discussion would appear to be in the public interest, and no ground for entry into executive session would likely apply.

I hope that I have been of assistance.

RJF:jm

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February 24, 2006

E-Mail

TO: Teresa Merlucci

FROM: Camille S. 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 information presented in your correspondence.

Dear Ms. Merlucci:

We are in receipt of your January 12, 2006 request for an advisory opinion concerning the application of the Open Meetings Law to a "community forum meeting" held by a board of education. Specifically, you inquire whether anyone can speak at such a gathering or whether the opportunity to do so may be limited to residents of the district.

We are unaware of any provision in the Education Law or the Open Meetings Law pertaining to "community forum meetings", and we speculate that such a meeting is most likely held for the purpose of gathering community input on a particular issue.

From our perspective, a "community forum meeting" is different from a meeting of a public body, and both are different from a public hearing. A meeting is generally a gathering of a quorum of a public body for the purpose of discussion, deliberation, and potentially taking action within the scope of its powers and duties. A hearing is generally held pursuant to law to provide members of the public with an opportunity to express their views concerning a particular subject, such as a proposed budget, a local law or a matter involving land use. It is likely that a "community forum meeting" is similar to a public hearing, due to its purpose, but unlike a public hearing, is not prescribed by law. Public hearings are often required to be preceded by the publication of a legal notice. In contrast, §104(3) of the Open Meetings Law specifies that notice of a meeting must merely be "given" to the news media and posted. We note, too, that a meeting of a public body held in accordance with the Open Meetings Law can only occur with the presence of a quorum. A hearing or a community forum, on the other hand, can be conducted without a quorum present.

While we know of no judicial decisions concerning the ability of those to speak at either meetings or hearings, when a public body does permit the public to speak, we 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 our view, would be unreasonable.

We 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 forum 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 a meeting of a public body or a public hearing, we believe that a court would determine that a public body may limit the amount of time allotted to person who wishes to speak, so long as the limitation is reasonable.

Legal notices for public hearings normally include the following indication: "at such hearing any person may be heard." Neither the notice nor the statute requiring that the hearing be held distinguishes among those who might want to express their views. That being so, we do not believe that a public body could validly require that those who attend or seek to attend a hearing identify themselves by name, residence or interest. In short, it is our view that any member of the public has an equal opportunity to partake in a public hearing, and that an effort to distinguish among attendees

by residence or any other qualifier would be inconsistent with the law and, therefore, unreasonable.

Moreover, people other than residents, particularly those who own property or operate businesses in a community, may have a substantial interest in attending and expressing their views at hearings held by school boards and other public bodies. Prohibiting those people from speaking, even though they may have a significant tax burden, while permitting residents to do so, would, in our view, be unjustifiable. Further, it may be that a non-resident serves, in essence, as a resident's representative, and that precluding the non-resident from speaking would be equivalent to prohibiting a resident from speaking. In short, it is unlikely that a public body could validly prohibit a non-resident from speaking at a public forum based upon residency.

On behalf of the Committee on Open Government, we hope this is helpful to you.

CSJ:jm

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OML-AO-4142

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February 24, 2006

Ms. Carol Lucas
[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. Lucas:

We are in receipt of your January 9, 2006 request for an advisory opinion concerning the application of the Freedom of Information and Open Meetings Laws to requests made to the Town of Mamakating. In response to your many questions, we 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.

One of your requests pertains to correspondence between Town officials that was denied on the ground that the materials involve "personnel matters." Here we point out that there is no exception for "personnel matters" in the Freedom of Information Law, and the term "personnel" appears nowhere in that statute. The nature and content of so-called personnel records may differ from one agency to another, and from one employee to another. In any case, neither the characterization of documents as "personnel records" nor their placement in personnel files would necessarily render those documents "confidential" or deniable under the Freedom of Information Law (see Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980). On the contrary, the contents of those documents serve as the relevant factors in determining the extent to which they are available or deniable under the Freedom of Information Law.

In analyzing the issue with respect to the Zoning Board of Appeals correspondence to which you seek access, the exception of greatest significance may be §87(2)(b). That provision permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion 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

and 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. Further, 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 their official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, 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].

Another provision of significance may be §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.

To the extent that the correspondence indicates final agency policy, a determination of the ZBA and/or instructions to the staff ZBA attorney which affects the public, we believe that it would be required to be made available pursuant to the Freedom of Information Law.

With regard to your question about educational seminars on open government issues, there is no requirement that elected officials attend any such seminars. It may be that the seminar to which

the Supervisor referred is one of the many conducted by our Executive Director. Should you require further related information, most of our materials are available online at our website noted above.

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.

Turning to your questions pertaining to public participation at meetings of the Town Board, we 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. 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, we do not believe that the public would have the right to attend.

There is nothing in the Open Meetings Law that pertains to the right of those in attendance to speak or otherwise participate at meetings. Certainly a member of the public may attend meetings and 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 we are aware provides the public with the right to speak *during* meetings, we do not believe that a public body is required to permit the public to do so. Clearly a public body may in our 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 our 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.

Next, as you may be aware, §30 of the Town Law provides in part that the town clerk "shall attend all meetings of the town board, act as clerk thereof, and keep a complete and accurate record of the proceedings of each meeting." As such, a town clerk has the statutory duty to prepare minutes of meetings of a town board.

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.

If a clerk does not prepare minutes in accordance within two weeks as required by law, he or she would have failed to carry out his or her statutory duties. A legal remedy addressing any such failure would involve the initiation by any person of a proceeding under Article 78 of the Civil Practice Law and Rules to compel the clerk to carry out his or her duties in a manner consistent with law.

Turning now to what appears to be the Town's constructive denial of your requests for records, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, 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. Although we are not advising you to institute an Article 78 proceeding against the Town, that would be one of the options available to you should an appeal go unanswered.

Additionally, insofar as the Town Clerk specifically denied access to certain records, she did not refer to your right to appeal the denial. Section 89(4)(a) of the Freedom of Information Law states in relevant part that:

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

Further, the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), which govern the procedural aspects of the Law, state that:

> "(a) The governing body of a public corporation or the head, chief executive or governing body of other agencies shall hear appeals or shall designate a person or body to hear appeals regarding denial of access to records under the Freedom of Information Law.
>
> (b) Denial of access shall be in writing stating the reason therefor and advising the person denied access of his or her right to appeal to the person or body established to hear appeals, and that person or body shall be identified by name, title, business address and business telephone number. The records access officer shall not be the appeals officer" (§1401.7).

It is also noted that the state's highest court has held that a failure to inform a person denied access to records of the right to appeal enables that person to seek judicial review of a denial. Citing the Committee's regulations and the Freedom of Information Law, the Court of Appeals in Barrett v. Morgenthau held that:

> "[i]nasmuch as the District Attorney failed to advise petitioner of the availability of an administrative appeal in the office (see, 21 NYCRR 1401.7[b]) and failed to demonstrate in the proceeding that the procedures for such an appeal had, in fact, even been established (see, Public Officers Law [section] 87[1][b], he cannot be heard to complain that petitioner failed to exhaust his administrative remedies" [74 NY 2d 907, 909 (1989)].

In sum, a Town's records access officer has the duty individually, or in that person's role of coordinating the response to a request, to inform a person denied access of the right to appeal, as well as the name and address of the person or body to whom an appeal may be directed.

On behalf of the Committee on Open Government, we hope this is helpful to you. In an effort to enhance understanding of and compliance with the Freedom of Information Law, a copy of this advisory opinion will be forwarded to the Town officials.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:jm
cc: Town Board
Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4143

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February 27, 2006

Mr. Crawford R. Thoburn
[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. Thoburn:

As you are aware, I have received your letter in which you questioned the propriety of an executive session held by the Village of Aurora Board of Trustees.

The matter involved approval of "the demolition of a municipally owned building and use for its land for a new street to access an expanded parking lot planned by a private commercial developer." You added that:

> "In exchange for the demolition of our public building and the new use of its lot as a street, the approved agreement provides that the Village will be deeded a parcel of land owned by the developer's partner (and leased an additional parcel at $1 per year) for future use as public parkland under specific conditions."

The Mayor contended that the agreement could be drafted and negotiated in your words, "entirely behind closed doors because it was about real estate." You wrote, however, that:

> "...the private or public sale of our municipal building, or its lot, or the parcels offered in exchange by the College was never considered. No exchange of money, other than the token annual $1, was ever in question. Since valuation was not at issue, it would seem that the meetings were improperly closed to public view."

In this regard, a public body, such as a village board of trustees, cannot meet in private or conduct an executive session to discuss the subject of its choice. By way of background, the phrase "executive session" is defined in §102(3) of the Open Meetings Law to mean a portion of an open meeting during which the public may be excluded. As such, an executive session is not separate and

distinct from a meeting, but rather is a portion of an open meeting. The Law also contains a procedure that must be accomplished during an open meeting before an executive session may be held. Specifically, §105(1) states in relevant part that:

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

The ensuing provisions, paragraphs (a) through (h), specify and limit the subjects that may properly be considered in executive session.

The only ground for entry into executive session of apparent significance, §105(1)(h), permits a public body to enter into executive session to discuss:

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

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

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

Assuming that your description of the facts is accurate, it does not appear that the Board could properly have discussed the matter in question during an executive session.

Lastly, with respect to the enforcement of the Open Meetings Law, §107 provides that:

> "1. Any aggrieved person shall have standing to enforce the provisions of this article against a public body by the commencement of a proceeding pursuant to article seventy-eight of the civil practice law and rules, and/or an action for declaratory judgment and injunctive relief. In any such action or proceeding, the court shall have the power, in its discretion, upon good cause shown, to declare any action or part thereof taken in violation of this article void in whole or in part.
>
> An unintentional failure to fully comply with the notice provisions required by this article shall not alone be grounds for invalidating any action taken at a meeting of a public body. The provisions of this article shall not affect the validity of the authorization, acquisition, execution or disposition of a bond issue or notes.
>
> 2. In any proceeding brought pursuant to this section, costs and reasonable attorney fees may be awarded by the court, in its discretion, to the successful party."

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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February 27, 2006

E-Mail

TO: Karen A. Hindenlang

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 Ms. Hindenlang:

We are in receipt of your January 16, 2006 request for an advisory opinion concerning the application of the Open Meetings Law to a series of meetings, over the course of which an agreement pertaining to real property was reached between the Village of Aurora and the Aurora Foundation. As represented by you,

> "Our Mayor claimed, citing the opinion of our Village Attorney, that the nature of this agreement allowed it to be negotiated and drafted behind closed doors because it was about real estate."

First, and 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.).

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 Board members gather 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.

Please note that 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 meetings which may or may not have been attended by a majority of the Town Board. If the Town Board consists of five members, the Open Meetings Law would not apply to a meeting for which less than three members are present.

Nevertheless, we also 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. 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.

With regard to your specific question about the Town Board's ability to conduct meetings on the agreement in private based on Open Meetings Law §105(1)(h), we note that the Town Board would have had to have given notice in accordance with §104, and then voted to enter into executive session based on the real property provision in the law. We offer the following comments to elaborate.

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

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

The ensuing provisions, paragraphs (a) through (h), specify and limit the subjects that may properly be considered in executive session.

Paragraph §105(1)(h) permits a public body to enter into executive session to discuss:

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

In our opinion, the language quoted above, like the other grounds for entry into executive session, is based on the principle that public business must be discussed in public unless public discussion would in some way be damaging, either to an individual, for example, or to a government in terms of its capacity to perform its functions appropriately and in the best interest of the public.

In short, the language of §105(1)(h) is limited and precise, for it focuses solely on the impact of publicity on the value of a parcel. Based on the terms of that provision, only in those instances in which "publicity would *substantially affect the value*" of a parcel of real property may an executive session properly be held.

If the facts as you relay them are accurate, that "no sale of our municipal building, nor sale of its lot, nor sale of the parcels offered in exchange by the College were considered. No exchange of money, other than the token annual $1, was ever in question", we would question how or the extent to which publicity would have "substantially" affected the value of those parcels.

On behalf of the Committee on Open Government, we hope this is of assistance to you. Additionally, subsequent to your request, our office received a similar request pertaining to the same transaction. For your information, a copy of our response to that request is included herein.

CSJ:jm

cc: Crawford R. Thoburn
Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4145

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February 28, 2006

E-MAIL

TO: Pamela Flinton

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. Flinton:

I have received your letter in which you asked whether it is "lawful for a Board to require persons wishing to speak during the Public Comments section of the meeting to provide the comments in writing 2-3 days prior to the meeting."

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

While public bodies have the right to adopt rules to govern their own proceedings, the courts have found in a variety of contexts that such rules must be reasonable. By means of example, in a decision rendered in 1963 concerning the use of tape recorders, it was found that the presence of a tape recorder, which then was a large and obtrusive device, would detract from the deliberative process and that, therefore, a policy prohibiting its use was reasonable [Davidson v. Common Council, 40 Misc.2d 1053]. However, when changes in technology enabled the public to use portable, hand-held tape recorders, it was found that their use would not detract from the deliberative process, because those devices were unobtrusive. Consequently, it was also determined that rules adopted by public bodies prohibiting their use were unreasonable [People v. Ystueta, 99 Misc.2d 1105 (1979); Mitchell v. Board of Education of the Garden City Union Free School District, 113 AD 2d 924 (1985). Specifically, in Mitchell, it was held that: "While Education Law §1709(1)

authorizes a board of Education to adopt by laws and rules for its government and operations, this authority is not unbridled. Irrational and unreasonable rules will not be sanctioned."

While the procedure that you described may not permit comments to be made concerning new matters, in my view, it would not be found by a court to be unlawful.

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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February 28, 2006

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 facts presented in your correspondence.

Dear Mr. O'Shaughnessy:

I have received your letter concerning the time within which minutes of meetings must be disclosed.

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

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

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

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

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4147

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

February 28, 2006

Ms. Marilyn Bartelotte
[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. Bartelotte:

I have received your letter in which you asked whether a certain gathering constituted a "meeting" that should have been held in accordance with the Open Meetings Law.

On January 18, you were at the office of the Boonville Town Clerk to review records concerning a proposed subdivision when the Clerk informed you that three members of the Town Board, the entire Planning Board, and a representative of the Tug Hill Commission gathered the preceding night to review the same records. When you asked whether notice was given to the public before the gathering, the Clerk told you, in your words, that it was not a "formal meeting and there was no notice to the public, and that none was necessary as the purpose was to bring the new board up to speed on the subdivision law." She added that the group discussed the proposed subdivision that was the subject of an upcoming public hearing.

From my perspective, the gathering as you described it constituted a "meeting" that fell within the requirements of the Open Meetings Law.

Section 102(1) of the Open Meetings Law defines the term "meeting" to mean, the "official convening" of a public body, such as a town board or a planning board, "for the purpose of conducting public business." In a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be convened open to the public, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

The decision rendered by the Court of Appeals was precipitated by contentions made by public bodies that so-called "work sessions" and similar gatherings held for the purpose of discussion, but without an intent to take action, fell outside the scope of the Open Meetings Law.

In discussing the issue, the Appellate Division, whose determination was unanimously affirmed by the Court of Appeals, stated that:

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

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

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

Based upon the direction given by the courts, if a majority of a public body gathers to discuss public business, any such gathering, in my opinion, would ordinarily constitute a "meeting" subject to the Open Meetings Law, irrespective of its characterization. I note, too, that it has been held that a "briefing session" during which a majority of a city council was present was found to be a "meeting" that fell within the coverage of the Open Meetings Law.

Lastly, every meeting of a public body must be preceded by notice 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
Planning Board
Hon. Elaine H. Tompkins, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-15843
OML-AO-4148

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February 28, 2006

E-Mail

TO: Ronald Knott

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. Knott:

I have received your letter in which you indicated that a "group of concerned citizens" in the Town of Stuyvesant videotapes Town Board meetings. You wrote that a resident recently "has been making copies of the tape and selling them" and asked whether that practice is "legal."

In this regard, first, it has been held that those who attend open meetings of public bodies, such as town boards, may audio record or video record those meetings, so long as the use of the recording devices is neither disruptive nor obtrusive [see e.g., Mitchell v. Board of Education of the Garden City Union Free School District, 113 AD2d 924 (1985); Csorny v. Shoreham-Wading River Central School District, 759 NYS2d 513, 305 AD2d 83 (2003)].

When a member of the public records a meeting, the tape is his or her property. What the person does with the tape is beyond the control of the government. In Mitchell, the Appellate Division found that the ability to record an open meeting cannot be restricted, even though a tape recording may be altered, edited, or replayed in a manner that is out of context.

Lastly, I point out that it was held years ago that an agency's tape recording of an open meeting is accessible under the Freedom of Information Law (see Zaleski v. Hicksville Union Free School District, Board of Education of Hicksville Union Free School, Sup. Ct., Nassau Cty., NYLJ, Dec. 27, 1978). When records are accessible under the Freedom of Information Law, it has been held that they should be made equally available to any person, regardless of one's status, interest or the intended use of the records [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. Moreover, the Court of Appeals, the State's highest court, has held that:

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

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

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

OMC-AO-4149

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March 2, 2006

Mr. Joseph W. Vogt
[redacted]

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

Dear Mr. Vogt:

We are in receipt of your January 13, 2006 request for an advisory opinion concerning the application of the Open Meetings Law to a recent meeting of the Common Council of the City of Little Falls. Based on your correspondence and the article you attached from *The Evening Times*, it appears that in the course of its regularly scheduled meeting, the entire Common Council, which consists of seven democrats and one republican, entered into a "caucus".

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

If the gathering described in your letter and the article were attended by council members from two political parties, we do not believe that a republican legislator could be characterized as a "guest" or that they can be described as political caucuses exempt from the Open Meetings Law. Again, such meetings would appear to be "meetings" that fall within the coverage of that statute.

In a variety of decisions, the courts have determined that provisions authorizing the exclusion of the public from meetings of public bodies should be construed narrowly. Notable in the context of the situation described is Buffalo News v. Buffalo Common Council [585 NYS 2d 275 (1992), which involved the interpretation of the exemption regarding political caucuses, the court concentrated on the expressed legislative intent appearing in §100 of the Open Meetings Law, stating that: "In view of the overall importance of Article 7, any exemption must be narrowly construed so that it will not render Section 100 meaningless" (id., 278).

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

> "The Court of Appeals in *Orange County* (supra) also declared: 'The purpose and intention of the State Legislature in the present context are interpreted as expressed in the language of the statute and its preamble.' The legislative intent, therefore, expressed in Section 108, must be read in conjunction with the Declaration of Legislative Policy of Article 7 as set forth in its preamble, Section 100.
>
> > "It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy. The people must be able to remain informed if they are to retain control over those who are their public servants. It is the only climate under which the commonwealth will prosper and enable the governmental process to operate for the benefit of those who created it" (id., 277).

With respect to the enforcement of the Open Meetings Law, and whether "the election of the Council President was contrary to law", we note that while it is our opinion that purported action taken outside the context of a meeting could be considered a nullity, the election was conducted after the members had reconvened at the public meeting.

Section 107(1) of the Law states in part that:

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

However, the same provision states further that:

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

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

On behalf of the Committee on Open Government, we hope this is helpful to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

cc: Common Council

OML-AO- 4150

From: Robert Freeman
To: nancy mconnell
Date: 3/2/2006 8:54:06 AM
Subject: Re: Closed meeting

In situations in which meetings are scheduled less than a week in advance, §104 of the Open Meetings Law requires that notice be given to the news media and posted "to the extent practicable...at a reasonable time" prior to the meetings.

I note that the law does not require that notice be "advertised" or that public body pay to place a legal notice in a newspaper; it merely requires that notice be "given". That might be accomplished by immediately telephoning the local news media and posting notice at the usual location or locations. It is also noted that it has been held that meetings should not generally be held on short notice unless there is a real need to do so.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
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[redacted]

OML-AO-4151

From: Robert Freeman
To: Steven Rocklin
Date: 3/9/2006 9:25:45 AM
Subject: Re: State Appliance Efficiency Act

Good morning - -

Based on several judicial decisions, assuming that the committee in question is not a creation of law and is wholly advisory in nature, it would not constitute a "public body" that falls within the requirements of the Open Meetings Law. This is not intended to suggest that it may not hold meetings open to the public, but rather that it is not required to do so.

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

Robert J. Freeman
Executive Director
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STATE OF NEW YORK
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March 13, 2006

E-MAIL

TO: Sandra Regan

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. Regan:

I have received your letter in which you raised questions concerning the timely disclosure of minutes of a town board meeting and a request that minutes be altered.

In this regard, first, it is clear that minutes must be prepared and made available to the public within two weeks of the meetings to which they relate. 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.

It is suggested that you contact the town clerk and emphasize that the law requires the minutes to be prepared and made available within two weeks.

Second, minutes of meetings, in my opinion, above all, must be accurate. If an inaccuracy is brought to the attention of a town clerk or town board, I believe that it would be reasonable and their responsibility to ensure that the minutes are indeed accurate. However, there is nothing in the law that provides a member of the public with the authority to insist on changing minutes or including a letter within minutes of a meeting. Only when a town board, through approval a motion by a majority of its membership, acts to include a letter within minutes would there be an obligation to do so.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
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March 13, 2006

E-Mail

TO: Jennifer Ries-Taggart

FROM: Robert J. Freeman, Executive Director RJF

Dear Ms. Ries-Taggart:

I have received your letter and point out that there is no provision of which I am aware that focuses on whether a policy must be placed in a manual.

It is noted, however, that the Open Meetings Law is applicable to governmental boards, such as the boards of trustees of municipal and school district libraries. Additionally, §260-a of the Education Law specifies that board of trustees of various kinds of "public" libraries, including those that may be not-for-profit corporations, are required to comply with the Open Meetings Law.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

OMC FO-4154

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March 13, 2006

E-Mail

TO: Juliet Aldrich

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. Aldrich:

I have received your letter concerning requests that comments or letters offered during meetings of a board of education be included within the minutes.

In this regard, there is no requirement that letters read aloud be included in minutes on request or otherwise.

The Open Meetings Law contains what might be characterized as minimum requirements concerning the contents of minutes. Specifically, §106 states that:

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

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

Based upon the foregoing, it is clear that minutes need not consist of a verbatim account of what is expressed at a meeting, and again, that there is no obligation to include letters read aloud in the minutes.

Although it was suggested that you, as president, may "pick and choose" which letters should be included in the minutes, I would disagree with such a suggestion. In my view, the Board's practice should be consistent; either all such letters should be included in the minutes, or none should be included, unless a motion to include a particular letter within the minutes is approved by a majority vote of the total membership.

You also asked about the ability of a member of the public to express negative comments concerning an employee during an open meeting. Here I point out that 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 a board of education, does not want to answer questions or permit the public to speak or otherwise participate at its meetings, I do not believe that it would be obliged to do so. 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 issue that you raised, in my opinion, the Board could, by policy, prohibit comments, whether positive or negative, that focus on a particular employees. However, if the Board permits praiseworthy comments regarding its employees, it must also permit negative or critical commentary.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
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OML-AO-4155

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March 15, 2006

E-Mail

TO: Dan Kuchta

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. Kuchta:

I have received your letter in which you asked whether a "site walk" conducted by a zoning board of appeals falls within the coverage of the Open Meetings Law.

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

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

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

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

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

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

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

There is case law, however, dealing with what might have been characterized as a field trip or site visit. In the first decision, the members of a public body were in a van, and it was held that "the Open Meetings Law was not violated" [City of New Rochelle v. Public Service Commission, 450 AD 2d 441 (1989)]. In that case, members of the Public Service Commission toured the proposed route of a power line in order to acquire a greater understanding of evidence previously presented. More recently, in Riverkeeper v. The Planning Board of the Town of Somers (Supreme Court, Westchester County, June 14, 2002), it was concluded that a site visit by a Planning Board does not constitute a meeting subject to the Open Meetings Law so long as its purpose is not "for anything other than to 'observe and acquire information.'" The court in that decision cited and apparently relied on advisory opinion rendered by this office in which it was suggested that:

> "...site visits or tours by public bodies should be conducted solely for the purpose of observation and acquiring information, and...any discussions or deliberations regarding such observations should occur in public during meetings conducted in accordance with the Open Meetings Law."

I hope that the foregoing will be useful to you.

RJF:jm

STATE OF NEW YORK
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March 15, 2006

Mr. Ralph P. Miccio
Counsel
New York Temporary State
Commission on Lobbying
2 Empire State Plaza, 18th Floor
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 information presented in your correspondence.

Dear Mr. Miccio:

I have received your letter in which you asked that I confirm in writing the general advice offered to you by phone concerning the application of the Open Meetings Law to a certain matter before the Temporary State Commission on Lobbying.

You wrote concerning the matter as follows:

> "The New York Temporary State Commission on Lobbying is conducting an investigation of a possible violation of the New York State Lobbying Act. Under section 73 of the New York Civil Rights Law, the Commission is prohibited from making public certain information obtained in this investigation unless a majority of the Commissioners agree to release the information. It has become necessary to provide certain information to another investigative agency.
>
> "I would like to have this matter discussed and voted upon in an Executive Session at the Commission Meeting tomorrow, but I am concerned about our possible violation of the Open Meetings Law."

In this regard, I offer the following comments.

First, because the Commission consists of more than two members, is a creation of law, and is required to carry out specific statutory functions and duties, I believe that it clearly constitutes a "public body" that falls within the scope of the Open Meetings Law.

Second, pertinent to the issue is the statute to which you referred, §73 of the Civil Rights Law, which provides in subdivision (8) in relevant part that:

> "Except in the course of a subsequent hearing open to the public, no testimony or other evidence adduced at a private hearing or preliminary conference or interview before a committee or other multi-member investigating agency shall be disseminated or made available to the public by any member of the agency, its counsel or employees, except with the approval of a majority of the members of such agency."

Third, the Open Meetings Law contains two vehicles under which a public body may conduct 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, provided, however, that no action by formal vote shall be taken to appropriate public moneys..."

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. It may, however, vote during an executive session, unless a vote is to appropriate public money.

Although you did not describe the nature of investigation being conducted by the Commission, paragraph (c) of §105(1) may be pertinent, for it authorizes the Commission to enter into executive session to discuss "information relating to current or future investigation or prosecution of a criminal offense which would imperil effective law enforcement if disclosed."

The other vehicle that may be applicable to exclude 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.

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

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

Assuming that the Commission is discussing a matter that is exempt from disclosure pursuant to §73(8) of the Civil Rights Law, it would be considering a matter that is confidential under state law that, therefore, would be exempt from the coverage of the Open Meetings Law.

Lastly, 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 and §105(1) of the Open Meetings Law, a public body may take action during a properly convened executive session [see Open Meetings Law, §105(1)]. If no action is taken, there is no requirement that minutes of the executive session be prepared. 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. I point out, however, 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 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 takes action involving information that is exempt from disclosure in accordance with §73(8), the minutes need not include that information. When §73(8) is applicable and pertains to records, those records would be deniable under §87(2)(a) of the Freedom of Information Law, which pertains to records that "are specifically exempted from disclosure by state or federal statute."

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
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March 15, 2006

E-MAIL

TO: Shmuel Gerber

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. Gerber:

We are in receipt of your request for an advisory opinion concerning "secret balloting" and quorum requirements, specifically the following two questions: (1) whether the decision in Perez v. City University of New York [5 NY3d 522, 806 NYS2d 460 (2005)] is "a departure" from Smithson v. Ilion Housing Authority, [130 AD2d 965, 516 NYS2d 564 (4th Dept, 1987) *aff'd*, 72 NY2d 1034, 534 NYS2d 930 (1988)] with respect to secret balloting, and (2) whether bylaws, which could define a "quorum" of a public body at the City University of New York as a majority of the entire membership, are in keeping with the Open Meetings Law.

With regard to your question about the recent decision by the Court of Appeals in Perez, *supra*, by way of background, since the Freedom of Information Law was enacted in 1974, it has imposed what some have characterized as an "open vote" requirement. Although the Freedom of Information Law generally pertains to existing records and ordinarily does not require that a record be created or prepared [see §89(3)], an exception to that rule involves voting by agency members. Specifically, §87(3) of the Freedom of Information Law has long required that:

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

Stated differently, when a final vote is taken by members of an agency, a record must be prepared that indicates the manner in which each member who voted cast his or her vote.

In terms of the rationale of §87(3)(a), it appears that the State Legislature in precluding secret ballot voting sought to ensure that the public has the right to know how its representatives may have

voted individually concerning particular issues. Although the Open Meetings Law does not refer specifically to the manner in which votes are taken or recorded, we 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."

In Perez, the primary issue was whether the Hostos Community College Senate and its Executive Committee were subject to the Open Meetings Law. Further, the Court considered whether secret ballots by the Collage Senate were prohibited by either the Open Meetings Law or the Freedom of Information Law. Based on the Court's finding that the College Senate is subject to both laws, the Court held that although there was no requirement pursuant to the Open Meetings Law to record an accounting of each participant's ballot, it would be impossible for the College Senate to maintain the requisite record of votes pursuant to the Freedom of Information Law, were the final vote of each member anonymous or secret. "Consequently," the Court ruled, "voting by the College Senate and the Executive Committee may not be conducted by secret ballot." Perez, 5 NY3d at 530, 806 NYS2d at 464.

In 1988 the Court affirmed an Appellate Division decision in which it was found that "[t]he use of a secret ballot for voting purposes was improper", and that the Freedom of Information Law requires "open voting and a record of the manner in which each member voted" [Smithson v. Ilion Housing Authority, 130 AD 2d 965, 967, 516 NYS 2d 564, 566 (4th Dept 1987), aff'd 72 NY 2d 1034, 534 NYS 2d 930 (1988)].

Based on Smithson and now Perez, it is clear that in order for an agency to comply with the Freedom of Information Law, a record must be prepared and maintained indicating how each member cast his or her vote. Disclosure of the record of votes represents the only means by which the public could know how its representatives asserted their authority. Ordinarily, a record of votes of the members will appear in minutes required to be prepared pursuant to §106 of the Open Meetings Law, and in our opinion, so long as minutes indicate how each member cast his or her vote, the requirements of the Freedom of Information Law would be satisfied.

In addition to the above-stated declaration set forth in §100 of the Open Meetings Law, §106 specifically requires the following:

> 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.

Accordingly, while there is no provision in the Open Meetings Law which requires the keeping of a record of the vote by member, it is our opinion that the purpose and intent of the law are clear, and to the extent that a summary of a vote taken could include a record of each member's vote, we recommend that it should. The requirement, however, that a record be prepared indicating the manner in which the members voted is imposed by the Freedom of Information Law.

Lastly, as a general matter, 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 question which you pose is whether public bodies at the university "will be subject to a quorum (and voting) requirement of a majority of the entire membership, regardless of particular provisions set out in the various bylaws", and further, whether a college council or faculty senate with 200 members and/or a small student senate with 20 members would be public bodies.

In response, please note that it is not the size of the public body which dictates whether it would be subject to those laws. In this regard, as you may be aware, the Open Meetings Law is applicable to public bodies, and §102(2) defines the phrase "public body" to mean:

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

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

From our perspective, the university bylaws imposing a quorum requirement on meetings of public bodies which by their nature are subject to the Open Meetings Law, would have no impact on the application of the Open Meetings Law. Again, based on the statutory definition of "public body", such entities are subject to quorum requirements.

On behalf of the Committee on Open Government, we hope this is helpful to you.

CSJ:tt

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March 15, 2006

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.

Dear Mr. Streppa:

We are in receipt of your request for an advisory opinion concerning the application of the Open Meetings Law to budget committee meetings of the Medina Central School District. As you describe the committee, it consists of three members of the seven member Board of Education, the Superintendent of Schools and the Director of Financial Services. Based on your description of its functions, the committee "discusses general budget items, the budgeting process and matters related to collective bargaining. It does not create a written report but does provide feedback to the Board of Education in open public meetings and, to the extent authorized by law, in executive session as they pertain to collective bargaining." In addition, based on your understanding of an advisory opinion previously issued by the Committee on Open Government, it was your view that these meetings were not subject to the Open Meetings Law.

While there is no case law of which we are aware that deals with the kind of situation at hand, because the Open Meetings Law is intended to enable the public to observe the deliberative process, the budget committee is in our view, essentially a committee of the Board and, therefore, constitutes a public body required to comply with that statute. In this regard, we 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 the core of a committee consists solely of members of a public body, such as the Board of Education, we believe that the Open Meetings Law is applicable.

In support of our opinion and 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", we 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 3 members of the Board of Education, would fall within the requirements of the Open Meetings Law when such an entity discusses or conducts public business collectively as a body [see Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984, 437 NYS 2d 466, (4th Dept. 1981), *appeal dismissed* 55 NY 2d 995, 449 NYS 2d 201 (1982)].

Additionally, with respect to the general intent of the Open Meetings Law, the first sentence of its legislative declaration, §100, states that:

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

In an early decision that focused largely on the intent of the Open Meetings Law that was unanimously affirmed by the Court of Appeals, it was asserted that:

> "We believe that the Legislature intended to include more than the mere formal act of voting or the formal execution of an official document. Every step of the decision-making process, including the decision itself, is a necessary preliminary to formal action. Formal acts have always been matters of public record and the public has always been made aware of how its officials have voted on an issue. There would be no need for this law if this was all the Legislature intended. Obviously, every thought, as well as every affirmative act of a public official as it relates to and is within the scope of one's official duties is a matter of public concern. It is the entire decision-making process that the Legislature intended to affect by the enactment of this statute" [Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, 415, *affirmed* 45 NY2d 947 (1978)].

In our opinion, committees are "public bodies" required to comply with the Open Meetings Law. Again, the amendments to the definition of "public body" suggest a clear intention on the part of the State Legislature to ensure that entities consisting of two or more members of a governing body (committees, subcommittees or similar bodies) are themselves public bodies falling with the coverage of the Law.

Does the applicability of the Open Meetings Law change if a committee consists of three members of a governing body, and in addition, a fourth or fifth person, not a member of the governing body, is designated to serve on the committee? What if each committee of the Board consisted solely of its own members, plus the Superintendent as an *ex officio* member? What if additions of that nature were made to evade the applicability and intent of the Open Meetings Law? From our perspective, when the core membership of an entity consists of members of a governing body, the kinds of additions or actions described in those questions would not change the essential character of the entity. In this case, the core membership of such a committee includes three Board members, plus the Superintendent and the Director of Finance. The core members, typically having been designated by means of a resolution approved by the Board, presumably may be removed only by action taken by the Board. Their status on the committee is likely permanent, unless and until the Board as a whole takes action to remove them or until they no longer serve on the Board.

Based on the foregoing, it is our opinion that the budget committee is essentially a committee of the Board and, therefore, constitutes a public body required to comply with the Open Meetings Law when a majority of the core members of the committee gather for the purpose of discussing matters within the area of its activity.

On behalf of the Committee on Open Government, we hope this is helpful to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

OML-AO-4159

From: Robert Freeman
To: [redacted]
Date: 3/17/2006 2:59:28 PM
Subject: Hi - -

Hi - -

It was great to see you, too, and I felt that the event was enjoyable and a positive experience for those who attended.

You referred to the status of a "crisis intervention team" under the Open Meetings Law. If that group merely consists of school staff, I do not believe that its meetings would fall within the coverage of the Open Meetings Law. However, if your reference is to a "district-wide school safety team", I believe that its meetings are subject to the Open Meetings Law.

Section 2801-a of the Education Law states in subdivision (2) that a "comprehensive district-wide safety plan shall be developed bythe district-wide safety team" which must include "policies and procedures" relative to implied or direct threats of violence, prevention and intervention strategies, building security, etc. Subdivision (4) provides that "Each district-wide school safety team shall be appointed by the board of education...and shall include but not be limited to representatives of the school board, student, teacher, administrator, and parent organizations, school safety personnel, and other school personnel."

A district-wide school safety team is a creation of law and carries out statutory functions for a school district. Therefore, it constitutes a "public body" required to comply with the Open Meetings Law. If that is the entity to which you referred, its meetings must, in my view, be conducted open to the public, except to the extent that there is a basis for entry into an executive session.

I hope that this will be useful to you.

Please keep in touch.

Robert J. Freeman
Executive Director
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March 17, 2006

Mr. Ron Antini
Chairman
Concerned Taxpayers Assn. Of Granville
324 Dekalb Road
Granville, NY 12832

Ms. Florence Riegert
Co-Chairman
Concerned Taxpayers Assn. Of Granville
324 Dekalb Road
Granville, NY 12832

The staff of the Committee on 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. Antini and Ms. Riegert:

We are in receipt of your request for an advisory opinion concerning availability of minutes, and the application of the Open Meetings Law to the preparation of minutes of a meeting of the Town of Granville Board of Assessment Review. Three months after the meeting, the Town Clerk indicated that the minutes include "the opening of the meeting and the closing," and that "a copy of the minutes, as yet has not been filed with the Town Clerk." To date, you are still awaiting production of such minutes. In this regard, we offer the following comments.

Section 106 of the Open Meetings Law provides direction concerning the contents of minutes and the time within which they must be prepared and disclosed. Specifically, that provision states that:

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

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

Based upon the foregoing, minutes must be prepared and made available within two weeks of meetings, and, at a minimum, subdivision (1) directs that minutes consist of a record or summary of motions, proposals, resolutions, action taken and the votes of the members. While it is unclear from the Clerk's description whether the minutes consist only of the opening and closing of the meeting, in our opinion, if that is an accurate statement, such an account would not be consistent with the provisions of the Open Meetings Law.

It is emphasized that the law requires that minutes be prepared and made available within two weeks, and 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.

Although you did not mention a tape recording of the meeting, we note that if the May 24, 2005 meeting was tape recorded, in our view, if it still exists, a tape recording of an open meeting is accessible, for any person could have been present, and none of the grounds for denial would apply. Moreover, case law indicates that a tape recording of an open meeting is accessible for listening and/or copying under the Freedom of Information Law [see Zaleski v. Board of Education of Hicksville Union Free School District, Supreme Court, Nassau County, NYLJ, December 27, 1978].

On behalf of the Committee on Open Government, we hope this is helpful to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt
cc: Hon. Jenny Martelle

From: Robert Freeman
To: [redacted]
Date: 3/20/2006 2:14:53 PM
Subject: Dear Mr. Nicolaysen:

Dear Mr. Nicolaysen:

I have received your letter, and the issue is whether the eight supervisors constitute a "public body" subject to the Open Meetings Law.

In brief, if the group merely involves supervisors representing their towns, and the group has no decision making authority, it is doubtful that the Open Meetings Law would apply. On the other hand, if the group has the power to make decisions that are binding on the towns represented, I believe that it would constitute a public body required to comply with the Open Meetings Law.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
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OML-AO-4162

From: Robert Freeman
To: [redacted]
Date: 3/21/2006 1:52:19 PM
Subject: Hi - -

Hi - -

If a meeting is adjourned, you asked whether the board can "be called back to order (in case they forgot to do something?)?" If the meeting has ended, if those in attendance have gone, I do not believe that the board can validly reconvene on the spot and conduct what in essence would be a new meeting held without notice to the public. Following an adjournment, any new convening would constitute a new meeting and, therefore, notice would have to be given to the public and the news media. Additionally, there may be issues relating the board's ability to comply with §62 of the Town Law pertaining to special meetings.

The second issue involves including names and addresses of those who address the board during meetings or hearings. There is no obligation to include names and addresses in the minutes, and in some instances, for reasons discussed in the attached opinion, I believe that it may be unwise to do so.

Hope this helps.

See you at the convention.
Bob

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STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

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OML-AO-4163

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March 21, 2006

E-MAIL

TO: Peter Golden

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. Golden:

We are in receipt of your request for an advisory opinion concerning whether members of a public body may discuss the performance of a contractor in a public meeting, or whether such discussion would be required to be conducted during an executive session. In this regard, because the Open Meetings Law is permissive, it does not require that discussions are conducted during executive session, but rather permits public bodies, under appropriate circumstances, to enter into executive session for specific purposes.

It is clear that a public body such as a Board of Education might justifiably consider the performance of a contractor in executive session under §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..."

In short, even though the contract is public, a discussion of the employment history of a particular person or corporation, for example, could clearly be conducted during an executive session.

Again, however, even though a matter may be discussed in executive session, there is no requirement that it must be discussed in executive session. The introductory language of §105(1), which prescribes a procedure that must be accomplished before an executive session may be held, indicates that a public body "may" conduct an executive session only after having completed that procedure.

If, for example, a motion is made to conduct an executive session for a valid reason, and the motion is not carried, the public body could either discuss the issue in public, or table the matter for discussion in the future. Similarly, although the Freedom of Information Law permits an agency to withhold records in accordance with the grounds for denial, it has been held by the Court of Appeals, the state's highest court, that the exceptions are permissive rather than mandatory, and that an agency may choose to disclose records even though the authority to withhold exists [Capital Newspapers v. Burns], 67 NY 2d 562, 567 (1986)].

On behalf of the Committee on Open Government, we hope this is helpful to you.

CSJ:tt

STATE OF NEW YORK
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March 24, 2006

E-Mail

TO: Hon. Frank Coccho, Mayor of the City of Corning

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 Mayor Coccho:

I have received your letter and appreciate your interest in compliance with the Open Meetings Law.

You have questioned the propriety of an executive session recently held by the City of Corning Economic Revolving Loan Fund Committee with an applicant to discuss his loan request. You summarized the exchanges between the Committee and the applicant as follows:

> "* Committee - Please explain the project.
> * Applicant - Refurbish the building to include new carpets, windows, upgrade heat and a/c, remodel 2nd floor, etc.
> * Applicant advised the committee he wasn't going to work forever and improving the building would enhance its value and sale.
> * Applicant discussed with the committee a local merchant organization that offers grants for projects upon completion of project.
> * Applicant inquired of the committee what the code requirements for his building would be.
> * Committee advised applicant the city can loan up to 100% for code related corrections.
> * Committee also advised the applicant they would cooperate and initially recommend a portion of the loan he was requesting."

Following the executive session, you suggested that its authority to meet in private under the circumstances would have been limited to a discussion or review of "the applicant's financial status or credit history, which never occurred."

I agree with your contentions.

By way of background, as you are aware, the Open Meetings Law is based on a presumption of openness. Stated differently, meetings of public bodies, such as the Committee, must be conducted open to the public, except to the extent that an executive session may properly be held. Most importantly, the authority to hold executive sessions is limited to the eight grounds for entry into executive session appearing in paragraphs (a) through (h) of §105(1) of the Open Meetings Law.

The only ground relevant to the matter, §105(1)(f), permits a public body to enter into executive session to discuss:

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

In the context of the Committee's functions, I believe that an executive session may properly be held only to discuss the "financial, credit or employment history of a particular person or corporation." If those issues do not arise, in my opinion, there would be no basis for conducting an executive session. As you described the situation, §105(1)(f) could not properly have been asserted. If that is so, the meeting should have been conducted wholly in public.

I hope that I have been of assistance.

RJF:jm

cc: Economic Revolving Loan Fund Committee

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4165

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March 24, 2006

Hon. Chuck Lesnick
Yonkers City Council President
City Hall, 4th Floor
Yonkers, NY 10701

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

Dear Council President Lesnick:

I have received your letter in which you referred to discussions by the Yonkers City Council relating to a development in the City and a variety of real property transactions.

According to your letter, an executive session was recently held to discuss "the proposed Master Development Designation Agreement (MDDA)" relating to:

> "...several things that will affect not only the price of the land that the City is selling the developer, but aspects of the development that will affect whether certain parcels currently owned by private owners will be part of the potential site assemblage, and whether the municipality will ultimately pay for those acquisitions through TIF financing or some other mechanism."

You added that:

> "It is our understanding that since the amount we request the developers pay for the city owned sites (and the method by which it is paid) could impact the amount that private owners negotiate from the developer for their sites."

You asked whether I "agree that executive session is justified by the fact that this MDDA could affect the prices of land paid by the developer to the private land-owners, a cost that might ultimately be borne by the City." In my view, the propriety of executive sessions in the circumstances that you described relate primarily to two considerations. 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 city council, cannot enter into an executive session to discuss the subject of its choice. From my perspective, the grounds for entry into executive session are based on the need to avoid some sort of harm that would arise by means of public discussion, and that is so with respect to the only ground for entry into executive session that appears to be relevant in relation to the matter.

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

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

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

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

In this instance, the development involves not one but several parcels. That being so, it is possible that public discussion relative to a particular parcel could affect the negotiations and, therefore, the prices paid for other parcels where no final price has yet been established. In those or similar situations, insofar as publicity would "substantially" affect the value of those parcels, I would agree that an executive session may properly be held. However, in other situations in which

publicity would have little or no impact upon the value of real property, I do not believe that there would be a basis for conducting an executive session.

Second, based upon your comments, it appears that the ability to conduct executive sessions is limited and that various aspects of the Council's consideration of the matter must be discussed in public. You referred to "periodic updates to the public" and explanations of the financing of the project, and I would conjecture that other aspects of the Council's consideration of the project should also be discussed in public. General discussions that serve to educate Council members regarding the process and the steps needed to move forward towed completion likely could not justifiably be discussed in private.

In short, it is reiterated that executive sessions may properly be held in my opinion only to the extent that publicity "would substantially affect the value" of one or more parcels of real property. I recognize that it may be difficult and perhaps cumbersome during the course of a meeting to enter into executive session, return to an open meeting and later enter into executive session again, should the need arise. However, those kinds of actions by the Council may be fully appropriate and necessary to comply with the Open Meetings Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
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OML-AO-4166

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March 27, 2006

E-MAIL

TO: Kathryn Burke

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, unless otherwise indicated.

Dear Ms. Burke:

We are in receipt of your request for an advisory opinion concerning application of the Open Meetings Law to the proceedings of the SUNY Farmingdale Student Senate. Specifically, you inquire about your right to speak at a meeting of a public body, and whether elected members of the public body have the ability to ban a member of the public from attending future meetings. Prior to receiving your request, I spoke with the President of the Student Senate, who indicated her desire to conduct certain votes by secret ballot in the event she was not able to prevent the public from observing a particular vote. In this regard, we offer the following comments.

First, the Open Meetings Law is 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."

According to a decision by the Court of Appeals, New York State's highest court, an entity equivalent to the SUNY Farmingdale Student Senate, an association at a CUNY community college, was authorized to review budgets and allocate student activity fees and disbursements. Due to its ability to exercise authority of this nature, the court determined that the student government body constitutes a "public body" required to comply with the Open Meetings Law [Smith v. CUNY, 92 NY2d 707 (1999)]. It is our understanding that the Student Senate at SUNY Farmingdale performs similar functions.

Pursuant to §103 of the Open Meetings Law, meetings of public bodies must be held open to the general public. Accordingly, we believe that the SUNY Farmingdale Student Senate is clearly a public body subject to the Open Meetings Law.

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, such as the Student Senate, 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. 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, we 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 students 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.

We 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 our view, 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 our view that the Student Senate may by policy or rule limit comments to matters involving Senate business or the operation of the Student Senate. In short, when a public body does permit the public to speak, we believe that it should do so based upon reasonable rules that treat members of the public equally.

From our perspective, any such rules could serve as a basis for preventing verbal interruptions, shouting or other outbursts, as well as slanderous or obscene language or signs; similarly, we believe that the Student Senate could regulate movement on the part of those carrying signs or posters so as not to interfere with meetings or prevent those in attendance from observing or hearing the deliberative process.

A public body's rules pertaining to public participation typically indicate when, during a meeting (i.e., at the beginning or end of a meeting, for a limited period of time before or after an agenda item or other matter is discussed by a public body, etc.) those in attendance may speak. Most rules also limit the amount of time during which a member of the body may speak (i.e., no more than three minutes).

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

With regard to the President's attempt to enter into a "voting session", asking all non-voting members to leave the room, we note that there is no provision in law for entering into a "voting session", and we do not believe the Senate has any authority to exclude the public from attendance at any such session.

Only under limited circumstances may a public body remove itself from an open meeting, and enter into an "executive session." By of background, the Open Meetings Law requires that a

procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Section 105(1) states in relevant part that:

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

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.

And, it has been held judicially that :

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

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

With regard to the issue of conducting votes in public, it has been found that the governing body of an entity similar to the Student Senate, a CUNY student government association, could not elect its officers by secret ballot vote (Wallace v. City University of New York, Supreme Court, New York County, NYLJ, July 7, 2000).

In this regard, we direct your attention to the Freedom of Information Law. Section 87(3)(a) provides that:

"Each agency shall maintain:

(a) a record of the final vote of each member in every agency proceeding in which the member votes..."

Based upon the foregoing, when a final vote is taken by an "agency" subject to the Freedom of Information Law [see §86(3)], a record must be prepared that indicates the manner in which each member who voted cast his or her vote. Ordinarily, records of votes will appear in minutes.

In terms of the rationale of §87(3)(a), it appears that the State Legislature in precluding secret ballot voting sought to ensure that the public has the right to know how its representatives may have voted individually concerning particular issues. Although the Open Meetings Law does not refer specifically to the manner in which votes are taken or recorded, we believe that the thrust of §87(3)(a) of the Freedom of Information Law is consistent with the Legislative Declaration set forth above. 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)]. Most recently, the Court of Appeals confirmed that members of public bodies cannot vote by secret ballot [Perez v. City University of New York, 2005 Slip Opinion 08765, Nov. 17, 2005 ___NY3d ___].

On behalf of the Committee on Open Government, we hope this is helpful to you.

CSJ:tt

cc: Taneeka Johnson

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4167

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March 28, 2006

Mr. and Mrs. Robert J. Brignola
[redacted]

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

Dear Mr. and Mrs. Brignola:

I have received your letter in which you sought an opinion concerning a meeting of the Troy City Council during which the public was prohibited from speaking.

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, such as a city council, to listen to their deliberations and observe the performance of public officials. However, as you may be aware, that right is limited, for public bodies in appropriate circumstances may enter into closed or executive sessions. As such, it is reiterated that, in my opinion, there is no constitutional right to attend meetings.

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

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: City Council

STATE OF NEW YORK
DEPARTMENT OF STATE
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OML-AO-4168

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March 31, 2006

E-MAIL

TO: Mona Goodman

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. Goodman:

I have received your letter and the materials relating to it. You have requested an advisory opinion concerning the propriety of certain actions involving the Long Beach City Council.

You wrote that:

> "The new administration hired a new City Manager on 1/3/06. He is a retiree of the New York City Police Dept. and receives a pension. Then, on 1/22, the new administration placed a classified ad in the New York Times for a City Manager, seemingly as a procedural step in helping the retiree get a waiver from the State Civil Service Commission, so that he may collect his pension and his City Manager salary of $137,000."

You also transmitted a transcript of a City Council meeting involving an exchange between the City Council President, Mr. Remo, and Councilman Hennessey in which the latter sought answers to questions relating to the ad. The Council President indicated that the issues involved a "personnel matter" that should be discussed in executive session. Councilman Hennessey persisted and raised a series of questions as follows:

> "I'd like to know if Mr. Remo had any input into the placement of the ad, I'd like to know if any other members of the council had any input into the placement of the advertisement. I'd like to know where the purchasing agent gets the legal authority to take the lead on placing such an ad. I want to know how we paid for the ad, I want to know who authorized the payment of the ad. I would like to know whose

> idea it was in the first place to place the ad. I would like to know why Mr. Sofield and myself were excluded from the placement of the ad and why we had to find out with a phone call from somebody else that the ad was placed. I'd like to know who developed the criteria and I think that's very very important. The criterial for the ad is very very specific in that it requires two things, a master's degree in a government related field and police, I'm sorry, policing at the executive level. I'd like to know who had the authority to develop the criteria specifically. Who chose to put that in the ad and why that specific criteria was chosen. I'd like to know also with regards to the criteria including the police officer experience, why do we need that experience now as opposed to city planning, opposed to city financing, opposed to municipal law (not law enforcement) but municipal law and I'd also like to know why police officer experience is such a high importance in the advertisement especially when the city's major crime rate has dropped nearly 40% and the crime across the country is down, why is that issue more important than the other issues that the city is facing. I'd like to know if Mr. Laffey was in involved in any way shape or form in drafting or placing the ad for the position for which he holds."

In response, the Council President said that "It has to do with the hiring process" and reiterated that any discussion should occur during an executive session, for the issues constitute a personnel matter.

Later in the exchange, the Council President indicated that he would provide answers to the Councilman's questions in writing, but only after having received an "assurance" that "anything that will be discussed in executive session given to you in writing does not find its way into the public..."

From my perspective, the foregoing indicates that the Council President and perhaps Council members do not properly understand either the Open Meetings Law or the Freedom of Information Law. It is emphasized that the term "personnel" appears in neither of those statutes, and that the characterization of an issue as a "personnel matter" does not necessarily to lead to a conclusion that the matter is confidential. On the contrary, frequently discussions concerning personnel matters, for reasons to be described in the ensuing commentary, must be conducted in public. Similarly, there are numerous aspects of personnel records that must be disclosed to comply with the Freedom of Information Law.

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, except to the extent that the subject matter under consideration may properly be discussed during an executive session.

It is noted 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. Consequently, 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 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, while one of the grounds for entry into executive session may relate to personnel matters, the language of that provision is precise. In its original form, §105(1)(f) of the Open Meetings Law permitted a public body to enter into an executive session to discuss:

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

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

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

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

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

When a personnel matter involves "the hiring process", as it was described by the Council President, rather than a "particular person", I do not believe that §105(1)(f) may be asserted to justify

holding an executive session. Further, having reviewed the questions raised by Councilman Hennessey that were quoted earlier, none, in my view, pertains to a particular person, and discussions of and answers to those questions must, in my opinion, occur in public to comply with law. I point out that even though an issue or an action taken might relate only to one employee, when that action would affect or serve as precedent in cases arising in the future pertaining to other persons in similar situations, there would be no basis for entry into executive session. In a decision involving different facts but in my opinion the same principle, it was held that the "personnel" exception for entry into executive session was not validly asserted. The Appellate Division, Second Department, determined that:

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

In sum, only to the extent that the matters considered by the City Council might have focused on a particular person in conjunction with one or more of the qualifying topics appearing in §105(1)(f) may an executive session properly be held.

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

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

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

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

Next, with respect to written responses to questions or any other documentary materials, the Freedom of Information Law governs rights of access. That statute is expansive in its coverage, for it pertains to all records of an agency, such as a city, and defines the term "record" to include:

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

In a case in which an agency claimed, in essence, that it could remove various documents from the coverage of the Freedom of Information Law, the Court of Appeals found that:

> "...respondents' construction -- permitting an agency to engage in a unilateral prescreening of those documents which it deems to be outside the scope of FOIL -- would be inconsistent with the process set forth in the statute. In enacting FOIL, the Legislature devised a detailed system to insure that although FOIL's scope is broadly

> defined to include all governmental records, there is a means by which an agency may properly withhold from disclosure records found to be exempt (see, Public Officers Law §87[2]; §89[2],[3]. Thus, FOIL provides that a request for access may be denied by an agency in writing pursuant to Public Officers Law §89(3) to prevent an unwarranted invasion of privacy (see, Public Officers Law §89[2]) or for one of the other enumerated reasons for exemption (see, Public Officers Law §87[2]). A party seeking disclosure may challenge the agency's assertion of an exemption by appealing within the agency pursuant to Public Officers Law §89(4)(a). In the event that the denial of access is upheld on the internal appeal, the statute specifically authorizes a proceeding to obtain judicial review pursuant to CPLR article 78 (see, Public Officers Law §89[4][b]). Respondents' construction, if followed, would allow an agency to bypass this statutory process. An agency could simply remove documents which, in its opinion, were not within the scope of the FOIL, thereby obviating the need to articulate a specific exemption and avoiding review of its action. Thus, respondents' construction would render much of the statutory exemption and review procedure ineffective; to adopt this construction would be contrary to the accepted principle that a statute should be interpreted so as to give effect to all of its provisions...
>
> "...as a practical matter, the procedure permitting an unreviewable prescreening of documents -- which respondents urge us to engraft on the statute -- could be used by an uncooperative and obdurate public official or agency to block an entirely legitimate FOIL request. There would be no way to prevent a custodian of records from removing a public record from FOIL's reach by simply labeling it 'purely private'. Such a construction, which could thwart the entire objective of FOIL by creating an easy means of avoiding compliance, should be rejected" [Capital Newspapers v. Whalen, 69 NY 2d 246, 253-254 (1987)].

Based on the foregoing, it is clear in my opinion that any documents that may relate to the issue constitute agency records subject to whatever rights of access may exist under the Freedom of Information law.

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

A request for or promise of confidentiality is irrelevant in determining the extent to which City records may be withheld under the Freedom of Information Law. The Court of Appeals has held that a request for or a claim or 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..."

The Court also concluded that "just as promises of confidentiality by the Department do not affect the status of documents as records, neither do they affect the applicability of any exemption" (id., 567).

In a different context, one involving a personnel matter, in Geneva Printing Co. and Donald C. Hadley v. Village of Lyons (Supreme Court, Wayne County, March 25, 1981), a public employee charged with misconduct and in the process of an arbitration hearing engaged in a settlement agreement with a municipality. One aspect of the settlement was an agreement to the effect that its terms would remain confidential. Notwithstanding the agreement of confidentiality, which apparently was based on an assertion that "the public interest is benefited by maintaining harmonious relationships between government and its employees", the court found that no ground for denial could justifiably be cited to withhold the agreement. On the contrary, it was determined that:

> "the citizen's right to know that public servants are held accountable when they abuse the public trust outweighs any advantage that would

> accrue to municipalities were they able to negotiate disciplinary matters with its employee with the power to suppress the terms of any settlement".

As suggested earlier, there is nothing in the Freedom of Information Law that deals specifically with personnel records or files. The nature and content of so-called personnel files may differ from one agency to another, and from one employee to another. In any case, neither the characterization of documents as "personnel records" nor their placement in personnel files would necessarily render those documents "confidential" or deniable under the Freedom of Information Law (see Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980). On the contrary, the contents of those documents serve as the relevant factors in determining the extent to which they are available or deniable under the Freedom of Information Law. Typically, two of the grounds for denial are relevant to an analysis of rights of access to personnel records.

Pertinent is §87(2)(b), which permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". In addition, §89(2)(b) provides a series of examples of unwarranted invasions of personal privacy.

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

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

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

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

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

In an effort to enhance compliance with and understanding of the Open Meetings and Freedom of Information Laws, copies of this opinion will be forwarded to the Council President and the members of the Council to whom you referred.

I hope that I have been of assistance.

RJF:tt

cc: Hon. Leonard G. Remo
Hon. James P. Hennessey
Hon. Thomas R. Sofield, Jr.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4169

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April 5, 2006

Ms. Andrea Ann Lella
CEC 31 Member
[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. Lella:

We are in receipt of your requests for advisory opinions concerning application of the Open Meetings Law to multiple scenarios. We have attempted to address the various issues you raise in the comments set forth below.

Initially you describe a situation in which a Community Education Council entered into executive session "to discuss matters of individual privacy". By way of background, as you are aware, the Open Meetings Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Section 105(1) states in relevant part that:

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

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

In this regard, it has been held judicially that :

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

> Additionally, the topics discussed during the executive session must remain within the exceptions enumerated in the statute (see generally, Matter of Plattsburgh Publ. Co., Div. of Ottaway Newspapers v City of Plattsburgh, 185 AD2d §18), and these exceptions, in turn, 'must be narrowly scrutinized, lest the article's clear mandate be thwarted by thinly veiled references to the areas delineated thereunder' (Weatherwax v Town of Stony Point, 97 AD2d 840, 841, quoting Daily Gazette Co. v Town Bd., Town of Cobleskill, supra, at 304; see, Matter of Orange County Publs., Div. of Ottaway Newspapers v County of Orange, 120 AD2d 596, lv dismissed 68 NY 2d 807)"

In short, it is reiterated that a public body may validly conduct an executive session only to discuss one or more of the subjects listed in §105(1) and that a motion to conduct an executive session must be sufficiently detailed to enable the public to know that there is a proper basis for entry into the closed session. "Matters of individual privacy" is not one of the subjects enumerated in the statute.

When the Council explained that it was necessary to discuss a particular council member's action and any action to be taken with respect to that member, it is likely that an executive session could have been held. Section 105(1)(f) authorizes a public body to enter into executive session to discuss:

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

Under the circumstances, it appears that some aspects of the Board's discussion of the situation might have involved a matter leading to the removal of a particular person.

Because the topic discussed in executive session included the formation of a committee, however, we note that only in rare instances may a board of education take action during an executive session. To the extent that the responsibilities and role of a Community Education Council can be equated with a board of education, and to the extent that precedents cited below apply, we offer the following.

As a general rule, a public body may take action during a properly convened executive session [see Open Meetings Law, §105(1)]. In the case of most public bodies, if action is taken during an executive session, minutes reflective of the action, the date and the vote must be recorded in minutes pursuant to §106(2) of the Law. If no action is taken, there is no requirement that minutes of the executive session be prepared. Various interpretations of the Education Law, §1708(3), however, indicate that, except in situations in which action during a closed session is permitted or required by statute, a school board cannot take action during an executive session [see United Teachers of Northport v. Northport Union Free School District, 50 AD 2d 897 (1975); Kursch et al. v. Board of Education, Union Free School District #1, Town of North Hempstead,

Nassau County, 7 AD 2d 922 (1959); Sanna v. Lindenhurst, 107 Misc. 2d 267, modified 85 AD 2d 157, aff'd 58 NY 2d 626 (1982)]. Stated differently, based upon judicial interpretations of the Education Law, a school board generally cannot vote during an executive session, except in those unusual circumstances in which a statute permits or requires such a vote.

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

In our view, if action was taken with respect to a particular Council member, i.e., to form a committee to investigate her and/or to determine to take other action with regard to her, and if the above-referenced law applies to community education councils, as well as boards of education, we believe that any such action could properly have been taken only during an open meeting. If those provisions do not apply to community education councils, we believe action may validly be taken during an executive session.

Second, you relate that you have been informed that as a Council member, you are prohibited from discussing what was said at an executive session, "as it would violate the specified rules of conduct for an Executive Session and that it would result in removal from the council." This advice may have been given to you based on a recent decision by the Commissioner of Education in Application of Nett and Raby (October 24, 2005) in which the Commissioner determined, in brief, that a member of a board of education may be removed from office if s/he discloses information acquired during an executive session.

In our opinion, although we are not suggesting that it be ignored, the Commissioner's decision is erroneous, for matters discussed during executive session would be "confidential" only on rare occasions. While we would not suggest that a member of the council should knowingly fail to comply with law, attached is an advisory opinion (OML-AO 3449) that describes in detail the rationale for our disagreement with the Commissioner. Most importantly, we do not intend to suggest that such disclosures would be uniformly appropriate or ethical; unilateral disclosure by a member of a public body might serve to defeat or circumvent the principles under which public bodies are intended to operate.

The questions you raise, including whether a Council member could "waive her right to confidentiality since s/he was the only topic of discussion" or "discuss this meeting with a lawyer", along with the questions raised in our advisory opinion cited above, are helpful in shedding light on implications of the Commissioner's ruling.

With regard to the scenario you describe, one or more members of the Council revealed the topic of the executive session to a member who could not be present, prior to the meeting. Although the Open Meetings Law would not apply to a discussion held between two members, we assume that the discussion which occurred during the executive session later would also be verbally summarized for the non-attending member. It is our opinion that sharing information about what was discussed at the executive session with members of the Council who were not able to be present would be permitted under the law, for it is logical that Council members permitted by law to attend all executive sessions may learn of what transpired at any particular executive session.

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

Based on 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 email 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' (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, 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 Council 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 email communications are made via a listserv or other means through which the members receive them at different times, and there is no instantaneous or simultaneous communication, that circumstance, in our opinion, would be equivalent to the transmission of inter-office memoranda. In that kind of situation, where the recipients open their mail at different times and take varying amounts of time to respond, in our view, the Open Meetings Law would not be implicated. Whether or not opinions are expressed through the transmission of emails is not dispositive of whether the communications are in keeping with the Open Meetings Law.

With regard to your questions about the significance of Robert's Rules of Order, and the Council's obligations to conform to them, we note that Robert's Rules are not law. To the extent that Robert's Rules may conflict with a law, a policy, or perhaps with a rule adopted by a public body, Robert's Rules would, in our opinion, have no effect. It is our opinion that Robert's Rules are confusing and often misunderstood. Accordingly, we believe their "application" is the absence of law, policy, regulation or bylaws often unnecessarily creates confusion and undue formality.

With respect to the issue of a letter signed by six members of the Council, and the information about how the letter was signed, specifically that the six members who eventually signed the letter convened at a church, you indicate that "Those [six] members contend that the letter is a product of them as individuals NOT as CEC members and because the actions took place in a church the Law does not apply due to the separation of church and state."

This statement, if accurate, is in direct contrast to the manner in which the six signatories began the letter, which is as follows:

> "We, as council members of the Community Education Council (CEC) for District 31, feel that it is our duty as public servants to ...".

Accordingly, we reiterate our opinion as previously set forth and enclosed herein (OML-AO-3899). Because the members indicated the role in which they composed the letter as Council members, and pursuant to their "duty as public servants", we believe that they were acting in their capacities as Council members. Further, when a majority of a public body gathers, in their capacities as members of that body, for the purpose of carrying out their duties, the gathering in our view would constitute a "meeting" subject to the Open Meetings Law, irrespective of its location [see Orange County Publications v. Council of the City of Newburgh, 60 AD2d 409, aff'd 45 NY2d 947 (1978)].

On behalf of the Committee on Open Government, we hope this is helpful to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

Encs.

cc: Community Education Council

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4170

41 State Street, Albany, New York 12231
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Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

April 10, 2006

E-MAIL

TO: Roy Paul

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. Paul:

I have received your inquiry and offer the following comments.

In short, 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 hope that I have been of assistance.

RJF:tt

cc: Board of Education

4171

From: Robert Freeman
To: [redacted]
Date: 4/10/2006 1:06:58 PM
Subject: Dear Mr./Ms. Janik:

Dear Mr./Ms. Janik:

I have received your inquiry in which you referred to work sessions of a planning board during which there may be "side conversations between members of the board...which are not audible to anyone in attendance."

In my view, if, for example, one member of a board leans over to whisper to another, activity of that nature would not be inconsistent with the Open Meetings Law. If, on the other hand, a majority of a board engages in a discussion that is not audible to those in attendance, that kind of activity would, in my opinion, fail to comply with that statute.

I believe that every provision of law, including the Open Meetings Law, must be implemented in a manner that gives reasonable effect to its intent. If a majority of a public body situates itself or speaks in a manner so softly that those in attendance cannot listen to their discussion or deliberations, I believe that so doing would be unreasonable and be inconsistent with the requirements imposed by the Open Meetings Law.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
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FOIL-AO-1589
OML-AO-4172

From: Robert Freeman
To: [redacted]
Date: 4/10/2006 12:27:15 PM
Subject: Dear Ms. Levy:

Dear Ms. Levy:

I have received your inquiry concerning your right to gain access to records of a homeowners' association and to attend its meetings.

In this regard, the Freedom of Information Law pertains to rights of access to records maintained by entities of state and local government. Similarly, the Open Meetings Law is applicable to meetings of government bodies, i.e., town boards, city councils, boards of education, etc. Neither of those laws would apply to the records or meetings of a homeowners' association or other private entity.

It is suggested that you attempt to review the by-laws of the association. They would serve as the source of rights of access, should any such rights currently exist. If no rights of access are conferred in the by-laws, you and others might take the necessary steps to attempt to amend the by-laws to guarantee rights of access to records and meetings.

I hope that I have been of assistance.

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

FOIL-AO-15902
OML-AO-4173

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April 10, 2006

E-MAIL

TO: Patty Croissant

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. Croissant:

I have received your inquiry concerning the obligation of "the Board of Commissioners of a public housing authority...to keep minutes from executive sessions."

In this regard, first, the governing bodies of all public authorities, including public housing authorities, constitute "public bodies" required to comply with the Open Meetings Law [see §102(2)].

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

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OML-AO-4174

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April 10, 2006

Professor William Crain
The City College of New York
North Academic Center, Rm. 7/120
Convent Avenue at 138th Street
New York, NY 10031

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

Dear Professor Crain:

We are in receipt of your request for an advisory opinion concerning a recent ruling by the Court of Appeals, Perez v. City University of New York [5 NY3d 522 (2005)], and its applicability to proceedings of the Faculty Senate or a Faculty Council of the City College of New York. Specifically, you asked whether such entities, "as true governing bodies", are required to "deliberate *and* vote in public." In this regard, we offer the following.

First, the Open Meetings Law is 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."

Second, it has been found that the governing body of a CUNY student government association, could not elect its officers by secret ballot vote (Wallace v. City University of New York, Supreme Court, New York County, NYLJ, July 7, 2000).

In this regard, we direct your attention to the Freedom of Information Law. Section 87(3)(a) provides that:

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

Based upon the foregoing, when a final vote is taken by an "agency" subject to the Freedom of Information Law [see §86(3)], a record must be prepared that indicates the manner in which each member who voted cast his or her vote. Ordinarily, records of votes will appear in minutes.

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

Most recently, as you note, the Court of Appeals confirmed that members of public bodies cannot vote by secret ballot (Perez v. City University of New York, supra).

Third, while a public body may vote during an executive session, the Open Meetings Law requires the following two elements with respect to the executive session: (one) that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session, and (two) that minutes are to be prepared.

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.

Further, 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.

We point out that minutes of executive sessions need not include information that may be withheld under the Freedom of Information Law. From our 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)].

In sum, while a public body could vote during an executive session, from which the public is excluded, such a vote is required to be recorded in the minutes and made available to the public within one week of the executive session.

On behalf of the Committee on Open Government, we hope this is helpful to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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OML-AO-4175

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April 11, 2006

Mr. John F. Fitzgerald
[redacted]

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

Dear Mr. Fitzgerald:

We are in receipt of your letter of February 15, 2006, and have taken the liberty of construing it as a request for an advisory opinion concerning what was characterized as your appeal of a denial of access by the Valhalla Union Free School District. As the basis for your request for minutes of executive sessions, you referred to minutes of District meetings which indicate the appointment of a person for purposes of taking minutes during executive sessions. In an effort to enhance understanding of the Freedom of Information and Open Meetings Laws, we offer the following.

First, although §106(2) of the Open Meetings Law 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, we believe that minutes reflective of decisions reached must be prepared and made available. In Previdi v. Hirsch [524 NYS 2d 643 (1988)], the issue involved access to records, i.e., minutes of executive sessions held under the Open Meetings Law. Although it was assumed by the court that the executive sessions were properly held, it was found that "this was no basis for respondents to avoid publication of minutes pertaining to the 'final determination' of any action, and 'the date and vote thereon'" (id., 646). The court stated that:

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

Therefore, if the Board reaches a "consensus" that is reflective of its final determination of an issue, we believe that minutes must be prepared that indicate its action, as well as the manner in which each member voted. We 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.

Perhaps more importantly in your case, however, the Freedom of Information Law pertains only to existing records. Section 89(3) of the Law states in part that an agency need not create a record in response to a request. Again, to the extent that records which you have requested do not exist, the Freedom of Information Law does not apply. If there are no records, it is our opinion that the provisions for appealing a denial of access contained within the Freedom of Information Law would not apply to the circumstances of your request, for no records would have been withheld.

On behalf of Committee on Open Government, we hope this is helpful to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:jm
cc: Diane Ramos-Kelly

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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April 14, 2006

E-MAIL

TO: Sue Brander

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. Brander:

We are in receipt of your request for an advisory opinion concerning application of the Open Meetings Law to various proceedings of the Stark Town Board. You inquire specifically about the sufficiency of notice of a meeting of the Town Board during the annual employees' Christmas party and indicate you were informed that you would not have been permitted to attend such meeting "because it was a private party." Further, you indicate that the Town Board scheduled a meeting with a representative from NYSERDA, members of the board of education and a neighboring town board, from which "the public will be excluded." In this regard, we offer the following comments.

You added that you believe "there have been some violations of the Open Meetings laws, and possibly other procedural errors, as well." 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 determine whether a public body has "violated" the law. Only a court could make such a determination.

With respect to the matters that you described, first, by way of background, the definition of "meeting" [see Open Meetings Law, §102(1)] has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that any gathering of a majority of a public body for the purpose of conducting public business is a "meeting" that must be conducted open to the public, whether or not there is an intent to 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, 401 NYS2d 84, 60 Ad 2d 409, aff'd 411 NYS2d 564,45 NY 2d 947 (1978)].

The decision rendered by the Court of Appeals was precipitated by contentions made by public bodies that so-called "work sessions" and similar gatherings held for the purpose of

discussion, but without an intent to take action, fell outside the scope of the Open Meetings Law. In discussing the issue, the Appellate Division, whose determination was unanimously affirmed by the Court of Appeals, stated that:

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

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

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

Based upon the direction given by the courts, when a majority of the Board convenes to discuss the Village business, any such gathering, in our opinion, would constitute a "meeting" subject to the Open Meetings Law. If indeed the Town Board conducted a meeting as part of or during a party, we believe that the Open Meetings Law would have applied.

Second, the Open Meetings Law requires that notice be given to the news media and posted prior to every meeting. Specifically, §104 of that statute provides that:

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

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

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

In the context of your inquiry, if notice of the meeting was given to the news media, whether it was published in the newspaper would not be determinative of compliance with law. Although notice of meetings must be given to the news media, there is no requirement that the news media print or publicize that a meeting will be held. In our opinion, if notice of the meeting was transmitted to the media in a timely manner and posted in the designated public locations, the requirements of the law concerning notice would have been met.

With regard to a meeting of the Town Board with the school board and a neighboring town board, if a quorum of either of the town boards or the board of education gathers to conduct public business, collectively, as a body, the gathering, in our view, would constitute a "meeting" subject to the Open Meetings Law. We note, too, that it has been held that joint meetings of two or more public bodies fall within the coverage of the Open Meetings Law [Oneonta Star Division of Ottoway Newspapers, Inc. v. Board of Trustees of Oneonta School District, 66 Ad2d 51 (1979)]. We note that 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.

Accordingly, it is our opinion that the Open Meetings Law would govern a joint meeting of the board of education, a neighboring town board and Stark Town Board members and that an executive session could be held only pursuant to one of the purposes enumerated in §105(1).

Finally, to the extent that you have raised issues such as whether a formal vote must be taken to forward a document to the county for review, whether your submissions should have been discussed at a public meeting, and whether a second public hearing should have been held, we note that neither the Open Meetings Law nor the Freedom of Information Law would apply to affect any of these actions.

On behalf of the Committee on Open Government, we hope this is helpful to you.

CSJ:tt

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4177

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April 17, 2006

E-Mail

TO: Debra MacDougal

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. MacDougal:

I have received your letter in which you indicated that you are a member of the West Monroe Town Board, which consists entirely of members of one political party. You described a series of events that involve issues arising in relation to the Open Meetings Law.

In brief, the first situation involved a gathering of three Board members who are also members of a political party committee for the purpose of conducting interviews to fill a vacancy on the Town Board. The other concerned a phone call to you from the Supervisor "asking for [your] approval" to take certain action. In this regard, I offer the following comments.

First, the Open Meetings Law applies to public bodies, such as town boards, and the definition of "meeting" [see Open Meetings Law, §102(1) has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals, 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 to discuss Town business, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law, unless the meeting or a portion thereof is exempt from the Law.

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

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

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

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

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

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

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

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

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

> "The Court of Appeals in *Orange County* (supra) also declared: 'The purpose and intention of the State Legislature in the present context are interpreted as expressed in the language of the statute and its preamble.' The legislative intent, therefore, expressed in Section 108, must be read in conjunction with the Declaration of Legislative Policy of Article 7 as set forth in its preamble, Section 100.
>
> > "It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy. The people must be able to remain informed if they are to retain control over those who are their public servants. It is the only climate under which the commonwealth will prosper and enable the governmental process to operate for the benefit of those who created it.
>
> "A literal reading of Section 108, as urged by Respondent, could effectively preclude the public from any participation whatsoever in a government which is entirely controlled by one political party. Every public meeting dealing with sensitive or controversial issues could be preceded by a 'political caucus' which would have no public input, and the public meetings decisions on such issues would be a mere formality. Such interpretation would negate the Legislature's declaration in Section 100. The Legislature could not have contemplated such a result by amending Section 108 and at the same time preserving Section 100" (id., 277).

Based on the foregoing, I believe that consideration of the matter must focus on the overall thrust of the decision. To reiterate a statement in the Buffalo News decision: "any exemption must be narrowly construed so that it will not render Section 100 meaningless" (id., 278). Since all the members of the Town Board are from a single political party, based on the decision cited above, I do not believe that a majority of the members of the Board may validly conduct a closed political caucus to discuss matters of public business. 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. It appears that the gathering in question constituted a "meeting", for it involved a matter of public business, the authority of the Board to fill a vacancy in a public office.

Third, when a public body conducts a meeting, the Open Meetings Law is based on a presumption of openness. Stated differently, meetings of public bodies must be conducted in public except to the extent that an executive session may appropriately be held. Paragraphs (a) through (h)

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

In my view, the only provision that might have justified the holding of an executive session to discuss filling a vacancy in an elective office is §105(1)(f) of the Open Meetings Law, which permits a public body to enter into an executive session to discuss:

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

Under the language quoted above, it would appear that a discussion focusing on the individual candidates could validly be considered in an executive session, for it would involve a matter leading to the appointment of a particular person. Nevertheless, in the only decision of which I am aware that dealt directly with the propriety of holding an executive to discuss filling a vacancy in an elective office, the court found that there was no basis for entry into executive session. In determining that an executive session could not properly have been held, the court stated that:

> "...respondents' reliance on the portion of Section 105(1)(f) which states that a Board in executive session may discuss the 'appointment...of a particular person...' is misplaced. In this Court's opinion, given the liberality with which the law's requirements of openness are to be interpreted (Holden v. Board of Trustees of Cornell Univ., 80 AD2d 378) and given the obvious importance of protecting the voter's franchise this section should be interpreted as applying only to employees of the municipality and not to appointments to fill the unexpired terms of elected officials. Certainly, the matter of replacing elected officials, should be subject to public input and scrutiny" (Gordon v. Village of Monticello, Supreme Court, Sullivan County, January 7, 1994), modified on other grounds, 207 AD 2d 55 (1994)].

Based on the foregoing, notwithstanding its language, the court in Gordon held that §105(1)(f) could not be asserted to conduct an executive session. I point out that the Appellate Division affirmed the substance of the lower court decision but did not refer to the passage quoted above. Whether other courts would uniformly concur with the finding enunciated in that passage is conjectural. Nevertheless, since it is the only decision that has dealt squarely with the issue at hand, I believe that it is appropriate to consider Gordon as an influential precedent.

Lastly, in my view, the Board may validly conduct a meeting or carry out its authority only at a meeting during which a majority of its members has physically convened or during which a majority has convened by means of videoconferencing, and even then, only when reasonable notice is given to all of the members.

There is nothing in the Open Meetings Law that would preclude members of a public body from conferring individually, by telephone, via mail or e-mail. However, a series of communications between individual members or telephone calls among the members which results in a collective decision, a meeting held by means of a telephone conference or series of telephone calls, or a vote taken by mail or e-mail would in my opinion be inconsistent with law.

Based on relatively recent legislation, I believe that voting and action by a public body may be carried out only at a meeting during which a quorum has physically convened, or during a meeting held by videoconference. It is noted that the Open Meetings Law pertains to public bodies, and §102(2) defines the phrase "public body" to mean:

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

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

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

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

The amendments to the Open Meetings Law in my view clearly indicate that there are only two ways in which a public body may validly conduct a meeting. Any other means of conducting a meeting, i.e., by telephone, by mail, or by e-mail, would be inconsistent with law.

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

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

Based on the foregoing, again, a valid meeting may occur only when a majority of the total membership of a public body, a quorum, has "gathered together in the presence of each other or through the use of videoconferencing." Only when a quorum has convened in the manner described in §41 of the General Construction Law would a public body have the authority to carry out its powers and duties. Consequently, it is my opinion that a public body may not take action or vote by means of telephone calls or e-mail. Moreover, §41 requires that reasonable notice be given to all the members. If that does not occur, even if a majority is present, I do not believe that a valid meeting could be held or that action could validly be taken.

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

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

> Council of City of Newburgh, 60 AD2d 309, 415 Affd 45 NY2d 947).
>
> "The issue was the Town's policy concerning tax assessment reductions, clearly a matter of public business. There was no physical gathering, but four members of the five member board discussed the issue in a series of telephone calls. As a result, a quorum of members of the Board were 'present' and determined to publish the Dear Resident article. The failure to actually meet in person or have a telephone conference in order to avoid a 'meeting' circumvents the intent of the Open Meetings Law (see e.g., 1998 Advisory Opns Committee on Open Government 2877). This court finds that telephonic conferences among the individual members constituted a meeting in violation of the Open Meetings Law..."

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

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

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

In sum, I concur with your understanding that the Board may not take action by means of a series of phone contacts or through voting by phone.

I hope that I have been of assistance.

RJF:jm

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April 17, 2006

E-Mail

TO: Richard J. Olson, Esq.

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. Olson:

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

You wrote that the Village of Millbrook created an Architectural Advisory Commission, and that "[u]pon referral from the Planning Board or Building Inspector that Commission has 30 days to give a non binding recommendation on the exterior architecture of the building." You have asked whether the Commission is subject to the Open Meetings Law.

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

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

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

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

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.).

I note, however, that it has also been advised that an advisory body that performs a necessary step in the process of decision making constitutes a public body subject to the Open Meetings Law. If, for instance, the Planning Board or Building Inspector cannot perform certain functions until it receives a recommendation from the Commission, I believe that the Commission would constitute a public body subject to the Open Meetings Law, even though it does not have the authority take final and binding action [see Perez v. City University of New York, 5 NY3d 522 (2005)].

I hope that I have been of assistance.

RJF:jm

cc: Board of Trustees

STATE OF NEW YORK
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April 17, 2006

Ms. Rebecca Ryan
Mr. Kevin Zeeches
[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. Ryan and Mr. Zeeches:

I have received your correspondence concerning in which you requested a "decision" concerning certain matters relating to the Village of Warsaw Zoning Board of Appeals.

According to your letter, following a hearing and a meeting, the Chairman of the Board announced that the ZBA would make its "decision" pertaining to a certain matter on March 23. Several present objected to that date because it conflicted with a function scheduled that night, and further, because the speakers at the function were also the appellants in the matter to be decided by the Board on March 23. You added that the "decision to set the date was not voted upon during the meeting and came from a previously closed session meeting of the ZBA with the Mayor." You also referred to a subsequent "unannounced meeting" during which another request to reschedule the meeting was denied. Additionally, attached to one of your letters is the ZBA's code of conduct, which states in part that "[a]fter the close of public comments, the Board will decide whether to rule this evening or within the 62 day statutory time frame."

In this regard, it is emphasized that the neither the Committee on Open Government nor its staff is empowered to render a decision that is binding. Rather, this office is authorized to provide advice and opinions, and the following comments should be considered advisory.

First, the portion of the code of conduct quoted above is, in my view, unclear. When the Board decides to "rule...within the 62 day statutory time frame", the language does not indicate whether such decision involves rendering a decision at some point within 62 days or whether that provision has been interpreted to require the Board to specify a date within 62 days on which it will render a decision.

Second, it does not appear that the Board could validly have met during a "closed session" with the Mayor to set the date for rendering its decision. In short, the Open Meetings Law is based on a presumption of openness. Stated differently, meetings of public bodies, such as a zoning boards

of appeals, must be conducted open to the public unless there is a basis for entry into executive session. Paragraphs (a) through (h) of §105 of the Law specify and limit the grounds for conducting an executive session, and in my opinion, setting a date for an upcoming meeting could not properly have been discussed by the Board during an executive session.

Similarly, I do not believe that the Board could properly "discuss the evidence presented" at a hearing during a "closed session meeting." I note by way of historical background 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.

You asked whether a decision to set the date of a meeting is "nullified because it was made in secret." If a judicial proceeding is initiated under the Open Meetings Law, §107 provides that a court may, in its discretion, nullify action taken in private in violation of that statute. Therefore, if action is taken in violation of law, it is not automatically void, but rather is voidable.

Lastly, you referred to "unannounced" meetings. Here I point out that every meeting of a public body must be preceded by notice of the time and place given in accordance with §104 to the news media and by means of posting in one or more designated public locations.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Zoning Board of Appeals

STATE OF NEW YORK
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April 19, 2006

Hon. Bruce A. Rich
Trustee
Village of Saltaire
[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. Rich:

We are in receipt of your request for an advisory opinion concerning the recent adoption of Local Law No. 1, 2006 by the Village of Saltaire, as set forth in relevant part as follows:

> "**§34-2. Findings.**
>
> The Board of Trustees of the Village of Saltaire has determined that, because the Village is located on a barrier island with limited or no ferry service during parts of the year, is geographically separated with no reasonable alternative access, and is primarily a seasonal community with a substantial number of residents having second homes widely dispersed throughout the region, it is in the best interests of the residents of the Village that the Board periodically hold public meetings outside of the boundaries of the Incorporated Village of Saltaire in order to facilitate and maximize the attendance and participation of as many residents as possible at said meetings. In recognition of the foregoing there may be occasions when the convenience and needs of the residents of the Village are better served by scheduling a meeting of the Board at a location outside of the Village.
>
> "**§34-3. Designation of time and place of meetings.**
>
> The Board of Trustees shall hold public meetings at such times and places in the Village and at places outside the Village as it shall, by

> resolution, provide. The Board of Trustees, at its discretion, may hold one or more of its meetings at a location outside of the Incorporated Village of Saltaire when the convenience and needs of the community indicate that such an alternative location would be necessary or desirable; provided that (a) any chosen location shall be open and accessible to the public, (b) such location shall be connected telephonically or by similar means to a meeting location designated within the Incorporated Village of Saltaire, unless same is not possible for uncontrollable reasons and (c) such location shall be located in the State of New York."

In this regard, there is nothing in the Open Meetings Law that specifies precisely where meetings must be held. Nevertheless, it has been advised in a variety of contexts that every provision of law, including the Open Meetings Law, must be carried out in a manner that gives reasonable effect to its intent. Section 100 of that statute, the legislative declaration, states in part that: "It is essential...that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy." In our opinion, a meeting of the Village Board, or any municipal body, must be held at a location where members of the public who might want to attend may have a reasonable opportunity to do so.

What is reasonable, in our view, may be dependent on attendant facts and circumstances. As you may be aware, there are judicial decisions indicating that meetings held by a board of education some twenty miles from the district it serves (Goetschius .v Board of Education, Supreme Court, Westchester County, March 8, 1999) and others held at 7:30 a.m. [Goetschius v. Board of Education, 244 AD2d 552 (1997)] effectively precluded many from attending and represented an unreasonable exercise of authority in a manner inconsistent with the Open Meetings Law. In those cases, it appears that a public body's actions were intended to ensure that some individuals, notably the petitioner, a union activist, and others, could not attend.

In the context of the information which you have relayed and the findings of fact which the Village has adopted, access to the Village is limited during parts of the year, it is primarily a seasonal community, and there is a twenty-five year history of holding budget hearings at an alternative location in New York County in order to facilitate and maximize the attendance and participation of as many residents as possible.

There is likely no perfect time or place for holding meetings that would accommodate the needs of all of those interested in attending. While a substantial percentage of the Village's population is seasonal, there are some who reside year-round in the Village of Saltaire. While a large percentage of second-home owners may reside in New York County, it may be that some do not. What may be fair to some may be unfair to others. In consideration of the facts associated with the situation that you presented, however, we do not believe that a court would determine that the local law is unreasonable or inconsistent with the Open Meetings Law.

We note that in an attempt to ameliorate the effects of holding meetings in remote locations, Local Law No. 1 provides for the telephonic connection between the open meeting and a designated location within the incorporated limits of the Village of Saltaire when possible. In this regard, we offer the following comments for guidance.

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

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

In view of that definition and others, 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 Village Board, 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 amendments to the Open Meetings Law in our view clearly indicate that there are only two ways in which a public body may validly conduct a meeting. Any other means of conducting a meeting, i.e., by telephone, by mail, or by e-mail, would be inconsistent with law.

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

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

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

Based on the foregoing, again, a valid meeting may occur only when a majority of the total membership of a public body, a quorum, has "gathered together in the presence of each other or through the use of videoconferencing." Only when a quorum has convened in the manner described in §41 of the General Construction Law would a public body have the authority to carry out its powers and duties. Accordingly, it is our opinion that a resident who wishes to observe proceedings via telephone would not be prohibited from doing so, however, a Board Member's participation by telephone would not be sufficient for attendance and/or voting purposes. Further, we point out that the notice requirements set forth in §104 would apply to both "locations" of the meeting, New York County and the Village of Saltaire.

On behalf of the Committee on Open Government, we hope this is helpful to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
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April 20, 2006

E-Mail

TO: Daina Beckman

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. Beckman:

As you are aware, I have received your letter concerning your right to gain access to records involving the expenditure of public monies by the Town of Hartsville.

In this regard, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, records reflective of the expenditure of public monies are clearly accessible under the Freedom of Information Law.

In addition, those records must be maintained and made available pursuant to §29(4) of the Town Law. That provision states that the supervisor:

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

Further, subdivision (1) of §119 of the Town Law states in part that:

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

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

You also referred to an executive session held by the Town Board "without any explanation except it was personal." Here I direct your attention to the Open Meetings Law, which applies to public bodies, such as town boards. Like the Freedom of Information Law, the Open Meetings Law is based on a presumption of openness. Meetings of public bodies must be conducted open to the public, except to the extent that the subject of discussion may properly be considered in executive session. Paragraphs (a) through (h) of §105(1) specify and limit the grounds for entry into executive session. Therefore, a public body may not conduct an executive session to discuss the subject of its choice.

Before an executive session may be held, a procedure must be accomplished in public. Specifically, the introductory language of §105(1) states that:

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

It is suggested that you review the provisions of the Open Meetings Law, which is available on our website, and particularly the grounds for entry into executive session.

I hope that I have been of assistance.

RJF:jm

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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April 20, 2006

Mr. Bill VanAllen
[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. VanAllen:

I have received your letter in which you requested an advisory opinion concerning the propriety of an executive session held by the State Board of Elections. You wrote that the executive session involved discussion by the Board "with a representative of US-DOJ and others to discuss a proposed consent order regarding compliance with the federal 'Help America Vote Act' HAVA."

A news article that you forwarded indicates that "[t]he state Monday was working feverishly to avert a lawsuit by the U.S. Department of Justice over failure to comply with voting rights laws, spurring the Board of Elections to consider setting up temporary ways for disabled voters to cast ballots."

The article also noted that:

> "Over the objections of a reporter, the commission met behind closed doors to discuss its proposed consent deal, arguing private sessions are allowed to discuss litigation and that the Justice Department specifically requested all negotiations be secret."

As I understand the situation, there was no basis for entry into executive session.

By way of background, as a general matter, the Open Meetings Law is based on a presumption of openness. Stated differently, meetings of public bodies must be conducted open to the public, except to the extent that an executive session may properly be held . Further, that statute requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, §105(1) states in relevant part that:

> "Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of

> the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

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 membership before such a session may validly be held. The ensuing provisions of §105(1) specify and limit the subjects that may appropriately be considered during an executive session.

It would appear that the only pertinent ground for entry in executive session would have been §105(1)(d), which, as suggested by the Board's Counsel, permits a public body to enter into an executive session to discuss "proposed, pending or current litigation". Based on judicial decisions, the scope of the so-called litigation exception is narrow. As stated judicially:

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

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

In the context of the situation that you described, even if there would otherwise have been a basis for entry into executive session, once the federal officials were invited to join the Board, the Board, in my view, would have lost its authority to conduct an executive session.

Lastly, in my opinion, the request by the Justice Department that the "negotiations be secret" is irrelevant. Unless the law authorizes the Board to conduct public business in private, a request for secrecy by federal officials has no bearing on the Board's obligation to comply with the state's Open Meetings law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Elections
Todd Valentine

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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OML-AO-4183

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April 24, 2006

Ms. Rebecca H. Albright
181 McChesney Street
[redacted]

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

Dear Ms. Albright:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information and Open Meetings Laws to Niagara County Head Start, of which you are a member of the Board of Directors. You wrote that

> "Niagara County Head Start is a non-profit agency that administers a Federal Grant for the purpose of providing Head Start programming for needy children in Niagara County New York. The agency is in no way connected to Niagara County Government, however it was many years ago before becoming incorporated. Federal funds are granted to Niagara County Head Start for the sole purpose of administering and providing the Head Start program in Niagara County."

Further, you wrote that

> "...minutes and agendas are not made available to the staff of the agency or parents of the children in the program, and staff have been directly told that they may not attend meetings of Policy Council or Board of Directors. I am very uncomfortable with both of these practices and would use a letter from you to strongly advise the Executive Director to make the appropriate changes."

From our perspective, it is not entirely clear whether Niagara County Head Start is subject to the requirements of the Freedom of Information Law, however, we have reason to believe that Niagara is required to disclose its records, with exceptions.

By way of background, the New York 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 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."

As such, the Freedom of Information Law generally applies to records maintained by entities of state and local government. Although it appears that Head Start performs a governmental function, it is questionable whether it constitutes a "governmental entity" or, therefore, is an agency subject to the Freedom of Information Law.

It is also our understanding that Head Start programs are created by means of the authority conferred by the federal government, pursuant to updated provisions of the Economic Opportunity Act of 1964. Located within Title 42 of the United States Code, §9831 of Chapter 105, sets forth the purposes and parameters for Head Start programs as follows:

> "to promote school readiness by enhancing the social and cognitive development of low-income children through the provision, to low-income children and their families, of health, educational, nutritional, social, and other services that are determined, based on family needs assessments, ..." (§9831).

The Secretary of Health and Human Services is authorized under this federal law to designate any local public or private nonprofit or for-profit agency within a community as a Head Start agency, which agency can then transfer such responsibility to a "delegate agency" [§9832(2)]. As such, by means of the delegated authority, those entities apparently perform federal duties for the previously designated organization.

Subchapter II of Chapter 105 expresses an intent to enhance public participation as well as disclosure of information regarding the functions and duties of community action agencies. Specifically, §9839(a) states in relevant part that:

> "Each Head Start agency shall observe standards of organization, management, and administration which will assure, so far as reasonably possible, that all program activities are conducted in a manner consistent with the purposes of this subchapter and the objective of providing assistance effectively, efficiently, and free of any taint of partisan political bias or personal or family favoritism. Each such agency shall establish or adopt rules to carry out this section, which shall include rules to assure full staff accountability in matters governed by law, regulations, or agency policy. Each agency shall also provide for reasonable public access to information,

> including public hearings at the request of appropriate community groups and reasonable public access to books and records of the agency or other agencies engaged in program activities or operations involving the use of authority or funds for which it is responsible."

Again, while it is unlikely that the Freedom of Information Law applies to records maintained by a delegate agency, we believe that the federal legislation quoted above indicates an intent to ensure accountability to the public by providing "...reasonable public access to information, ... and reasonable public access to books and records of the agency...."

Turning now to your questions pertaining to access to meetings of the Policy Council or Board of Directors, the Open Meetings Law applies to public bodies, entities that carry out governmental function for governmental entities. In view, it does not appear that the Policy Council or Board of Directors would constitute a "public body" subject to the Open Meetings Law. Section 9839(a) indicates an intent to ensure "...reasonable public access to information, including public hearings at the request of appropriate community groups...". Accordingly, it is unclear whether the intent of the legislation was to provide public access to meetings of the Policy Council or Board of Directors.

On behalf of the Committee on Open Government, we hope this is helpful to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

STATE OF NEW YORK
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May 2, 2006

E-Mail

TO: Dianne Berardicurti

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. Berardicurti:

I have received your letter in which you questioned your right to gain access to records and attend meetings of a local soccer organization, which has apparently been created as a not-for-profit corporation.

In this regard, the Freedom of Information and the Open Meetings Laws apply to governmental entities.

Specifically, 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."

Since the organization in question 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 organization.

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 organization, it would not constitute a public body, for it does not perform a governmental function. Therefore, its meetings 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, notwithstanding the foregoing, I believe that not-for-profit corporations are required to disclose a form 990 to the general public. As I understand its content, the form 990 is a general financial statement filed with the Internal Revenue Service.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
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May 4, 2006

Mr. James E. Morganson
Code Enforcement Officer
Town of North Elba
2693 Main Street
Lake Placid, NY 12946

The staff of the Committee on 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. Morganson:

I have received your letter in which you raised a variety of questions relating to a "public hearing meeting" held by the Zoning Board of Appeals (ZBA) of the Town of North Elba.

According to your letter, in brief, in response to a complaint made by a resident, the ZBA retained an "independent attorney" to investigate. You, code enforcement officer for the Town, and the ZBA'a clerk were "served with subpoenas", and the meeting was held on March 23. You wrote that "the front door entrance to this meeting was locked shortly after normal Town Hall business hours because no one had informed the maintenance staff that a special meeting of the ZBA was scheduled", and that the independent attorney was given the authority to conduct the meeting/hearing. You added that:

> "He began by announcing that this was to be an evidentiary hearing and the subpoenaed witnesses would be sequestered away from the proceedings. Three of us were made to leave the noticed Public Hearing (emphasis yours).
>
> "The persons asked to leave the Public Hearing were:
> 1. Marty Bruce, the citizen whose Building Permit was being questioned;
> 2. Joyce Marshall, Code and Zoning Coordinator and the Clerk of the ZBA;
> 3. James Morganson, Code Enforcement Officer/Building Inspector.

> "The three of us sat in the Building Department office while the complaining citizens were allowed to tell their side of the story without any rebuttal."

Further:

> "After the meeting began Mrs. Joyce Marshall tried to keep the official tape recorder set-up to record the meeting. The recording of the ZBA Meeting in her normal responsibility as the designated clerk fo the ZBA. After the first tape, the Chairman of the ZBA refused to let the recording continue and went so far as to confiscated the tape. There is no recorded tape of the proceeding. When Joyce Marshall tried to replenish the tape she was asked to leave the room by the ZBA Chairman who stated that there would be no recorded record of the proceedings. The 'independent attorney' hired by the ZBA also told Joyce Marshall to leave the room."

You and others were called to testify and were "sworn in" by the stenographer retained by the attorney.

Based on the foregoing and additional details that you provided, I believe that the events reflect a series of failures to comply with law or give effect to judicial decisions. In this regard, I offer the following comments.

First, while there are distinctions between meetings and public hearings, often the two overlap. When a majority of a public body is present for the purpose of conducting a public hearing, I believe that the gathering also constitutes a "meeting" as that term has been construed in judicial decisions. In brief, it was held more than twenty-five years ago that any gathering of a majority of a public body, such as the ZBA, for the purpose of conducting public business constitutes a meeting subject to the Open Meetings Law, even if there is no intent to take action, and irrespective of the manner in which the gathering is characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD2d 409, aff'd 45 NY2d 947 (1978)]. It appears that a majority of the ZBA was present during the event at issue, and if that was so, I believe that the gathering was a "meeting" falling within the requirements of the Open Meetings Law.

Second, §103 of the Open Meetings Law states that meetings of public bodies shall be open to the general public. From my perspective, every law, including the Open Meetings Law, must be implemented in a manner that gives reasonable effect to its intent. In this instance, if the entrance to the site of the meeting was locked, the ability of those interested in attending might have been limited in a way that was unreasonable. Additionally, since it is unclear whether proper notice was given, I point out that §104 requires that notice of the time and place be given prior to every meeting of a public body and states in relevant part that:

> "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and

> shall be conspicuously posted in one or more designated public locations at least seventy-two hours before 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."

Third, there is nothing in the Open Meetings Law that authorizes persons to be sequestered. Again, the law specifies that meetings are open to the general public, and I do not believe that there would have been any basis for the sequestration of you or the others identified in your letter. It is emphasized, too, that zoning boards of appeals might have had the authority to conduct quasi-judicial proceedings in private, but that the law was amended to prohibit them from doing so.

By way of background, numerous problems and conflicting interpretations arose under the Open Meetings Law as originally enacted with respect to the functions of zoning boards of appeals. In §108(1), the Law had exempted from its coverage "quasi-judicial proceedings". When a zoning board of appeals functioned in a manner analogous to a judicial proceeding, those functions were often considered "quasi-judicial" and, therefore, outside the requirements of the Open Meetings Law. As such, they 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. Stated differently, due to the amendment, a zoning board of appeals must conduct its meetings 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).

Under the circumstances that you described, I do not believe that the ZBA could validly have conducted an executive session. 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 carry out its duties in public.

Lastly, based on judicial decisions, the Chairman of the ZBA could not have precluded the Clerk or any person in attendance from recording the proceedings, so long as the use of the recording device was neither obtrusive nor disruptive.

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

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 determinations cited above, 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.

In an effort to enhance understanding of and compliance with applicable law, a copy of this opinion will be sent to the ZBA and its clerk.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Zoning Board of Appeals
Joyce Marshall

STATE OF NEW YORK
DEPARTMENT OF STATE
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May 5, 2006

Mr. Donald G. Hobel
[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. Hobel:

I have received your letter in which you asked whether there is "any directive that requires that county legislature meetings provide an agenda specifying each planned activity/event."

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

You also raised a question concerning the oath of office taken by public officers. I have neither the jurisdiction nor the expertise to respond, for the advisory authority of the Committee on Open Government relates to matters involving public access to government information.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
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May 8, 2006

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 information presented in your correspondence.

Dear Ms. Perron:

I have received your letter in which you alleged that the Board of Trustees of the Village of Ossining reached a consensus and a determination by phone.

From my perspective, a public body, such as a village board of trustees, may validly conduct a meeting or carry out its authority only at a meeting during which a majority of its members has physically convened or during which a majority has convened by means of videoconferencing. In this regard, I offer the following comments.

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

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

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

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

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

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

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

Second, there is nothing in the Open Meetings Law that would preclude members of a public body from conferring individually, by telephone, via mail or e-mail. However, a series of communications between individual members or telephone calls among the members which results in a collective decision, a meeting held by means of a telephone conference or series of telephone calls, or a vote taken by mail or e-mail would in my opinion be inconsistent with law.

Based on relatively recent legislation and as suggested earlier, I believe that voting and action by a public body may be carried out only at a meeting during which a quorum has physically convened, or during a meeting held by videoconference. It is noted that the Open Meetings Law pertains to public bodies, and §102(2) defines the phrase "public body" to mean:

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

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

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

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

The amendments to the Open Meetings Law in my view clearly indicate that there are only two ways in which a public body may validly conduct a meeting. Any other means of conducting a meeting, i.e., by telephone, by mail, or by e-mail, would be inconsistent with law.

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

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

Based on the foregoing, again, a valid meeting may occur only when a majority of the total membership of a public body, a quorum, has "gathered together in the presence of each other or through the use of videoconferencing." Only when a quorum has convened in the manner described in §41 of the General Construction Law would a public body have the authority to carry out its powers and duties. Consequently, it is my opinion that a public body may not take action or vote by means of telephone calls or e-mail. Moreover, §41 requires that reasonable notice be given to all the members. If that does not occur, even if a majority is present, I do not believe that a valid meeting could be held or that action could validly be taken.

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

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

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

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

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

A copy of this opinion will be sent to the Board of Trustees.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
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May 8, 2006

E-Mail

TO: Mr. Tom Gillett

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. Gillett:

I have received your letter in which you referred to "a Rochester Area School Health Plan (RASHP) Consortium whose membership includes representatives of 19 Monroe County School districts." You indicated that RASHP is "a health care consortium which has contracted to offer medical and drug benefits to school district employees in the member districts" and meets quarterly. You asked whether the meetings of RASHP are subject to the Open Meetings Law.

If I understand the facts accurately, meetings of the Board of Directors of RASHP fall within the coverage of the Open Meetings Law. In this regard, I offer the following comments.

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

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

As I understand the matter, the Board of Directors carries out its duties in accordance with the authority conferred by Articles 5-G of the General Municipal Law and 47 of the Insurance Law. With respect to the former, §119-o(1) of the General Municipal states in relevant part that:

> "In addition to any other general or special powers vested in municipal corporations and districts for the performance of their

> respective functions, powers or duties on an individual, cooperative, joint or contract basis, municipal corporations and districts shall have the power to enter into, amend, cancel and terminate agreements for the performance among themselves or one for the other of their respective functions, powers and duties on a cooperative or contract basis or for the provision of a joint service..."

In Article 47 of the Insurance Law, §4701(a) states that:

> "Cooperative health risk-sharing agreements allow public entities to: share, in whole or part, the costs of self-funding employee health benefit plans; provide municipal corporations, school districts and other public employers with an alternative approach to stabilize health claim costs; lower per unit administration costs; and enhance negotiating power with health providers by spreading such costs among a larger pool of risks."

Further, subdivision (e) and (f) of §4702 respectively provide as follows:

> "(e) 'Municipal cooperative health benefit plan' or 'plan' means any plan established or maintained by two or more municipal corporations pursuant to a municipal cooperation agreement for the purpose of providing medical, surgical or hospital services to employees or retirees of such municipal corporations and to the dependents of such employees or retirees.
>
> (f) 'Municipal corporation' means within the state of New York, a city with a population of less than one million or a county outside the city of New York, town, village, board of cooperative educational services, school district, a public library, as defined in section two hundred fifty-three of the education law, or district, as defined in section one hundred nineteen-n of the general municipal law."

Based on the foregoing, the participants in the consortium have been given the legal authority to create a cooperative health benefit plan in furtherance of their official governmental functions, powers and duties. If that is so, the Board of Directors conducts public business and performs a governmental function for a group of public corporations, i.e., school districts. In short, given the characteristics of RASHP, again, I believe that it is a "public body" required to comply with the Open Meetings Law.

Lastly, the foregoing is not to suggest that the meetings of the Board of Directors must be conducted in public in their entirety. As you may be aware, every meeting of a public body is required to be preceded by notice given in accordance with §104 of the Open Meetings Law, and every meeting must be convened as an open meeting. Nevertheless, in view of the functions of the Board of Directors, it is likely that some aspects of its business could be conducted during validly

convened executive sessions. For example, there may be instances in which it considers collective bargaining negotiations or the financial or medical history of a particular person. In those kinds of circumstances, executive sessions could likely be held pursuant to §105(1)(e) or (f) of the Open Meetings Law.

I hope that I have been of assistance.

RJF:jm

cc: Board of Directors

STATE OF NEW YORK
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May 8, 2006

E-MAIL

TO: James White

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. White:

I have received your letter in which you indicated that you serve on the Board of Trustees of an association library, and that the Board of Trustees would like to invite the Town and Village Boards "to an informal meeting at the library." You wrote that:

> "The intent for the meeting is to invite all of the elected board members, new and old, to an informal, informational meeting, and present a Power Point presentation on the library, introduce the library Board of Directors, inform them of the services and materials, programs, where our operation money comes from, endowments, and local government support, etc. And anser [sic] any questions the board members may have regarding library business. No decisions are being made, no request for funding above what funding is provided. We, as a board, just felt the local government officials would be interested in what the library does for the town and village."

You have asked whether the event as you described it must be preceded by notice and open to the public. In this regard, I offer the following comments.

First, the Open Meetings Law is generally 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. However, it is clear that the Library Board of Trustees is required to comply with the Open Meetings Law as well.

As you may be aware, the boards of trustees of a variety of entities characterized as "public libraries" are required to give effect to the Open Meetings Law. Some are governmental entities; others are not-for-profit corporations that typically have a relationship with government but which are not governmental entities. The boards of trustees of both the governmental and non-governmental public libraries are required to comply with the Open Meetings Law pursuant to §260-a of the Education Law, which states that:

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

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

Second, based on judicial decisions, I believe that the gathering that you described would fall within the coverage of the Open Meetings Law and must be preceded by notice. It is emphasized that the definition of "meeting" [see Open Meetings Law, §102(1)] has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be convened open to the public, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

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

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

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

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

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

It has also been held that joint meetings held by two or more public bodies are subject to the Open Meetings Law [Oneonta Star v. Board of Trustees of Oneonta School District, 66 AD 2d 51 (1979)], and that in another decision, it was 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)].

I hope that I have been of assistance.

RJF:tt

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May 8, 2006

E-MAIL

TO: Commissioner Judy Calogero

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 Commissioner Calogero:

I have received your letter concerning the application of the Open Meetings Law. You indicated that you serve as Chair and CEO of the Roosevelt Island Operating Corporation (RIOC), which has a nine member board. Five members constitute a quorum, and six of the members reside on the Island.

One of the resident Island board members referred in a recent email to "a follow- up meeting where a group of RIOC Island resident board members met with a group of Island residents representing the Roosevelt Island Residents Association." You expressed concern that "if five or six members of the RIOC board were to participate in that meeting that it could be construed as a RIOC board meeting." You have sought advice concerning the matter, and in this regard, I offer the following comments.

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

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

According to §3 of Chapter 196 of the Unconsolidated Laws, the Roosevelt Island Operating Corporation "shall be a body corporate and politic constituting a public benefit corporation and a

political subdivision of the state of New York". Since a public benefit corporation is a type of public corporation (see General Construction Law, §66), and since the powers and duties conferred upon the Corporation in §4 clearly indicate that it conducts public business and performs a governmental function, it is clear in my view that the RIOC Board is a public body required to comply with the Open Meetings Law. I note, too, that §41 of the General Construction Law, entitled "Quorum and majority", provides, in brief, that a majority of the total membership of a public body constitutes a quorum.

Second, 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" during which a quorum of a public body attended and functioned as a body constituted a "meeting" that fell within the coverage of the Open Meetings Law, even though the members were invited to attend by a non-member [see Goodman-Todman v. Kingston, 153 AD2d 103 (1990)].

In sum, assuming that at least five members of the RIOC Board gather with the Residents Association or any other person or group for the purpose of discussing matters within the jurisdiction of the RIOC, collectively, as a body, I believe that such a gathering, based on the judicial interpretation of the Open Meetings Law, would constitute a meeting that must be conducted in accordance with that statute and preceded by notice given to the news media and by means of posting pursuant to §104.

To be sure, not every instance in which a quorum of the RIOC Board is present would necessarily trigger the application of the Open Meetings Law. In the decision cited earlier, Orange County Publications, 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'" (supra, at 416).

In view of the foregoing, if members of a public body meet by chance or at a social gathering, for example, I do not believe that the Open Meetings Law would apply, for there would be no intent to conduct public business, collectively, as a body.

I point out that questions similar to yours have arisen at workshops and seminars during which I have spoken and which were attended by many, including perhaps a majority of the membership of several public bodies. Some of those persons have asked whether their presence at those gatherings fell within the scope of the Open Meetings Law. In brief, I have responded that, since the members of those entities did not attend for the purpose of conducting public business as a body but rather as attendees in a large audience, the Open Meetings Law, in my opinion, did not apply. Based on our conversation, the gathering question would not have involved RIOC Board members as attendees in an audience or as observers, but rather as active participants, acting in their capacities as Board members. If that is so, and if a quorum is present, again, I believe that the gathering would constitute a meeting falling within the coverage of the Open Meetings Law. If, however, fewer than a quorum convenes, the Open Meetings Law would not apply.

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

RJF:tt

STATE OF NEW YORK
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May 9, 2006

Lucy Fox, Assessor
Town of Geddes
[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. Fox:

I have received your correspondence concerning the propriety of a proposed executive session that may be held by the Geddes Town Board.

According to a memorandum addressed to you by the Town Supervisor, there is an intent to discuss the following two questions during an executive session:

> "1. When did Mike Maxwell tell you that the revaluation amount did not include these permits and when did you inform the elected officials?
>
> 2. How may building permits (households) were not included in the revaluation process?"

In this regard, the Open Meetings Law is based upon a presumption of openness. A public body, such as a town board, cannot 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 be considered during an executive session. From my perspective, the subject matter of the questions raised in the memorandum would not qualify for discussion during an executive session. Rather, I believe that the matters raised in those questions must be discussed in public to comply with the Open Meetings Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
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May 10, 2006

E-Mail

TO: Christine Iacobucci

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. Iacobucci:

As you are aware, I have received your letter and a variety of materials concerning disclosures that you have made as a member of the Lansing Central School District Board of Education. In short, you have been criticized in relation to those disclosures by the President of the Lansing Administrators & Supervisors Organization and in a letter signed by six members of the Board.

From my perspective, the controversy associated with your comments represents an overreaction and misapplication of law.

According to your letter, you could not attend a Board workshop, and you later received "handouts from the session and the notes the board president had taken." You forwarded a copy of the notes, which state in items 3 and 4 in relevant part as follows:

> "f. Bonita
> i. Relationships - Above All & Never Ending
> ii. Short term: interim positions
> iii. John Gizzi (i.e., review records, evaluate, mentor, develop, options re: tenure
>
> 4. Mark will have to support Debra and her interactions with the faculty as she does her work. Need to help her overcome resistance. Board agrees to support Mark as he works with Debra."

At an ensuing meeting, you wrote that "you read aloud item 3.f.iii., asked its meaning and were told that the matter would not be discussed during the current meeting." You then read aloud item 4, asked what it means, and were told by the Board President that "it had to do with Deborah Pichette and her role in faculty development." You indicated that "that's all that was said."

Following the meeting during which you read aloud the preceding, the President of the Administrators & Supervisors Association, Michelle Stone, addressed a memorandum to Mark Lewis, the Superintendent, and Bonita Lindberg, the Board President, and wrote as follows:

> "As you are aware, during the board of education meeting on 2/13/06, a member of the board of education revealed personnel information regarding two members of the administrative staff. To the best of my knowledge, that information was read from a set of minutes kept during a board of education retreat, considered a closed (executive) session. The incident was shocking, demoralizing, and illegal.
>
> "As the president of the Lansing Administrators and Supervisors Organization and on behalf of that unit, I am requesting that action be taken against the board member who acted inappropriately. Although nothing can take away the humiliation caused by her statements, it is important that she be held accountable."

In response to that memorandum, Ms. Lindberg wrote to Ms. Stone, stating that:

> "The Board wants you to know that it sincerely regrets the fact that information we had discussed privately during our workshop in January was read aloud by a board member during the public session of the meeting held on February 13th. That board member had chosen not to attend the workshop.
>
> "I have discussed the matter with Board Counsel and, while the workshop topics did not rise to the level of confidentiality afforded to an Executive Session, certain information, comments and general conversation regarding some of the ancillary matters, did relate to items and views concerning some of our employees. As such, the comments and observations of board members offered privately were of a personal enough nature that they should have been treated by all board members in the same manner as we treat such items at the public sessions of board meetings. As you know, the board generally attempts to avoid discussion of matters relating to confidential personnel information in open session.
>
> "It simply should not have been discussed by the board member at that time. It only served to create a bad impression and to cause needless embarrassment to the individuals and to the board.

> "During the days immediately following the meeting I contacted Debra and John and offered my apology and that of the board."

In a separate letter addressed to you signed by six Board members referencing your comments made aloud, you were chided, for it was stated that the workshop:

> "...involved board comments and advice on pending and future personnel matters and therefore, should not have been discussed in open session. Without regard to the sensitivities of John and Debra, you chose to share with the general public input that we provided Dr. Lewis at his request. The comments we gave to Dr. Lewis regarding staffing and personnel matters were for the sole purpose of helping him establish his work agenda as our Superintendent. They were offered to him with the expectation that, for various reasons, the confidentiality of the subjects and the privacy rights of the employees would be respected, as we've always tried to do. The notes of that workshop were given to you, as a member of our board – with every expectation that you would recognize and respect the confidential nature of their content. The detrimental effect your actions had on our administrators is immeasurable. To have personnel matters discussed in the manner you chose invites severe criticism and complaints as well as the potential for litigation. We have an obligation to our administrators, faculty and staff to address their employment related issues in an appropriate manner and we trust you would understand the concern they would have about dealing with these confidential matters in a public meeting. In the future, we expect that you will refrain from discussing personnel matters outside of executive session."

Although I would like to offer a personal commentary concerning the reaction to your comments, I will refrain from so doing. Rather, my remarks will be limited to an analysis based on the law and its judicial construction. In brief, however, I do not believe that you violated any law or that the matters that you read aloud may be characterized as confidential.

First, the terms "personnel" and "confidential" arose frequently in the materials relating to your action. A careful reading of the Open Meetings Law indicates that the word "personnel" appears nowhere in that statute. To be sure, there are some issues that relate to "personnel" that may properly be considered during executive sessions. Nevertheless, there are many others that do not fall within any of the grounds for entry into executive session. Moreover, there is simply nothing in the Open Meetings Law that specifies that personnel-related issues are confidential.

As you are likely aware, the language of the provision generally cited to discuss personnel matters is limited and precise. Specifically, §105(1)(f) of the Open Meetings Law authorizes 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..."

In my view, there is nothing in the information that you read aloud that would appear to justify entry into executive session, for the topics appearing in that provision do not appear to have been pertinent or related to the information that you read aloud.

Second, even when there was a basis for entry into executive session, there is no obligation to convene in private. Section 105(1) prescribes a procedure that must be accomplished in public before an executive session may be held. 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, provided, however, that no action by formal vote shall be taken to appropriate public moneys..."

If no motion is made to enter into executive session, which was so in the context of the situation that you described, or if a motion to conduct an executive session is not approved, a public body is generally free to discuss issues in public.

Further, based on our conversation, it is my understanding that the items that you read aloud were initially discussed at the Board's workshop that was open to the public and could have been attended by any member of the public. If that is so, there appear to be no rationale for your fellow Board members' criticism of you.

Third, the only instances, in my view, in which members of a public body are prohibited from disclosing information would involve matters that are indeed confidential. In my opinion, there was nothing confidential about your remarks or the subject matter to which your remarks related. When a public body has the discretionary authority to discuss a matter in public or in private, I do not believe that the matter can properly be characterized as "confidential."

At this juncture, I note that one of the items discussed at the workshop that you could not attend involved a review by the District's attorney of a ruling by the Commissioner of Education, and the summary states that: "Individual members who breach confidentiality of exec session may be removed from their Board seat. Same for confidential information." The Commissioner's decision in Application of Nett and Raby (No. 15315, October 24, 2005) states as follows:

> "In addition to a board member's general duties and responsibilities, General Municipal Law §805-a(1)(b) provides that no municipal officer or employee (including a school board member) shall 'disclose confidential information acquired by him in the course of

> his official duties or use such information to further his personal interests.' It is well settled that a board member's disclosure of confidential information obtained at an executive session of a board meeting violates §805-a(1)(b) (see Applications of Balen, 40 Ed Dept Rep 250, Decision No. 14,474; Application of the Bd. of Educ.of the Middle Country Central School Dist., 33 id. 511, Decision No. 13,132; Appeal of Henning and Rohrer, 33 id, 232, Decision No. 13,035).
>
> "Less clear is what constitutes 'confidential' information. The term 'confidential' is not defined in the General Municipal Law and the legislative history of §805-a does not provide any additional guidance into the meaning of that word...
>
> "Absent a clear statutory definition, and given the importance of ensuring a uniform application in the educational system, the interpretation of 'confidential' in the school context is a matter best left to the Commissioner (see Komyathy v. Bd. of Educ. Wappinger Central School District No. 1, 75 Misc. 2d 859). Information that is meant to be kept secret is by general definition considered to be 'confidential' (see Black's Law Dictionary [8th Ed. 2004])."

While some interpretations of law might be "best left to the Commissioner", I point out that each of the precedents cited in the excerpt of the decision quoted above involve the Commissioner's own decisions. Avoided, however, are judicial decisions that are contrary to his conclusion.

Many judicial decisions have focused on access to and the ability to disclose records, and this office has considered the New York Freedom of Information Law, the federal Freedom of Information Act, and the Open Meetings Law in its analyses of what may be "confidential." To be confidential under the Freedom of Information Law, I believe that records must be "specifically exempted from disclosure by state or federal statute" in accordance with §87(2)(a). Similarly, §108(3) of the Open Meetings Law refers to matters made confidential by state or federal law as "exempt" from the provisions of that statute.

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

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

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

> "Exemption 3 excludes from its coverage only matters that are:
>
> > *specifically* exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) **requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue**, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.
>
> "5 U.S.C. § 552(b)(3) (1982) (emphasis added). Records sought to be withheld under authority of another statute thus escape the release requirements of FOIA if – and only if – that statute meets the requirements of Exemption 3, including the threshold requirement that it specifically exempt matters from disclosure. The Supreme Court has equated 'specifically' with 'explicitly.' *Baldridge v. Shapiro*, 455 U.S. 345, 355, 102 S. Ct. 1103, 1109, 71 L.Ed.2d 199 (1982). '[O]nly *explicitly* non-disclosure statutes that evidence a congressional determination that certain materials ought to be kept in confidence will be sufficient to qualify under the exemption.' *Irons & Sears v. Dann*, 606 F.2d 1215, 1220 (D.C.Cir.1979) (emphasis added). In other words, a statute that is claimed to qualify as an Exemption 3 withholding statute must, on its face, exempt matters from disclosure"[Reporters Committee for Freedom of the Press v. U.S. Department of Justice, 816 F.2d 730, 735 (1987); modified on other grounds,831 F.2d 1184 (1987); reversed on other grounds, 489 U.S. 789 (1989); see also British Airports Authority v. C.A.B., D.C.D.C.1982, 531 F.Supp. 408; Inglesias v. Central Intelligence Agency, D.C.D.C.1981, 525 F.Supp, 547; Hunt v. Commodity Futures Trading Commission, D.C.D.C.1979, 484 F.Supp. 47; Florida Medical Ass'n, Inc. v. Department of Health, Ed. & Welfare, D.C.Fla.1979, 479 F.Supp. 1291].

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

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

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

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

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

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

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

The Commissioner failed to include reference to the only judicial decision of which I am aware that dealt squarely with the assertion that information acquired during an executive session

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

Based on the foregoing, I believe that the Commissioner's conclusion that information that *may* be withheld or that information that *may* be discussed in executive session is confidential is inaccurate and contrary to the weight of judicial authority.

In sum, I do not believe that your disclosure involved a matter that could properly have been considered during an executive session. As I read the words that you read aloud, they are innocuous. There was no reason in my opinion for the reaction that you elicited. Even if an executive session could have been held to discuss the matter, and I am not suggesting that you or any other board member should intentionally disclose information that could clearly be damaging to an individual or the operation of a governmental entity, I reiterate my belief that the Commissioner's conclusion is inconsistent with both state and federal judicial decisions.

Lastly, I refer once again to the letter addressed to you and signed by six Board members. Because the first line in that letter says that "We are writing this letter out of concern for your conduct...", I question when the six members determined to prepare or approve the content of the letter. It appears that those six members may have taken action in a manner that contravened the requirements of the Open Meetings Law, and that their action represents a more serious lapse than that which is the subject of their disapproval and critical assessment of your conduct.

From my perspective, voting or action by a public body may be carried out only at a meeting during which a quorum has physically convened, or during a meeting held by videoconference.

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

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

In view of that definition and others, I believe that a meeting, i.e., the "convening" of a public body, involves the physical coming together of at least a majority of the total membership of such a body, or a convening that occurs through videoconferencing.

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

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

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

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

Conducting a vote or taking action in that manner or via e-mail or a series of telephone calls, would not, according to case law, constitute a valid meeting. In a decision dealing with a vote taken by phone, Cheevers v. Town of Union (Supreme Court, Broome County, September 3, 1998), which cited and relied upon an opinion rendered by this office, the court stated that:

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

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

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

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

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

RJF:jm

cc: Board of Education
Mark Lewis
Michelle Stone
Ben Ferrara

FOIL-AO-15952
OML-AO-4193

From: Robert Freeman
To: [redacted]
Date: 5/10/2006 10:59:52 AM
Subject: Dear Mr. Smith:

Dear Mr. Smith:

I have received your inquiry concerning agendas of town board meetings.

In short, there is nothing in the Open Meetings Law or any other statute of which I am aware that requires the preparation of an agenda. Therefore, while a public body, such as a town board, may choose to prepare an agenda, it is not required to do so. Further, if an agenda is prepared, there is no requirement that it be followed.

I note that when an agenda is prepared, it constitutes a "record" as that term is defined in §86(4) of the Freedom of Information Law. Based on that statute, assuming that the agenda briefly identifies the topics to be considered, it would be accessible under the Freedom of Information Law as soon as it exists.

I hope that I have been of assistance.

I hope that I have been of assistance.

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

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May 11, 2006

E-Mail

TO: Hon. Debra Hughey

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. Hughey:

I have received your letter concerning the sufficiency of minutes of the Brookhaven Town Board.

In this regard, the Open Meetings Law prescribes what might be viewed as minimum requirements concerning the contents of minutes. Section 106 states that:

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

Based on the foregoing, it is clear that minutes need not consist of a verbatim account of what is said. Rather, at a minimum, minutes must consist of a record or summary of motions, proposals, resolutions, action taken and the.

You referred to the transcription of verbatim minutes and the burden that such a practice creates. It is suggested that reasonable alternative exists and is practiced by many municipalities. In order to have a verbatim account of statements made at meetings, the meetings can be audio tape recorded or perhaps video recorded. If there is a question concerning the accuracy of minutes or a need for detail not ordinarily included in typical or abbreviated minutes of a meeting, the tape can be reviewed to ensure accuracy, to resolve a dispute or to refresh one's memory. I note, too, that minutes of meetings must be retained permanently pursuant to the records retention schedule issued by the State Archives at the State Education Department, but that tapes are required to be maintained for a period of months. At the expiration of the retention period, the tapes could be preserved, or if they are no longer of value, they could be erased and reused.

Lastly, 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)], a record must be prepared that indicates the manner in which each member who voted cast his or her vote. Ordinarily, although there is no requirement to do so, records of votes will appear in minutes.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
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May 12, 2006

Ms. Gayle Gifford
[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. Gifford:

We are in receipt of your request for an advisory opinion concerning application of the Open Meetings Law to gatherings of the Village Board of Delanson. As you relate, Delanson has a Board of only three, two Trustees and a Mayor, and it is your impression that two of the members meet at each other's homes, and that the Board may be holding emergency meetings that do not involve actual emergencies. Notice of the meetings is also an issue, and you have asked for clarification of the law. In this regard, we offer the following comments.

First, 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 board members gather 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 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."

As you previously indicated, the entire membership of the Village Board, as modified by a prior Village ordinance, consists of the Mayor and two Trustees. Accordingly, any gathering of two of the three members for the purpose of conducting Village business would constitute a meeting subject to the Open Meetings Law.

Additionally, while there is nothing in the Open Meetings Law that directly addresses the matter of notice of special or emergency meetings, that statute requires that notice be posted and given to the news media prior to every meeting of a public body. Specifically, §104 of that statute provides that:

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

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

We 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.

Under the many scenarios which you relate involving emergency meetings, it is questionable whether actual emergencies were pending in most of the meetings. Adopting a resolution to change residency requirements for Village employees, for example, in our opinion, would not constitute an emergency situation requiring urgent action taken by the Board.

With respect to your question about how long a notice of meetings must remain on a public bulletin board, there is no provision in the law which requires the posting to be maintained subsequent to a meeting.

Finally, we note that §106 of the Open Meetings Law deals directly with minutes of meetings and states that:

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

Based on the foregoing, it is clear that minutes need not consist of a verbatim account of what is said. Rather, at a minimum, minutes must consist of a record or summary of motions, proposals, resolutions, action taken and the vote of each member.

Here, to the extent that there are no minutes of the meeting at which the residency requirement was allegedly changed, there is no record of a vote taken. Without a record of the vote taken and at bare minimum, a summary of the resolution, or the resolution itself, it appears that the law has not been validly changed.

On behalf of the Committee on Open Government, we hope this is helpful to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:jm

cc: Board of Trustees

STATE OF NEW YORK
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May 15, 2006

E-MAIL

TO: William D. White

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. White:

We are in receipt of your request for an advisory opinion concerning the application of the Open Meetings Law to various meetings of the Oswego City Board of Education. Specifically, you inquire whether discussion of the parameters of or the contents of a request for proposal for the selection of a new school district attorney and/or performance of the current school district attorney, who is an independent contractor, may be appropriate topics for discussion in executive session. In this regard, we offer the following comments.

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

Second, although it is used frequently, the term "personnel" appears nowhere in the Open Meetings Law. While one of the grounds for entry into executive session often relates to personnel

matters, from 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. 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), 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. 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.

Accordingly, it is our view that while a discussion of the performance of the current school district attorney would fall within the scope of §105(1)(f), a discussion of the contents of a request for proposals would not. Consideration of a particular person's employment history, or matters leading to further employment, whether as an employee or as a contractor, would, in our view, be appropriate for discussion in executive session. Qualifications that must be met by a person or firm serving as the district's attorney, i.e., criteria or requirements for the position, on the other hand, the drafting of the request for proposal, should be discussed and determined in public.

On behalf of the Committee on Open Government, we hope this is helpful to you.

CSJ:tt

STATE OF NEW YORK
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May 17, 2006

Mrs. Rose Mary Warren
[redacted]

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

Dear Mrs. Warren:

I have received your letter in which you focused on the ability of members of the public to speak and express their views at meetings of public bodies.

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 choose to permit the public to speak, and many do so. In those situations, 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 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.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
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May 17, 2006

E-MAIL

TO: William H. Mycek, Esq.

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. Mycek:

I have received your letter in which you raised the following question: "In the event that a member of a board commences a proceeding against the school district, may that member be excluded from executive sessions discussing legal strategy in that matter?"

In my view, although the member who has commenced the proceeding cannot be excluded from an executive session, there is a different mechanism under which other board members may discuss litigation strategy without that member's presence. In this regard, I offer the following comments.

The Open Meetings Law provides two vehicles under which the public, in appropriate circumstances, may be excluded from meetings of public bodies. One is an executive session, a portion of an open meeting during which the public may be excluded [see Open Meetings Law, §102(3)]. Members of a public body have the right to attend executive session of the body, for §105(2) states that "Attendance at an executive session shall be permitted to any member of the public body and any other persons authorized by the public body."

Relevant to the issue that you raised 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, I believe that the exception is intended to permit a public body to discuss its litigation strategy behind closed doors.

The other vehicle that authorizes private discussion arises under §108 of the Open Meetings Law. Section 108 contains three "exemptions", and if a matter is "exempted" from the Open Meetings Law, that statute is not applicable.

Pertinent to 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, the communications made pursuant to that relationship are considered confidential under §4503 of the Civil Practice Law and Rules. Consequently, if an attorney and client establish a privileged relationship, the communications made pursuant to that relationship would in my view be confidential under state law and, therefore, exempt from the Open Meetings Law.

It has long been held that a municipal board may establish a privileged relationship with its attorney [People ex rel. Updyke v. Gilon, 9 NYS 243 (1989); Pennock v. Lane, 231 NYS 2d 897, 898 (1962)]. However, such a relationship is in my opinion operable only when a municipal board or official seeks the legal advice of an attorney acting in his or her capacity as an attorney, and where there is no waiver of the privilege by the client.

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

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

> and (b) not waived by the client'" [People v. Belge, 59 AD 2d 307, 399, NYS 2d 539, 540 (1977)].

Therefore, insofar as a board of education or other public body seeks legal advice from its attorney and the attorney offers legal advice, the communications between the board and the attorney would, in my opinion, be confidential and outside the coverage of the Open Meetings Law.

Further, to the extent that the board's attorney discusses litigation strategy, provides legal advice to or otherwise engages in an attorney-client relationship with his/her clients, the disclosure of which to the member who has commenced a lawsuit would be adverse to the interests of the school district or other entity, I believe that those communications would be privileged and therefore, outside the requirements of the Open Meetings Law. In that kind of situation, I believe that the member could be excluded from the gathering, for based upon the facts, that person could not be characterized as the client of the attorney, but rather as an adversary in the litigation. In my opinion, the exclusion of that member would be consistent with the thrust of decisional law concerning the intent of §105 (1)(d), the "litigation" exception for entry into executive session. Again, however, the private discussion held based on the attorney-client privilege would not be an executive session, but rather a matter that is exempt from the coverage of the Open Meetings Law.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
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May 17, 2006

Mr. Brendan Scott
Times Herald-Record
1170 Route 17M, Suite 4
Chester, NY 10918

The staff of the Committee on 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. Scott

We are in receipt of your request for an advisory opinion concerning application of the Open Meetings Law to a recent meeting of the SUNY Orange Board of Trustees, which you describe as follows:

> "The session, which was held at an unannounced time two and a half hours before the Board's regularly scheduled monthly meeting, was arranged to preview a consultant's final report on expanding SUNY Orange facilities, including matters related to building a new independent branch campus in the City of Newburgh."

When you were escorted from the meeting, the College President indicated to you that he did not want to "preempt" county lawmakers by releasing the information to the press, and thereby the public, prior to an open session of the Orange County Legislature, during which the same information was expected to be presented later in the day.

Whether it was characterized as a workshop or an executive session, based on the facts which you have presented, it appears that the gathering was a "meeting" subject to the Open Meetings Law. In this regard, we offer the following comments.

Soon after the enactment of the Open Meetings Law, the courts dealt with and rejected contentions that "workshops" and similar gatherings fell beyond the coverage of that law. In considering that issue, it is emphasized that the definition of "meeting" [§102(1)] has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals found that any gathering of a quorum of a public body for the purpose of conducting public business is a

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

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 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 requirements of openness and ability to enter into executive sessions. We note, too, that a "briefing session" during which a quorum of a public body was present was also found to constitute a meeting subject to the Open Meetings Law [Goodson Todman Enterprises, Ltd. v. City of Kingston Common Council, 153 AD2d 103 (1990)].

The Open Meetings Law requires that notice be given prior to every meeting. Specifically, §104 of that statute provides that:

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

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

Next, and with regard to the gathering which you described, it is emphasized that a public body cannot conduct an executive session to discuss the subject of its choice. By way of background, the phrase "executive session" is defined in §102(3) of the Open Meetings Law to mean a portion of an open meeting during which the public may be excluded. As such, an executive session is not separate and distinct from a meeting, but rather is a portion of an open meeting. The Law also contains a procedure that must be accomplished during an open meeting before an executive session may be held. Specifically, §105(1) states in relevant part that:

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

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.

You focused on a particular ground for entry into executive session, §105(1)(h), noting that:

> "[a] short portion of [the] meeting did indeed include discussion about potential sites for the Newburgh campus as well as details about negotiations with their owners. Such details, however, had

> already been frequently discussed in public forums and widely publicized in the press. In fact, the county executive's liaison to the Newburgh project, Chief Administrative Officer James O'Donnell, had on at least two occasions publicly stated plans use the publicity to 'play one against the other.'"

The provision which you cited, §105(1)(h), permits a public body to enter into executive session to discuss:

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

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

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

If the facts which you relate are accurate, that detailed information about potential sites and negotiations had already been disclosed, it is our opinion that it would have been inappropriate to have conducted an executive session.

Finally, you noted the presence of non-board members at the executive session. 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, while only the members of a public body, such as a board of trustees, have the right to attend an executive session, a public body may permit others to attend, on a limited basis.

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

On behalf of the Committee on Open Government, we hope this is of assistance to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:jm

cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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OML-AO-4200

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May 17, 2006

Mr. Antovk Pidejian
Empire State Development Corporation
633 Third Avenue
New York, NY 10017-6754

Dear Mr. Pidejian:

Thank you for forwarding a copy of the unpublished January 7, 2005 Decision and Judgment in NY1 News v. New York State Urban Development Corporation, New York County. In response to your request, we have removed Advisory Opinion No. 14583 from our website.

Although you have not requested it, we would like to take this opportunity to comment on the contents of the decision and perhaps offer some clarification. In its decision, the court acknowledged the existence of the jury as an agency, as defined by the Freedom of Information Law, but failed to include any consideration of the Open Meetings Law, limiting its discussion to application of the Freedom of Information Law only. In our opinion, had the court considered application of the Open Meetings Law, it is likely that it would have reached a different result.

In this regard, we note that 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."

A public authority is a public corporation. Therefore, any public authority, such as the New York State Urban Development Corporation and its subsidiary the Empire State Development Corporation, would constitute an "agency", a governmental entity, that is subject to the Freedom of Information Law.

On pages three and four of its decision, the court indicates the rationale for its determination that the "jury" is an "agency" within the meaning of the Freedom of Information Law. As described by the court, the jury consists of thirteen individuals charged with the responsibility of conducting

a competition and ultimately selecting a plan for a permanent memorial at the World Trade Center site. Contrary to petitioner's argument, the court concluded that the jury was not merely advisory, but rather,

> "... invested with complete decision-making authority, as evidenced by the guidelines for the memorial competition. . . . [which] clearly underpinned the understanding of the committee itself, as it thanked the respondent, the governor, the mayor, and the public in its January 13, 2004 statement for having granted it 'complete authority and automomy to make this very difficult, but crucially important decision.' [Emphasis Added]." P. 4.

The court further held that:

> "Petitioner's further argument that such a complete delegation of authority would have been illegal is unfounded as a matter of law."

We are in agreement with the judicial determination that the jury fits the definition of agency. In our opinion, if the jury would not exist but for its relationship with a public authority, and if it carries out its duties solely for or on behalf of an agency, it, too, would constitute an "agency" required to comply with the Freedom of Information Law.

What is lacking from the judicial decision, however, is the corresponding analysis regarding the Open Meetings Law. If the preceding assumptions and conclusions are accurate, the jury would be subject to the Open Meetings Law. That statute is applicable to public bodies, and §102(2) defines the phrase "public body" to include:

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

Again, assuming that the court is correct and that the jury carries out its duties solely for or on behalf of an agency, we believe that it is an entity that conducts public business and performs a governmental function for a public corporation, i.e., a public authority. If that is so, it is a public body that falls within the coverage of the Open Meetings Law.

Like the Freedom of Information Law, the Open Meetings Law is based on a presumption of openness. Meetings of public bodies must be conducted open to the public, except to the extent that an executive session may be conducted in accordance with §105(1) of the Open Meetings Law. When the jury met, on August 7, 2003, with Mayor Michael Bloomberg, Governor George Pataki, and former Mayor Rudolph Guiliani, therefore, it is our opinion that the meeting should have been open to the public.

The court's further analysis, that those portions of the video recording which reflect inter-agency communications between the Empire State Development Corporation, the Mayor and the Governor which are not statistical or factual information or data would be inconsistent with a finding that the jury's meetings are subject to the Open Meetings Law. If the press and the public should have been permitted to attend the meeting of the jury (assuming a quorum was present), it is our opinion that there would be no ground for denying access to the videotape recording in its entirety. Further, we disagree that the exchange between the jury and former Mayor Giuliani could properly be characterized as "inter-agency" in nature. In short, Giuliani was not a public officer or employee during that exchange and therefore would not have been an officer or employee of an agency.

In short, if the jury is an "agency" and a "public body", which we believe it to be, meetings of the jury would be governed by all aspects of the Open Meetings Law, including provisions concerning notice, minutes and public access.

Thank you for bringing this decision to our attention.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:jm

cc: Monica Iken

FOIL-AO-1597
OML-AO-4201

From: Robert Freeman
To: bethelclerk[redacted]
Date: 5/19/2006 9:40:41 AM
Subject: I have received your letter in which you raised two questions.

I have received your letter in which you raised two questions.

First, you referred to a stenographer who attends Town Board meetings but has not disclosed the identity of the person or firm she is representing. You asked whether that it permissible. In my view, since §103 of the Open Meetings Law states that meetings are open to the general public, the identity of the stenographer or her employer are irrelevant. In short, I do not believe that she can be required to disclose her interest or the name of the person or firm that she may be serving.

Second, you wrote that a person regularly seeks a copy of the tape recording of Town Board meetings under the Freedom of Information Law a day after the meetings. You asked whether you must accommodate him. In this regard, it was held more than twenty-five years ago that tape recordings of open meetings are accessible under the Freedom of Information Law. If the tape recording is being used, i.e., for the purpose of preparing the minutes, there would be no obligation to prepare a copy when he requests it. You have up to five business days to respond to a request, and if more time is needed, the receipt of the request must be acknowledged in writing, including an approximate date within twenty business days indicating when you will be able to grant the request. If it is not inconvenient to copy the tape when it is requested, there would be no reason to delay responding to the request.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
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STATE OF NEW YORK
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OML-AO-4202

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May 25, 2006

Mr. Peter F. Hedglon
Attorney at Law
112 Farrier Avenue
Oneida, NY 13421

The staff of the Committee on 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. Hedglon:

I have received your letter in which you questioned the propriety of an executive session held by the City of Oneida Common Council. You have sought an advisory opinion:

> "...on (a) whether or not the Common Council was sufficiently specific with respect to why it went into executive session and (b) whether approving the Agreement between the City and the Nation is within the scope of the word 'discussions' as that word is used in Public Officers Law section 105.1.d."

You indicated that:

> "The City of Oneida and the National have a long standing dispute over the tax status of land within the City purchased by the Nation. The Nation has asserted such land was exempt from taxation and regulation by local governments, and the City asserted the land was taxable. The United States Supreme Court ruled in a case involving the City of Sherrill and the Nation that similar land was taxable. The City of Oneida has sought to collect back and current taxes, and litigation ensued.
>
> "The Common Council of the City of Oneida did not, to the best of my knowledge, discuss or disclose in a public meeting prior to March 14, 2006 that negotiations were underway with the specific purpose of settling the pending litigation nor were specifics of any proposed settlement disclosed to the public....

> "The agreement between the City and the Nation includes specific provisions on things that were not subject to pending litigation, for example, freezing assessments (numbered paragraph 2. On page 2), procedure for contesting future assessments (numbered paragraph 3 on page 2), enforcement of land use standards (numbered paragraph 4. On page 2), or adopting arbitration as a dispute resolution method (numbered paragraph 8. On page 4)."

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

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

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

Section 105(1)(d) of the Open Meetings Law provides that a public body may enter into executive session to discuss "proposed, pending or current litigation."

In construing the exception concerning litigation, it has been held that:

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

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

Insofar as the Council's deliberations involved litigation strategy, judicial decisions indicate that the executive session was properly held. Although certain aspects of the Agreement did not involve issues that were the subject of litigation, it is possible that the City's strategy in seeking to settle the litigation involved some or all of those items. If that was so, in my view, they would have been elements of the City's litigation strategy and constituted proper matters for consideration in executive session. On the other hand, to the extent that they were not pertinent to or elements of the City's strategy in its efforts to reach an agreement, the executive session would appear to have been improperly withheld.

With respect to the sufficiency to motion for entry into executive session, the minutes refer to a motion to conduct an executive session "to discuss litigation", that the motion was carried and that a discussion " was held on a matter regarding litigation with the Oneida Indian Nation." The degree of specificity in the motion to enter into executive session is not clearly stated.

Here I point out that it has been held that:

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

The emphasis in the passage quoted above on the word "*the*" indicates that when the discussion relates to litigation, the motion must name the litigation. For example, a proper motion might be: "I move to enter into executive session to discuss our litigation strategy in the case of the XYZ Company v. the City of Oneida." Only by means of that kind of description can the public know that the subject matter may justifiably be considered during an executive session.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Common Council

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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May 25, 2006

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

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

Dear Mr. Costa:

As you are aware, I have received your letter. You wrote that the Tuckahoe Housing Authority conducts monthly meetings, but that some are held "off site" in Atlantic City.

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

I would conjecture that a court would find that a meeting of a public body held in Atlantic City would be unreasonable and represent a failure to comply with the Open Meetings Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Tuckahoe Housing Authority

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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May 25, 2006

Mr. Jim Nordgren
[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. Nordgren:

As you are aware, I have received your letter in which you sought an advisory opinion concerning a denial of a request for notes pertaining to a gathering that may have involved three members of the Lewisboro Town Board and the Town wetland inspector, Jay Fain. Mr. Fain appears to have been retained by the Town.

Attached to a your letter is a memorandum addressed to you by Kathleen Cory, the Town Clerk, in which she wrote as follows:

> "Mr. Nordgren requested any and all records and memoranda from a gathering that took place on January 26TH at the Town House. The gathering refers to a meeting at the Town House of the Supervisor and Town Board Member Peter DeLucia with Wetlands Inspector and Consultant Jay Fain. Board Member Suzanne Whalen was in the Town House picking up her mail during the meeting. Former Counsel Les Maron ruled that the meeting was not a Board meeting, and Town Clerk Kathy Cory advised Mr. Nordgren of the above.
>
> "On March 3, 2006, Mr. Nordgren requested the notes of two private individuals who are alleged by Mr. Nordgren to have participated in the above referenced meeting by telephone. Mr. Nordgren added that he also wanted any notes Mr. Fain may have taken and asked to appeal Ms. Cory's decision.
>
> "The Supervisor and Councilman DeLucia did not take notes and the two other private individuals deny any knowledge or involvement in the subject meeting. Town Attorney Jessica Bacal advised Ms. Cory

> that any notes Mr. Fain may have taken during the meeting are inter-agency or intra-agency materials and thus are not public information or materials subject to FOIL."

In this regard, I offer the following comments.

First, the gathering in question, as it was described by the Town Clerk, does not appear to have constituted a "meeting" subject to the Open Meetings Law. Section 102(1) of the Open Meetings Law defines the term "meeting" to mean "the official convening of a public body for the purpose of conducting public business". In a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be convened open to the public, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

Inherent in the definition and its judicial interpretation is the notion of intent. If there is an intent that a majority of a public body convene for the purpose of conducting public business, such a gathering would, in my opinion, constitute a meeting subject to the requirements of the Open Meetings Law. However, if there is no intent that a majority of public body will gather for purpose of conducting public business, collectively, as a body, I do not believe that the Open Meetings Law would be applicable, for in the same decision as that referenced above, the Court specified that "not every assembling of the members of a public body was intended to be included within the definition", indicating that social events or chance meetings do not fall within the Open Meetings Law (id., 416).

In the situation that you described, it does not appear that three Town Board members gathered for the purpose of conducting public business as a body. If they did so, the gathering in my opinion would have been a "meeting" that fell within the Open Meetings Law. On the other hand, the members may have been in the same building for a different reason. In short, if a majority of the Town Board did not convene for the purpose of conducting public business collectively, there would not have been a meeting, and the Open Meetings Law would not have applied.

Second, the Freedom of Information Law pertains to existing records, and §89(3) states in part that an agency is not required to create a record in response to a request. In the context of your request, if no records exist, the Freedom of Information Law, in my view, would not apply. I point out that when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." If you consider it worthwhile to do so, you could seek such a certification.

Third, the Freedom of Information Law defines the term "record" expansively to mean:

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

Based on the foregoing, notes or other documentary materials prepared by or for the Town constitute Town records that fall within the coverage of the Freedom of Information Law. Further, documents need not be in the physical possession of an agency to constitute agency records; so long as they are produced, kept or filed for an agency, the courts have held they constitute "agency records", even if they are maintained apart from an agency's premises.

It has been found, for example, that records maintained by an attorney retained by an industrial development agency were subject to the Freedom of Information Law, even though an agency did not possess the records and the attorney's fees were paid by applicants before the agency. The Court determined that the fees were generated in his capacity as counsel to the agency, that the agency was his client, that "he comes under the authority of the Industrial Development Agency" and that, therefore, records of payment in his possession were subject to rights of access conferred by the Freedom of Information Law (see C.B. Smith v. County of Rensselaer, Supreme Court, Rensselaer County, May 13, 1993).

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

Insofar as records, such as notes, are "kept, held, filed, produced or reproduced...*for* an agency", such as the Town, I believe that they would constitute "agency records" that fall within the scope of the Freedom of Information Law. For instance, if Mr. Fain was retained by the Town and prepared notes or other documentation in the performance of his duties for the Town, I believe that those items would fall within the scope of the Freedom of Information Law.

Next, to the extent that records exists, 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 the provision referenced as a basis for denial, §87(2)(g), potentially serves as one of the grounds for denial of access to records, due to its structure, it may require substantial disclosure. The cited 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.

The same kind of analysis would apply with respect to records prepared by consultants or others retained by agencies, for the Court of Appeals has held that:

> "Opinions and recommendations prepared by agency personnel may be exempt from disclosure under FOIL as 'predecisional materials, prepared to assist an agency decision maker***in arriving at his decision' (McAulay v. Board of Educ., 61 AD 2d 1048, aff'd 48 NY 2d 659). Such material is exempt 'to protect the deliberative process of government by ensuring that persons in an advisory role would be able to express their opinions freely to agency decision makers (Matter of Sea Crest Const. Corp. v. Stubing, 82 AD 2d 546, 549).
>
> "In connection with their deliberative process, agencies may at times require opinions and recommendations from outside consultants. It would make little sense to protect the deliberative process when such reports are prepared by agency employees yet deny this protection when reports are prepared for the same purpose by outside consultants retained by agencies. Accordingly, we hold that records may be considered 'intra-agency material' even though prepared by an outside consultant at the behest of an agency as part of the agency's deliberative process (see, Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD 2d 546, 549, supra; Matter of 124 Ferry St. Realty

> Corp. v. Hennessy, 82 AD 2d 981, 983)" [Xerox Corporation v. Town of Webster, 65 NY 2d 131, 132-133 (1985)].

It is emphasized that the Court in Xerox specified that the contents of intra-agency materials determine the extent to which they may be available or withheld, for it was held that:

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

Therefore, a record prepared, for example, by Town Board members, a Town employee, or a consultant for the Town would be accessible or deniable, in whole or in part, depending on its contents.

Lastly, you expressed the understanding that you must seek judicial review of a denial of access within forty-five days of an agency's final determination. I do not believe that to be so. It is my understanding that you have up to four months from an agency's final determination to do so.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Hon. Kathleen Cory
Jessica Bacal

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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May 25, 2006

Mr. Robert G. Potochniak
[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. Potochniak:

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

You referred to an executive session held by the Main-Endwell Central School District Board of Education to discuss a "possible real estate acquisition." Although the Board did not indicate the location of a parcel for possible purchase, you wrote that " it is widely believed that the property of discussion is located directly across from the high school and at the time had recently been listed with a real estate brokerage for public sale." You expressed the view that public knowledge of the District's interest in property would not substantially affect its value and wrote that the Board "would not provide any information" that justified its entry into executive session.

In other areas of concern, you wrote that notice was not given "prior to a school budget work shop" and that no minutes of the executive session were prepared.

In this regard, I offer the following comments.

First, a public body, such as a board of education, cannot conduct an executive session to discuss the subject of its choice, for 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..."

The ensuing provisions, paragraphs (a) through (h), specify and limit the subjects that may properly be considered in executive session.

You focused in your remarks on §105(1)(h), which permits a public body to enter into executive session to discuss:

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

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

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

Second, soon after the enactment of the Open Meetings Law, the courts dealt with and rejected contentions that "workshops" and similar gatherings fell beyond the coverage of that law. In considering that issue, it is emphasized that the definition of "meeting" [§102(1)] has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be convened open to the public, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

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

In discussing the issue, the Appellate Division, whose determination was unanimously affirmed by the Court of Appeals, stated that:

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

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

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

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

The Open Meetings Law requires that notice be given prior to every meeting. Specifically, §104 of that statute provides that:

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

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

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

Lastly, although §106(2) of the Open Meetings Law 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. When no action is taken during an executive session, there is no obligation to prepare minutes.

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
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May 25, 2006

E-MAIL

TO: Carl L. Tuohey

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. Tuohey:

As you are aware, I have received your letter in which you wrote that "[y]our small village does not comply with the Sunshine Laws", indicating that "[C]ommittee meetings held behind closed doors, and Village meetings are not published beforehand." You asked what the "repercussions or consequences" might be.

In this regard, I offer the following comments.

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

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

Based on the foregoing, a public body is, in my view, an entity required to conduct public business by means of a quorum that performs a governmental function and carries out its duties collectively, as a body. The definition refers to committees, subcommittees and similar bodies of a public body, and judicial interpretations indicate that if a committee, for example, consists solely of members of a particular public body, it constitutes a public body [see e.g., Glens Falls Newspapers v. Solid Waste and Recycling Committee of the Warren County Board of Supervisors, 195 AD2d 898 (1993)]. For instance, in the case of a legislative body consisting of seven members, four would constitute a quorum, and a gathering of that number or more for the purpose of conducting public

business would be a meeting that falls within the scope of the Law. If that entity designates a committee consisting of three of its members, the committee would itself be a public body; its quorum would be two, and a gathering of two or more, in their capacities as members of that committee, would be a meeting subject to the Open Meetings Law.

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

In the context of your comments, a village board of trustees clearly constitutes a public body required to comply with the Open Meetings Law. However, citizens advisory bodies or similar entities would not be required to give effect to that statute. Assuming that the committee does not consist solely of members of a governing body and has no authority to take any final and binding action for or on behalf of the Village, I do not believe that it constitutes a public body or, therefore, is obliged to comply with the Open Meetings Law.

The foregoing is not intended to suggest that such entities cannot hold open meetings. On the contrary, they 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.

Second, when an entity is subject to the Open Meetings Law, it must provide notice pursuant to §104 of the Open Meetings law. That provision states that:

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

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

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

I note that a public body is not required to pay to publish notice; rather, it is required to give notice to the news media. Once in receipt of notice, a newspaper, for example, may choose to print the notice, but is not obliged to do so.

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

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

However, the same provision states further that:

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

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

I hope that I have been of assistance.

RJF:tt

OML-AO-4207

From: Robert Freeman
To: Cooper, Elizabeth
Date: 5/31/2006 3:24:12 PM
Subject: Re:

Hi - -

You are correct. More technically, the application of the Open Meetings Law is triggered when a majority, a quorum, of a public body (e.g., a city council, a town board, a county legislature) gathers for the purpose of conducting public business collectively, as a body.

The group that you described includes members of numerous public bodies, but it does not involve a quorum of any particular public body. That being so the Open Meetings Law would not have applied.

In short, again, I believe that your conclusion is correct.

FOIL-AO-15992
OML-AO-4208

From: Robert Freeman
To: [redacted]
Sent: Thursday, June 01, 2006 3:18 PM
Subject: Dear Ms. Britton:

Dear Ms. Britton:

Notwithstanding your views regarding the seriousness of the matter, I point out first that there is no requirement that minutes of public hearings be prepared. When a hearing is also a meeting subject to the Open Meetings Law, that statute prescribes what might be characterized as minimum requirements concerning the contents of minutes. At a minimum, minutes must consist of a record or summary of motions, proposals, resolutions, action taken and the vote of the members. If none of those events occurs, there is no requirement that minutes be prepared.

Second, anyone present may record the proceedings, unless the use of a recording device is obtrusive or disruptive. That being so, a verbatim account of statements made during a public hearing may be prepared. If the municipality has a recording of a public hearing, the audio or video recording would be subject to the Freedom of Information Law and accessible to the public pursuant to that statute.

Lastly, I do not believe that the presence or absence of minutes of a hearing would bear upon the validity of action taken.

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

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CC: jmercer

OML-AO-4209

From: Robert Freeman
To: Anne
Date: 6/1/2006 4:52:14 PM
Subject: Re: Dear Ms. Britton:

I am familiar with §30(1) of the Town Law, and I point out that there is a distinction between a "hearing" and a "meeting."

A hearing typically involves a situation in which the public is given the right to speak regarding a particular matter. Hearings generally must be preceded by the publication of a legal notice. I know of no law that specifies that there must be minutes of a hearing. Similarly, I know of no law that requires that a quorum of a public body be present during a hearing.

A "meeting", according to the Open Meetings Law, is a gathering of a quorum of a public body for the purpose of conducting public business, collectively, as a body. Typically, a meeting is held for the purpose of discussion, deliberation and potentially the taking of action. While meetings must be preceded by notice given to the news media and by means of posting, the Open Meetings Law specifies that the notice need not be a legal notice. Further, although a public body may permit the public to speak during a meeting, it is not required to do so.

Minutes of meetings must be prepared to include to reference to the events described in our previous correspondence. If those events do not occur, while it may be good practice to summarize what is expressed at a meeting, again, I do not believe that there is any obligation to do so.

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STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

OML-AO-4210

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June 1, 2006

E-Mail

TO: Ms. Kathy Duchesneau

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. Duchesneau:

I have received your correspondence in which you referred to "workshops" held by the Phelps Town Board and asked whether they should be open to the public and preceded by notice in a local newspaper.

In this regard, first, there is no legal distinction between a "workshop" and a "meeting." By way of background, the definition of "meeting" [see Open Meetings Law, §102(1)] has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that any gathering of a majority of a public body for the purpose of conducting public business is a "meeting" that must be conducted open to the public, whether or not there is an intent to have action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 Ad 2d 409, aff'd 45 NY 2d 947 (1978)].

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

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

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

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

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

Based upon the direction given by the courts, when a majority of the Board convenes to discuss the Village business, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law, even if it is characterized as a "workshop."

Second, the Open Meetings Law requires that notice be given to the news media and posted prior to every meeting. Specifically, §104 of that statute provides that:

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

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

Lastly, even though a newspaper, for example, might receive notice of a meeting, there is no requirement that the newspaper publish the notice or otherwise publicize that a meeting has been scheduled. It may choose to do so, but is not obliged to do so.

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

I hope that I have been of assistance.

RJF:jm

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
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June 2, 2006

Mr. Lester Paul Halper
[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. Halper:

We are in receipt of your May 22, 2006 email request for an advisory opinion concerning the "weight and value" of minutes prepared during the normal course of business for the Oyster Bay-East Norwich Central School District. Although we have neither the jurisdiction nor the expertise to advise with respect to the evidentiary value or probative weight of the minutes, we offer the following remarks concerning the provisions in the Open Meetings Law relating to minutes.

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."

The provisions quoted above indicate that minutes need not consist of a verbatim of account of all that is stated a meeting. It is also clear that minutes must be prepared and made available to the public "within two weeks of the date of such meeting." 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. In our experience, minutes are among the most public and readily accessible records maintained by local governments. In many instances, they are routinely and informally made available without any written or formal request. While there is no requirement that minutes be placed on a municipality's website, either in their "official" or summary form, local governments often do so, again, because minutes are unquestionably public.

Second, inherent in the law is that the minutes must be accurate and reflect the reality of what occurred or was expressed. In our view, only a public body, by means of a majority vote of its total membership, may amend or correct minutes.

Lastly, §4518 of the Civil Procedure Law and Rules states in relevant part:

> "(a) Generally. Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible in evidence in proof of that act, transaction, occurrence or event, if the judge finds that it was made in the regular course of any business and that it was the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter....
>
> All other circumstances of the making of the memorandum or record, including lack of personal knowledge by the maker, may be proved to affect its weight, but they shall not affect its admissibility. The term business includes a business, profession, occupation and calling of every kind....
>
> (c) Other records. All records, writings and other things referred to in sections 2306 and 2307 are admissible in evidence under this rule and are prima facie evidence of the facts contained, provided they bear a certification or authentication by the head of the hospital, laboratory, department or bureau of a municipal corporation or of the state, or by an employee delegated for that purpose or by a qualified physician. (Emphasis added.)"

Accordingly, minutes prepared by a school district in the ordinary course of business would appear to be prima facie evidence of the facts contained therein.

On behalf of the Committee on Open Government, 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-16007
OML-AO-4212

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June 7, 2006

E-MAIL

TO: Florence Alpert

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. Alpert:

I have received your letter in which you referred to delays in the disclosure of minutes of meetings of a village board of trustees. You wrote that the clerk indicated that the minutes "cannot be made available until after the following bi-monthly meeting where they are read and accepted."

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 or "accepted." Nevertheless, as a matter of practice or policy, many public bodies approve minutes of their meetings. In the event that minutes have not been approved, to comply with the Open Meetings Law, it has consistently been advised that minutes be prepared and made available within two weeks, and that if the minutes have not been approved, they may be marked "unapproved", "draft" or "preliminary", for example. By so doing within the requisite time limitations, the public can generally know what transpired at a meeting; concurrently, the public is effectively notified that the minutes are subject to change. If minutes have been prepared within less than two weeks, I believe that those unapproved minutes would be available as soon as they exist, and that they may be marked in the manner described above.

You also wrote that you are required to request copies of the minutes in writing. Minutes, like all other records, fall within the coverage of the Freedom of Information Law. Pursuant to §89(3) of that law, an agency, such as a village, may require that a request be made in writing. It is emphasized, however, the statement of legislative intent appearing in §84 of the Freedom of Information Law states that records should be made available "wherever and whenever feasible." Since minutes of open meetings are clearly accessible to the public and can be readily located, there would be no good reason for delaying disclosure, even if a request for them must be made in writing.

I hope that I have been of assistance.

RJF:tt

OML-AO- 4213

From: Robert Freeman
To: [redacted]
Date: 6/9/2006 4:18:55 PM
Subject: Dear Mr. Ottalagano:

Dear Mr. Ottalagano:

I have received your inquiry concerning the ability of the Fulton County Board of Supervisors to conduct an executive session to discuss "a question of conflict of interest over the chairman...working with or for a firm doing work" for the County.

Without knowing more about the nature of the discussion, I cannot offer an unequivocal response. However, it appears that the only possible basis for conducting an executive session would involve §105(1)(f) of the Open Meetings Law. That provision authorizes a public body, such as the Board of Supervisors, to enter into executive session to discuss:

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

Insofar as a discussion by the Board focuses on the Chairman in conjunction with one or more of the topics appearing in §105(1)(f), I believe that an executive session could properly be withheld. If none of those topics is discussed, in my view, there would be no basis for conducting an executive session.

I hope that I have been of assistance.

cc: Board of Supervisors

Robert J. Freeman
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STATE OF NEW YORK
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OML-AO-4214

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

June 9, 2006

Mr. Mark Aldasch
[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, except as otherwise indicated.

Dear Mr. Aldash:

Your complaint concerning an executive session held by the City of Oneida communicated by phone to the State Commission of Investigation has been referred 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.

Based on a review of the information provided, including a memorandum concerning your complaint and newspaper articles from the Oneida Daily Dispatch and the Syracuse Post-Standard, the City of Oneida Common Council held a meeting on March 14, 2006 at which an agreement concerning taxes, zoning regulations and code enforcement inspection requirements was negotiated with the Oneida Indian Nation. Please note that we previously issued an advisory opinion pertaining to that meeting (copy enclosed), however, the facts on which our previous opinion was based differ significantly from those you indicate. Accordingly, we offer the following comments with regard to the issues which you have raised.

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

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

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

Second, it has been held judicially that :

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

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

Minutes of the meeting forwarded to the Committee in conjunction with the enclosed advisory opinion, indicate that the only persons present at the March 14, 2006 meeting were Councilmembers. One newspaper report states, however, that representatives from the Oneida Indian Nation were also present at the meeting. If representatives from the Nation were permitted to attend the executive session, the provision which permits a public body to enter into an executive session to discuss "proposed, pending or current litigation" (§105[1][d]) would not have applied for reasons outlined below.

While the courts have not sought to define the distinction between "proposed" and "pending" or "pending" and "current" litigation, they have provided direction concerning the scope of the exception in a manner consistent with the general intent of the grounds for entry into executive session. Specifically, 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)].

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

We note that if litigation is pending in federal court between the Oneida Common Council and the Oneida Indian Nation, there may be a court order which requires confidentiality of settlement negotiations. In that regard, we point out that there are two vehicles that potentially enable a public body to exclude the public from a meeting. One involves the ability to enter into an executive session. The other 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(3), which exempts from the Open Meetings Law:

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

From our perspective, if there was a court order in effect on the date of the meeting, requiring negotiations or settlement discussions to be kept confidential, a meeting for the purpose of conducting settlement negotiations between the Council and the Nation would be outside the coverage of the Open Meetings Law. If that is so, again, the procedure for entry into executive session would not apply. Similarly, the requirements regarding notice, the taking of minutes and other aspects of the Open Meetings Law would be inapplicable.

On behalf of the Committee on Open Government we hope this is helpful to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:jm

Enc.

cc: City Council
Peter Hedglon

OML-AO-4215

From: Robert Freeman
To: [redacted]
Date: 6/13/2006 9:49:17 AM
Subject: http://www.dos.state.ny.us/coog/otext/o4067.htm

http://www.dos.state.ny.us/coog/otext/o4067.htm

Dear Ms. Guarino:

Attached is an advisory opinion that deals with the issues that you raised. In short, if a quorum of the Board gathers to conduct public business, as a body, the gathering would constitute a meeting subject to the Open Meetings Law, even if there is no intent to take action. If less than a quorum participates, the Open Meetings Law would not apply.

I hope that I have been of assistance.

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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16028
OML-AO-4216

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

June 16, 2006

Mr. Brian Mandryck
[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. Mandryck:

I have received your letter and the materials relating to it. You have raised a variety of issues concerning the implementation of the Freedom of Information and Open Meetings Laws by the Lee Board of Fire Commissioners. Based on a review of the materials, I offer the following general remarks.

It is noted at the outset that you referred several times to the "United States Freedom of Information Law." There is a federal Freedom of Information Act, which applies only to records of federal agencies, and each state has enacted its own version of a law dealing with public access to records. Applicable in the context of your requests is the New York Freedom of Information Law.

That law pertains to existing records, and ordinarily, it does not require that an entity, such as a board of fire commissioners, to create records [see §89(3)]. Therefore, if requested records do not exist, there is no obligation to prepare new records to satisfy an applicant. For instance, if there are no records identifying firemen who cannot access the fire station through the use of the coded security system, there would be no obligation to create a record containing that information on your behalf.

A possible exception to that general principle relates to issues that you raised concerning minutes of meetings of the Board of Fire Commissioners and the application of the Open Meetings Law. However, before focusing on that issue, by way of background, the Open Meetings Law pertains to meetings of public bodies, and §102(2) of that statute defines the term "public body" to mean:

> "...any entity for which a quorum is required in order to conduct public business and which consists of two or more members,

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

Based on the foregoing, the Board of Fire Commissioners is clearly a public body required to comply with the Open Meetings Law.

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

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

In view of the ordinary definition of "convene", I believe that a "convening" of a quorum requires the physical coming together of at least a majority of the total membership of the Board, or a convening by means of videoconferencing. An affirmative vote of a majority would be needed for the Board to take action or to carry out its duties.

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

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

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

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

Based on the foregoing, again, a valid meeting may occur only when a majority of the total membership of a public body, a quorum, has "gathered together in the presence of each other or through the use of videoconferencing." Moreover, only when a quorum has convened in the manner described in §41 of the General Construction Law would a public body have the authority to carry out its powers and duties.

In sum, I do not believe that the Board may validly take action, except at a meeting during which a quorum convened and in which a majority of the Board's total membership voted in favor of the proposed action.

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

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

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

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

> "The word 'formal' is defined merely as 'following or according with established form, custom, or rule' (Webster's Third New Int.

> Dictionary). We believe that it was inserted to safeguard the rights of members of a public body to engage in ordinary social transactions, but not to permit the use of this safeguard as a vehicle by which it precludes the application of the law to gatherings which have as their true purpose the discussion of the business of a public body" (id.).

Based upon the direction given by the courts, when a majority of the Board convenes to discuss Fire District business, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law, even if it is characterized as a "workshop" or "work session."

The Open Meetings Law requires that notice be given to the news media and posted prior to every meeting. Specifically, §104 of that statute provides that:

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

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

You also referred to minutes, particularly minutes of executive sessions. In this regard, 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.

Finally with respect to the Open Meetings Law, 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.

Next, now focusing on the Freedom of Information Law, one of the issues relating to your requests for records may involve whether certain of your requests "reasonably describe" the records sought as required by §89(3) of that law. I point out that it has been held by the Court of Appeals that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

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

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

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

While I am unfamiliar with the recordkeeping systems of the Board, to extent that the records sought can be located with reasonable effort, I believe that the request would have met the requirement of reasonably describing the records. On the other hand, if the records are not maintained in a manner that permits their retrieval except by reviewing perhaps hundreds or even thousands of records individually in an effort to locate those falling within the scope of the request, to that extent, the request would not in my opinion meet the standard of reasonably describing the records.

When a proper request is made, 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, 2005 (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.

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. It is emphasized that the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the exceptions that follow. In my view, the phrase quoted in the preceding sentence evidences a recognition on the part of the Legislature that a single record or report, for example, might include portions that are available under the statute, as well as portions that might justifiably be withheld. That being so, I believe that it also imposes an obligation on an agency to review records sought, in their entirety, to determine which portions, if any, might properly be withheld or deleted prior to disclosing the remainder.

The Court of Appeals, the state's highest court, confirmed its general view of the intent of the Freedom of Information Law in Gould v. New York City Police Department, stating that:

> "To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption' (*Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750

> *see,* Public Officers Law § 89[4][b]). As this Court has stated, '[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld' (*Matter of Fink v. Lefkowitz*, 47 N.Y.2d, 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)" [89 NY2d 267, 275 (1996)].

Since you referred specifically to records involving payment to an attorney, most pertinent in my view is the first ground for denial, §87(2)(a), which 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 or imparted pursuant to an attorney-client relationship [see e.d., 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 or her client and that records prepared in conjunction with such an attorney-client relationship may be considered privileged under §4503 of the CPLR. Further, since the enactment of the Freedom of Information Law, it has been found that records may be withheld when the privilege can appropriately be asserted when the attorney-client privilege is read in conjunction with §87(2)(a) of the Law [see e.g., Mid-Boro Medical Group v. New York City Department of Finance, Sup. Ct., Bronx Cty., NYLJ, December 7, 1979; Steele v. NYS Department of Health, 464 NY 2d 925 (1983)]. Similarly, the work product of an attorney may be confidential under §3101 of the Civil Practice Law and Rules.

In the first decision of which I am aware in which the request involved records sought under the Freedom of Information Law concerning services rendered by an attorney to a government agency, Knapp v. Board of Education, Canisteo Central School District (Supreme Court, Steuben County, November 23, 1990), the matter pertained to a request for billing statements for legal services provided to a board of education by a law firm. Since the statements made available included "only the time period covered and the total amount owed for services and disbursements", the applicant contended that "she is entitled to that billing information which would detail the fee, the type of matter for which the legal services were rendered and the names of the parties to any current litigation". In its discussion of the issue, the court found that:

> "The difficulty of defining the limits of the attorney client privilege has been recognized by the New York State Court of Appeals. (Matter of Priest v. Hennessy, 51 NY2d 62, 68.) Nevertheless, the Court has ruled that this privilege is not limitless and generally does not extend to the fee arrangements between an attorney and client. (Matter of Priest v. Hennessy, supra.)...
>
> "There appear to be no New York cases which specifically address how much of a fee arrangement must be revealed beyond the name of the client, the amount billed and the terms of the agreement. However, the United States Court of Appeals, in interpreting federal law, has found that questions pertaining to the date and general nature

> of legal services performed were not violative of client confidentiality. (Cotton v. United States, 306 F.2d 633.) In that Court's analysis such information did not involve the substance of the matters being communicated and, consequently, was not privileged...
>
> "...Respondents have not justified their refusal to obliterate any and all information which would reveal the date, general nature of service rendered and time spent. While the Court can understand that in a few limited instances the substance of a legal communication might be revealed in a billing statement, Respondents have failed to come forward with proof that such information is contained in each and every document so as to justify a blanket denial of disclosure. Conclusory characterizations are insufficient to support a claim of privilege. (Church of Scientology v. State of New York, 46 NY 2d 906, 908.)"

In short, in Knapp, even though portions of the records containing the time billed and the amount paid for the time, it was determined that other aspects of billing statements indicating "the general nature of legal services performed", as well as certain others, did not fall within the attorney client privilege and were available.

In the other decision dealing with the issue under the Freedom of Information Law, Orange County Publications, Inc. v. County of Orange [637 NYS 2d 596 (1995)], the matter involved a request for "the amount of money paid in 1994 to a particular law firm for legal services rendered in representing the County in a landfill expansion suit, as well as "copies of invoices, bills, vouchers submitted to the county from the law firm justifying and itemizing the expenses for 1994" (id., 599). While monthly bills indicating amounts charged by the firm were disclosed, the agency redacted "'the daily descriptions of the specific tasks' (the description material) 'including descriptions of issues researched, meetings and conversations between attorney and client'" (id.).

Although the County argued that the "description material" is specifically exempted from disclosure by statute in conjunction with §87(2)(a) of the Freedom of Information Law and the assertion of the attorney-client privilege pursuant to §4503 of the CPLR, the court found that the mere communication between the law firm and the County as its client does not necessarily involve a privileged communication; rather, the court stressed that it is the content of the communications that determines the extent to which the privilege applies. Further, the court distinguished between actual communications between attorney and client and descriptions of the legal services provided, stating that:

> "Thus, respondent's position can be sustained only if such descriptions rise to the level of protected communications...
>
> "Consequently, while billing statements which 'are detailed in showing services, conversations, and conferences between counsel and others' are protected by the attorney-client privilege (Licensing

> Corporation of America v. National Hockey League Players Association, 153 Misc.2d 126, 127-128, 580 N.Y.S.2d 128 [Sup. Ct. N.Y.Co. 1992]; see, De La Roche v. De La Roche, 209 A.D.2d 157, 158-159 [1st Dept. 1994]), no such privilege attaches to fee statements which do not provide 'detailed accounts' of the legal services provided by counsel..." (id., 602).

In my view, the key word in the foregoing is "detailed." Certainly I would agree that a description of litigation strategy, for example, would fall within the scope of the attorney client privilege; clearly the Freedom of Information Law does not serve as a vehicle for enabling the public, which includes an adversary or potential adversary in litigation, to know the thought processes of an attorney providing legal services to his or her client.

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 Fire Commissioners.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Fire Commissioners

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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June 19, 2006

E-MAIL

TO: Hon. Amy Emerson, Supervisor

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 Supervisor Emerson:

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

You referred initially to an advisory opinion addressed to a resident concerning access to Town financial records in which I cited §29(4) of the Town Law. That provision involves the books of account kept by town supervisors and states that they are "open and available for inspection at all reasonable hours of the day..." In my view, the foregoing does not mean that when the account books are being used, they must be made immediately available on demand. I believe, however, that they must be made available without unreasonable delay. Further, §89(3) of the Freedom of Information Law requires that a response to a request for records be given within five business days of its receipt. Because the records in question are clearly accessible to the public and readily retrievable, in my opinion, there would be no valid basis for delaying disclosure.

You also wrote that you were told that the payroll of highway employees is not subject to the Freedom of Information Law. In short, that is not so. Records or portions of records indicating salaries or other payments made to all public employees are available to the public.

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

I point out that §87(3)(b) of the Freedom of Information Law states in relevant part that:

"Each agency shall maintain...

> (b) a record setting forth the name, public office address, title and salary of every officer or employee of the agency... "

As such, a payroll record that identifies all officers or employees by name, public office address, title and salary must be prepared to comply with the Freedom of Information Law. Moreover, I believe that the payroll record and other related records identifying employees and their salaries must be disclosed for the following reasons.

One of the grounds for denial, §87(2)(b), permits an agency to withhold record or portions of records when disclosure would result in "an unwarranted invasion of personal privacy." However, payroll information has been found by the courts to be available [see e.g., Miller v. Village of Freeport, 379 NYS 2d 517, 51 AD 2d 765, (1976); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NYS 2d 954 (1978)]. In Gannett, supra, the Court of Appeals held that the identities of former employees laid off due to budget cuts, as well as current employees, should be made available. In addition, this Committee has advised and the courts have upheld the notion that records that are relevant to the performance of the official duties of public employees are generally available, for disclosure in such instances would result in a permissible as opposed to an unwarranted invasion of personal privacy [Gannett, supra; Capital Newspapers v. Burns, 109 AD 2d 292, aff'd 67 NY 2d 562 (1986) ; Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, October 30, 1980; Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975) ; and Montes v. State, 406 NYS 664 (Court of Claims 1978)]. As stated prior to the enactment of the Freedom of Information Law, payroll records:

> "...represent important fiscal as well as operational information. The identity of the employees and their salaries are vital statistics kept in the proper recordation of departmental functioning and are the primary sources of protection against employment favortism. They are subject therefore to inspection" Winston v. Mangan, 338 NYS 2d 654, 664 (1972)].

In short, a record identifying agency employees by name, public office address, title and salary must in my view be maintained and made available.

It has been contended that W-2 forms and similar records may be withheld because the include social security numbers. However, in conjunction with the previous commentary concerning the ability to protect against unwarranted invasions of personal privacy, I believe that portions of W-2 forms or similar records could be withheld, such as social security numbers, home addresses and net pay, for those items are largely irrelevant to the performance of one's duties. However, for reasons discussed earlier, those portions indicating public officers' or employees' names and gross wages must in my view be disclosed.

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

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

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

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

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

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 discussions with the Town Attorney, 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.

Lastly, you questioned the ability to conduct an executive to discuss the reappointment of an individual to the Board of Assessment Review. In this regard, 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.

In the context of your question, it involved a matter leading to the appointment of a particular person. That being so, I believe that the executive session was validly held.

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

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

> "...the public body must identify the subject matter to be discussed (See, Public Officers Law § 105 [1]), and it is apparent that this must be accomplished with some degree of particularity, i.e., merely reciting the statutory language is insufficient (see, Daily Gazette Co. v Town Bd., Town of Cobleskill, 111 Misc 2d 303, 304-305). Additionally, the topics discussed during the executive session must remain within the exceptions enumerated in the statute (see generally, Matter of Plattsburgh Publ. Co., Div. of Ottaway Newspapers v City of Plattsburgh, 185 AD2d §18), and these exceptions, in turn, 'must be narrowly scrutinized, lest the article's clear mandate be thwarted by thinly veiled references to the areas delineated thereunder' (Weatherwax v Town of Stony Point, 97 AD2d 840, 841, quoting Daily Gazette Co. v Town Bd., Town of Cobleskill, supra, at 304; see, Matter of Orange County Publs., Div. of Ottaway Newspapers v County of Orange, 120 AD2d 596, lv dismissed 68 NY 2d 807).
>
> "Applying these principles to the matter before us, it is apparent that the Board's stated purpose for entering into executive session, to wit, the discussion of a 'personnel issue', does not satisfy the requirements of Public Officers Law § 105 (1) (f). The statute itself requires, with respect to personnel matters, that the discussion involve the 'employment history of a particular person" (id. [emphasis supplied]). Although this does not mandate that the individual in question be identified by name, it does require that any motion to enter into executive session describe with some detail the nature of the proposed discussion (see, State Comm on Open Govt Adv Opn dated Apr. 6, 1993), and we reject respondents' assertion that the Board's reference to a 'personnel issue' is the functional equivalent of identifying 'a particular person'" [Gordon v. Village of Monticello, 620 NY 2d 573, 575; 207AD 2d 55, 58 (1994)]."

I hope that I have been of assistance.

RJF:tt

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June 22, 2006

Mr. Anthony M. Cerreto
Village Attorney
Village of Port Chester
10 Pearl Street
Port Chester, NY 10573

The staff of the Committee on 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. Cerreto:

We are in receipt of your request for an advisory opinion concerning application of the Open Meetings and the Freedom of Information Laws to a "communications channel" established by a member of the Village of Port Chester Planning Commission. Your description of the "channel" as "an electronic messaging and discussion group" differs somewhat from the terms and conditions of the system, which is set forth in relevant part as follows:

> "**Purpose And Policy**:
>
> "...to broaden the expertise and support the mission of the Planning Commission members....
>
> "...to promote the ability of the Commission Members to ask technical questions in a controlled open environment prior to noticed meetings of the Village professionals who support the operation of the Commission...
>
> "The system will also serve as an additional method to notice meetings and transmit documents as may be deemed timely or necessary by the Chairman...
>
> "The overall goal of this system is to raise the level of review by Commission Members while avoiding any unnecessary delay in application review.

> "...This is solely a system in which Commission Members and Village Professionals can pose questions and receive answers based on the applicable Codes and Law, not submit issues for the Commission to take action upon.
>
> "Please help ensure that this system is a positive experience for all its members by letting the Commission Chairman know if you find content that violates our rules."

In this regard, we note that there is nothing in the Open Meetings Law that would preclude the Village from electronically forwarding documents and materials to members of the Commission, nor is there anything that would preclude Commission members from individually contacting Village professionals with questions about upcoming applications before the Commission and sharing those responses with other members of the Commission. A series of communications, however, between individual Commission members, or telephone conversations among the members which results in a collective decision, a meeting or vote held by means of an electronic conference or discussion group 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 were enacted in 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, or system such as the one you have described.

Conducting a vote or taking action via an electronic discussion group 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..."

If a majority of the members of the Commission engage in "instant e-mail" or communicate through a system such as this 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 this system is used as it is intended, only for distribution of materials and dissemination of information provided by Village professionals, with no substantive discussions occurring between members, that circumstance would be equivalent to the transmission of inter-office memoranda. In that kind of situation, in our view, the Open Meetings Law would not be implicated.

With regard to you question about how and the extent to which the Freedom of Information Law would apply to communications sent through this system, we offer the following comments.

First and most significantly, the scope of the Freedom of Information Law is expansive, for it encompasses all government agency records within its coverage. Section 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, records of communications need not be in the physical possession of an agency, such as the Village, to constitute agency records; so long as they are produced, kept or filed for an agency, the law specifies and the courts have held that 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 were kept on behalf of the University and constituted agency "records" falling within the coverage of the Freedom of Information Law. It is emphasized 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)].

Also pertinent is the first decision in which the Court of Appeals dealt squarely with the scope of the term "record", in which the matter involved documents pertaining to a lottery sponsored by a fire department. Although the agency contended that the documents did not pertain to the performance of its official duties, i.e., fighting fires, but rather to a "nongovernmental" activity, the Court rejected the claim of a "governmental versus nongovernmental dichotomy" and found that the documents constituted "records" subject to rights of access granted by the Law. Moreover, the Court determined that:

> "The statutory definition of 'record' makes nothing turn on the purpose for which it relates. This conclusion accords with the spirit as well as the letter of the statute. For not only are the expanding boundaries of governmental activity increasingly difficult to draw, but in perception, if not in actuality, there is bound to be considerable crossover between governmental and nongovernmental activities, especially where both are carried on by the same person or persons" [Westchester-Rockland Newspapers v. Kimball, 50 NY2d 575, 581 (1980)].

In our view, when Commission members communicate with one another or Village employees in writing, in their capacities as Commission members, any such communications constitute agency records that fall within the framework of the Freedom of Information Law.

The definition of the term "record" also makes clear that electronic communications between or among Commission members or Village employees fall within the scope of the Freedom of Information Law. Based on its specific language, if information is maintained by or for an agency in some physical form, it constitutes a "record" subject to rights of access conferred by the Freedom of Information Law. The definition includes specific reference to computer tapes and discs, and it was held soon after the reenactment of the statute that "[i]nformation is increasingly being stored in computers and access to such data should not be restricted merely because it is not in printed form" [Babigian v. Evans, 427 NYS2d 688, 691 (1980); aff'd 97 AD2d 992 (1983); see also, Szikszay v. Buelow, 436 NYS2d 558 (1981)]. Whether information is stored on paper, on a computer tape, or in a computer, it constitutes a "record." In short, this system is merely a means of transmitting information; communications can be viewed on a screen and printed, and we believe that the communications at issue must be treated in the same manner as traditional paper records for the purpose of their consideration under the Freedom of Information Law.

Third, the foregoing is not intended to suggest that communications sent through this system must be disclosed in their entirety. Like other records, the content of the communications is the primary factor in ascertaining rights of access.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. The records at issue, because they involve communications between or among agency officials, fall with one of the exceptions, §87(2)(g). Due its structure, however, that provision may require substantial disclosure. Specifically, §87(2)(g) enables an agency to withhold records that:

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

We emphasize 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.

In this vein, the Court of Appeals reiterated its general view of the intent of the Freedom of Information Law in Gould v. New York City Police Department [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 Police Department contended that complaint follow up reports could be withheld in their entirety on the ground that they fall within the exception regarding intra-agency materials, §87(2)(g). The Court, however, wrote that: "Petitioners contend that because the complaint follow-up reports contain factual data, the exemption does not justify complete nondisclosure of the reports. We agree" (id., 276), and stated as a general principle that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government" (id., 275). The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, stating that:

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

When records consist of intra-agency material, as in this instance, that they may be preliminary to a decision does not remove them from rights of access. One of the contentions offered by the agency in Gould was that certain reports could be withheld because they are not final

and because they relate to matters for which no final determination had been made. The Court rejected that finding and stated that:

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

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

The Court also dealt with the issue of what constitutes "factual data" that must be disclosed under §87(2)(g)(I). In its consideration of the matter, the Court found that:

> "...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][I]. Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182)" (id., 276-277).

In this case, it would appear that many of the communications transmitted through this system would consist largely of factual information and required to be made available to the public, i.e., notices of meetings, copies of applications, or background information. Those communications which would include opinions, advice and recommendations of Commission members or Village employees, on the other hand, would be subject to partial redaction prior to their release.

Finally, we note that the "Subscriber Usage Obligations And Limitations" section of the description you submitted is geared towards protection of free trade in a corporate environment. In our opinion, it would be appropriate to revise this section to address the Open Meetings Law directly.

On behalf of the Committee on Open Government we hope this is helpful to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

OML-AO- 4219

From: Robert Freeman
To: Geof Huth
Date: 6/26/2006 9:08:58 AM
Subject: Re: Open Meetings Question

Hi Geof - -

I apologize for being negligent in attending LGRAC meetings.

With respect to the issues that you raised,first, LGRAC clearly constitutes a "public body" required to comply with the Open Meetings Law. Additionally, at the end of the definition of the phrase "public body" in §102(2) of the Open Meetings Law, included is reference to any committee or subcommittee or similar body consisting of at least two members of a public body. Therefore, a meeting of LGRAC would involve a gathering of a majority (a quorum) of its total membership for the purpose of conducting public business. If a committee is designated consisting of two or more members of LGRAC, its quorum would be a majority of the membership of the committee, and a gathering of a quorum of committee members, in their capacities as committee members, would constitute a meeting of the committee also required to be held in accordance with the Open Meetings Law.

Second, every meeting of a governing body or a committee as described above must be preceded by notice of the time and place given to the news media and by means of posting. If a meeting is scheduled at least a week in advance, notice must be given at least 72 hours prior to the meeting; if a meeting is scheduled less than a week in advance, notice must be given "to the extent practicable" at a reasonable time prior to the meeting. I note that there is no obligation to pay for a legal notice. Notice must merely be "given" to the news media and posted; if the news media organization(s) in receipt of the notice choose not to publicize a meeting, that has no impact on compliance with the law by a public body.

I hope that this helps and that our paths will cross one of these days.

Bob

Robert J. Freeman
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June 26, 2006

Mr. Thomas Middendorf
[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. Middendorf:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to requests made to the Syosset Fire District, in particular with respect to the amount of time within which the District is required to respond to your requests. In an effort to address some of the questions you raise, we offer the following comments.

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

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, 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, 2005 (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.

Second, with respect to your requests for copies of minutes, §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."

With respect to the District's denial of your request for access to Length of Service Awards Program award beneficiaries and amounts paid in August of 2005 on the ground that the "list of participants and beneficiaries and proposal payouts is privileged litigation material", we note that if the records are part of a settlement agreement, and like other contracts between government agencies and persons or entities, they are accessible under the Freedom of Information Law.

The courts have consistently interpreted the Freedom of Information Law in a manner that fosters maximum access. As stated by the state's highest court, the Court of Appeals, twenty-five years ago:

> "To be sure, the balance is presumptively struck in favor of disclosure, but in eight specific, narrowly constructed instances where the governmental agency convincingly demonstrates its need, disclosure will not be ordered (Public Officers Law, section 87, subd 2). Thus, the agency does not have carte blanche to withhold any information it pleases. Rather, it is required to articulate particularized and specific justification and, if necessary, submit the requested materials to the court for in camera inspection, to exempt its records from disclosure (see Church of Scientology of N.Y. v. State of New York, 46 NY 2d 906, 908). Only where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld" [Fink v. Lefkowitz, 47 NY 2d 567, 571 (1979)].

In another decision, the Court of Appeals found that:

> "The Freedom of Information Law expresses this State's strong commitment to open government and public accountability and imposes a broad standard of disclosure upon the State and its agencies (see, Matter of Farbman & Sons v New York City Health and Hosps. Corp., 62 NY 2d 75, 79). The statute, enacted in furtherance of the public's vested and inherent 'right to know', affords all citizens the means to obtain information concerning the day-to-day functioning of State and local government thus providing the electorate with sufficient information 'to make intelligent, informed choices with respect to both the direction and scope of governmental activities' and with an effective tool for exposing waste, negligence and abuse on the part of government officers" [Capital Newspapers v. Burns,67 NY2d 562, 565-566 (1986)].

As the judicial decisions cited above make clear, 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. Sections 87(2)(b) and 89(2)(b) authorize agencies to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy."

Although instances have arisen in which agreements or settlements have included provisions requiring confidentiality, those kinds of agreements have uniformly been struck down and found to be inconsistent with the Freedom of Information Law. In short, it has been held that a promise or assertion of confidentiality cannot be upheld, unless a statute specifically confers confidentiality. In Gannett News Service v. Office of Alcoholism and Substance Abuse Services [415 NYS 2d 780 (1979)], a state agency guaranteed confidentiality to school districts participating in a statistical survey concerning drug abuse. The court determined that the promise of confidentiality could not be sustained, and that the records were available, for none of the grounds for denial appearing in the Freedom of Information Law could justifiably be asserted. In a decision rendered by the Court of Appeals, it was held that a state agency's:

> "long-standing promise of confidentiality to the intervenors is irrelevant to whether the requested documents fit within the Legislature's definition of 'record' under FOIL. The definition does not exclude or make any reference to information labeled as 'confidential' by the agency; confidentiality is relevant only when determining whether the record or a portion of it is exempt..." [Washington Post v. Insurance Department, 61 NY 2d 557, 565 (1984)].

In a different context, in Geneva Printing Co. and Donald C. Hadley v. Village of Lyons (Supreme Court, Wayne County, March 25, 1981), a public employee charged with misconduct and in the process of an arbitration hearing engaged in a settlement agreement with a municipality. One aspect of the settlement was an agreement to the effect that its terms would remain confidential. Notwithstanding the agreement of confidentiality, which apparently was based on an assertion that "the public interest is benefitted by maintaining harmonious relationships between government and its employees", the court found that no ground for denial could justifiably be cited to withhold the agreement. On the contrary, it was determined that:

> "the citizen's right to know that public servants are held accountable when they abuse the public trust outweighs any advantage that would accrue to municipalities were they able to negotiate disciplinary matters with its employee with the power to suppress the terms of any settlement".

In so holding, the court cited a decision rendered by the Court of Appeals and stated that:

> "In Board of Education v. Areman, (41 NY2d 527), the Court of Appeals in concluding that a provision in a collective bargaining

agreement which bargained away the board of education' s right to inspect personnel files was unenforceable as contrary to statutes and public policy stated: 'Boards of education are but representatives of the public interest and the public interest must, certainly at times, bind these representatives and limit or restrict their power to, in turn, bind the public which they represent. (at p. 531).

A similar restriction on the power of the representatives for the Village of Lyons to compromise the public right to inspect public records operates in this instance.

The agreement to conceal the terms of this settlement is contrary to the FOIL unless there is a specific exemption from disclosure. Without one, the agreement is invalid insofar as restricting the right of the public to access."

On behalf of the Committee on Open Government we hope this is helpful to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

cc: Louise Intindoli

STATE OF NEW YORK
DEPARTMENT OF STATE
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June 29, 2006

Ms. Sandra Small
[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. Small:

I have received your letter and the materials attached to it. You indicated that you are a member of the Enfield Town Board and appointed as liaison to the Enfield Volunteer Fire Company. You have sought "clarification on whether or not advance notice of Board member's attendance at the Fire Company's Board of Directors meeting is necessary", and whether residents must provide advance notice. You also raised questions concerning the status of a fire protection district and a fire district, and you sought guidance concerning the terms of the contract between the Town and the Company.

In this regard, the Committee on Open Government is authorized to provide advice and opinions pertaining to the Freedom of Information and Open Meetings Laws, and my comments will be limited to matters that you raised that relate to those statutes. It is suggested that questions that involve volunteer fire companies or fire districts be made to an attorney for the Department of State who has expertise on those subjects, Elisha Tomko. Ms. Tomko can be contacted at the Department by mail or by phone at (518)474-6740.

Insofar as I can address your questions, it is my understanding that a fire protection district is merely a geographical area that has no governing body or employees. A fire district is a governmental entity, and the meetings of a board of fire commissioners fall within the coverage of the Open Meetings Law.

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

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

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

Section 174(6) of the Town Law states in part that "A fire district is a political subdivision of the state and a district corporation within the meaning of section three of the general corporation law". Since a district corporation is also a public corporation [see General Construction Law, §66(1)], a board of commissioners of a fire district in my view is clearly a public body subject to the Open Meetings Law.

The Freedom of Information Law, the companion of the Open Meetings 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 or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Again, a fire district is a public corporation. Consequently, I believe that it is an "agency" required to comply with the Freedom of Information Law.

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

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

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

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

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

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

While I know of no judicial decision that focuses on the status of meetings of the boards of volunteer fire companies under the Open Meetings Law, I believe that the decision by the state's

highest court that those companies constitute "agencies" that fall within the coverage of the Freedom of Information Law indicates that the same conclusion would be reached regarding their status as "public bodies" required to comply with the Open Meetings Law.

Lastly, and in response to your specific question, §103 of the Open Meetings Law states that meetings of public bodies "shall be open to the general public." That being so, anyone may attend their meetings, and no advance notice can be required as a condition precedent to attending.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Enfield Volunteer Fire Company

STATE OF NEW YORK
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July 10, 2006

E-MAIL

TO: George Heidcamp

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. Heidcamp:

We are in receipt of your request for an advisory opinion concerning application of the Open Meetings Law to an executive session of a board of education at which the Board negotiated a contract with the Superintendent. In this regard we offer the following comments.

First, as you are likely aware, 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 matters" may be conducted or discussed in executive session, not all such matters fall within the grounds for entry into executive session. The only provision that pertains specifically to contracts, §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. In short, it does not appear that §105(1)(e) would be pertinent to your situation.

It is likely, however, that §105(1)(f) would have been relevant. 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..."

From our perspective, a discussion pertaining to the Superintendent and his contract could likely have been discussed appropriately in executive session. The issue would have dealt with that person's performance, i.e., his employment history.

We hope this helps to clarify your understanding of the Open Meetings Law.

CSJ:tt

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July 11, 2006

Mr. Patrick J. Nelligan
[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. Nelligan:

We are in receipt of your request for an advisory opinion concerning the application of the Open Meetings Law to two separate meetings of the Town Board of Amenia, New York. As you describe it, the Town Board entered into executive session during a regularly scheduled meeting to "discuss...the acquisition of real property", and then subsequently held a special meeting on short notice to discuss acquisition of the same parcel of property. A bond resolution for purchase of the subject 60-acre property was defeated in November, and according to your letter, "it is clear that the new Supervisor ... and a majority of the present Town Board, still feel that purchase should still be pursued."

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

With respect to the Board's use of executive session to discuss the parcel, the only provision of apparent significance, §105(1)(h) of the Open Meetings Law, permits a public body to enter into executive session to discuss:

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

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

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

Based on your description of the history of the Town's attempt to purchase this property, it seems unlikely to us that further discussion of the proposed acquisition would have a substantial impact on the value of the property. It is unlikely, therefore, that it would have been a proper topic for consideration in executive session.

We note that the agenda for the special meeting describes the proposed executive session "to discuss privileged and confidential information with the Town Attorney relative to the acquisition of real property." 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 our 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 our 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, we 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.

We 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 our 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, we believe that the attorney-client privilege has ended and that the body should return to an open meeting.

While it is not our intent to be overly technical, as suggested earlier, the procedural methods for 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.

With respect to your questions about minutes of an executive session and the propriety of "excusing" the Town Clerk from an executive session, we point out first that §106 of the Open Meetings Law which provides that:

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

In view of the foregoing, as a general rule, a public body may take action during a properly convened executive session [see Open Meetings Law, §105(1)]. If action is taken during an executive session, minutes reflective of the action, the date and the vote must be recorded in minutes pursuant to §106(2) of the Law. If no action is taken, there is no requirement that minutes of the executive session be prepared. It is clear from the Open Meetings Law that minutes need not consist of a verbatim account of what is said. Rather, at a minimum, minutes must consist of a record or summary of motions, proposals, resolutions, action taken and the vote of each member.

Second, subdivision (1) of §30 of the Town Law states in relevant part that the town clerk "shall attend all meetings of the town board, act as clerk thereof, and keep a complete and accurate record of the proceedings of each meeting". Third, subdivision (11) of §30 of the Town Law provides that the clerk "shall have such additional powers and perform such additional duties as are or hereafter may be conferred or imposed upon him by law, and such further duties as the town board may determine, not inconsistent with law". And fourth, §63 of the Town Law states in part that a town board "may determine the rules of its procedure".

In our opinion, inherent in each of the provisions cited is an intent that they be carried out reasonably, fairly, with consistency, and that minutes be accurate.

Further, pertinent to several of your questions is §105(2) of the Open Meetings Law, which provides that: "Attendance at an executive session shall be permitted to any member of the public body and any other persons authorized by the public body." Therefore, the only people who have

the right to attend executive sessions are the members of the public body, i.e., a town board conducting the executive session. A public body may 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.

If there is a dispute concerning the attendance of a person other than a member of the Town Board at an executive session, we believe that the Board could resolve the matter by adopting or rejecting a motion by a member to permit or reject the attendance by a non-member at an executive session.

As previously mentioned, subdivision (1) of §30 of the Town Law states in relevant part that the town clerk "shall attend all meetings of the town board, act as clerk thereof, and keep a complete and accurate record of the proceedings of each meeting". As suggested above, although the Town Board could choose to enable the clerk or others to attend an executive session, only the members of the Board have a right to attend an executive session. In our opinion, however, §30 of the Town Law is intended to require the presence of the clerk to take minutes in situations in which motions and resolutions are made and in which votes are taken.

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

With respect to your questions about adequate notice of the special meeting, we point out that there are two statutes that relate to notice of special meetings held by town boards. The phrase "special meeting" is found in §62(2) of the Town Law. That provision, from our perspective, deals with unscheduled meetings, rather than meetings that are regularly scheduled, and states in relevant part that:

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

The provision quoted above pertains to notice given to members of a town board, and the requirements imposed by §62 are separate from those contained in the Open Meetings Law.

Section 104 of the Open Meetings Law specifically 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.

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

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

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

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

We hope this helps to clarify your understanding of the Open Meetings Law.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

cc: Town Board

STATE OF NEW YORK
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July 13, 2006

E-Mail

TO: Ms. Susan Burgess

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. Burgess:

As you are aware, I have received your letter concerning the application of §105(1)(f) of the Open Meetings Law.

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

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

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

Second, although it is used frequently, the term "personnel" appears nowhere in the Open Meetings Law. Although one of the grounds for entry into executive session often relates to personnel matters, from my perspective, the term is overused and is frequently cited in a manner that is misleading or causes unnecessary confusion. To be sure, some issues involving "personnel" may

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

The language of the so-called "personnel" exception, §105(1)(f), 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.

The terms of §105(1)(f) are not limited to employees of a government agency, and there may be instances in which that provision could justifiably be cited in relation to other persons or, for example, corporate entities. Assuming that a matter relates to the governmental functions, powers or duties of a public body, I believe that a public body may enter into executive session to discuss one or more of the topics indicated in that provision, so long as the topic or topics relate to a particular person or corporation.

In situations in which §105(1)(f) may be validly asserted, it has been advised that a motion describing the subject to be discussed as "personnel" or "a particular 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 has confirmed the advice rendered by this office. In discussing §105(1)(f) in relation to a matter involving the establishment and functions of a position, the Court stated that:

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

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

You also referred to "a right to access to any documents produced in executive session wherein a 'particular person' has been discussed." The Open Meetings Law provides 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)].

The foregoing is not intended to suggest that records other than minutes that relate to an executive session may not be accessible. The Freedom of Information Law pertains to all government agency records and 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:jm

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July 13, 2006

E-MAIL

TO: Tony DeMilia

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. DeMilia:

As you are aware, I have received your letter in which you raised the following questions:

> "When a body goes into executive session to discuss the performance of an employee, doesn't the employee have the right to know what is said during the session? And shouldn't the employee be able to attend the session and/or be told in private what was discussed?"

In this regard, in short, I do not believe that the employee who is the subject of a discussion necessarily has the right to know what was said. Further, he or she does not have the right to attend an executive session during which that person is discussed. The only people who have the right to be present during an executive session are the members of the public body conducting the meeting. Specifically, subdivision (2) of §105 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, a public body may choose to permit the subject of a discussion in executive session to be present during the executive session. However, that person does not have the right to attend such executive session.

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

RJF:tt

FOML-AO-4226

From: Robert Freeman
To: [redacted]
Date: 7/13/2006 9:50:39 AM
Subject: I have received your inquiry concerning the status of cooperative library systems in relation to the

I have received your inquiry concerning the status of cooperative library systems in relation to the Open Meetings Law.

According to §260-a of the Education Law, meetings of boards of trustees of cooperative library systems "shall be held in conformity with and in pursuance to the provisions of article seven of the public officers law." Article 7 is the Open Meetings Law. That being so, it is clear that meetings of the boards of trustees of cooperative library systems must be held in compliance with the Open Meetings Law.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
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OML-AO - 4137

From: Robert Freeman
To: atravis@empire.state.ny.us; Bob Arnold; nick@fort-ticonderoga.org
Date: 7/18/2006 8:43:20 AM
Subject: Re: COMMISSION MEETING

Good morning - -

It's great to hear from you, and I'm happy to know that you're involved in your favorite endeavor, the study of history.

You are correct; the Commission, a statutory body, constitutes a "public body" that falls within the coverage of the Open Meetings Law (Public Officers Law, Article 7, §§100 -111). Section 104 pertains to notice, and with respect to meetings scheduled at least a week in advance, states that: "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."

I point out that notice of the time and place must merely be "given" to the news media. Whether the news organization in receipt of notice opts to publish or publicize is the choice of that organization. In a related vein, subdivision (3) of §104 specifies that the notice need not be a legal notice. That being so, there is no expenditure associated with providing notice to comply with the Open Meetings Law.

The major daily newspaper in Oswego is the Palladium Times, and I believe that the Syracuse Post-Standard has a bureau in Oswego as well. It is suggested that notice be given to both and posted, perhaps here in Albany and City Hall or an equally public location in Oswego.

I hope that this will be of utility, and if you or your colleagues have questions, please do not hesitate to contact me.

All the best.

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July 20, 2006

Mr. Jerry Ravnitzky
[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. Ravnitzky:

I have received your letter in which you sought an advisory opinion concerning a "policy-making meeting of four town board members" that was "closed to the public."

According to your letter, four members of the Carmel Town Board were invited by a developer to a meeting held in a restaurant. You wrote that "the four board members at first denied that they had held a secret meeting, but eventually admitted, in the public forum, that they had attended the meeting." It is your view that the gathering in question "violated the Open Meetings Law" and you asked whether I concur.

In this regard, the Committee on Open Government is authorized to offer advice and opinions concerning the Open Meetings Law. Neither the Committee nor its staff is empowered to render determinations or findings that "violations" of law occurred; only a court is empowered to do so. Nevertheless, based on the information that you provided, I believe that the gathering in question constituted a "meeting" falling within the coverage of the Open Meetings Law and the that Board failed to comply with that statute. In this regard, I offer the following comments.

First, 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."

Second, 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, 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.).

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, when a majority of the Board gathers to conduct public business, any such gathering would, in my opinion, constitute a "meeting" subject to the Open Meetings Law.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board

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July 27, 2006

E-Mail

TO: Ms. Donna A. Combs

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. Combs:

I have received your letter in which you referred to the "Board of Assessment Review conducting a meeting behind closed doors, with no public notice being given, several days after they had adjourned their regular meeting."

In this regard, a board of assessment review is in my view clearly a "public body" required to comply with the Open Meetings Law [see Open Meetings Law, §102(2)]. While meetings of public bodies generally must be conducted in public unless there is a basis for entry into executive session, following public proceedings conducted by boards of assessment review, I believe that their deliberations could be characterized as "quasi-judicial proceedings" that would be exempt from the Open Meetings Law pursuant to §108(1) of that statute. It is emphasized, however, that even when the deliberations of such a board may be outside the coverage of the Open Meetings Law, its vote and other matters would not be exempt. As stated in Orange County Publications v. City of Newburgh:

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

Therefore, although an assessment board of review may deliberate in private, based upon the decision cited above, the act of voting or taking action must in my view occur during a meeting.

If the sole purpose of the gathering to which you referred involved deliberations of a quasi-judicial nature, the Open Meetings Law would not have applied. However, if any other function was being carried out by the Board, i.e., voting or taking action, those functions would have been required to have been carried out during a "meeting" held in accordance with the Open Meetings Law. Additionally, as you are aware, every meeting of a public body must be preceded by notice given to the news media and by means of posting.

I hope that I have been of assistance.

RJF:jm

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July 27, 2006

E-Mail

TO: Ms. Ristiina Wigg

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. Wigg:

Please accept my apologies for the delay in response to your inquiry. In all honesty, it appears that your original communication was lost or misplaced.

You have raised the following questions:

> "- - Is the notice of time and place of public meetings of library trustees sufficient if this information it posed on the library's web site?
>
> - - Is notice of time and place sufficient if that information is printed in the library's newsletter?
>
> - - Must notice also be sent to a local newspaper or other media?"

In this regard, first, when a library board of trustees serves a governmental entity, i.e., a school district or municipality, I believe that it clearly constitutes a "public body" required to comply with the Open Meetings Law. Many entities characterized as public libraries are not governmental, but rather are not-for-profit corporations. Nevertheless, those entities are also required to comply with the Open Meetings Law due to the direction provided in §260-a of the Education Law.

Second, while I believe that providing notice of meetings on a web site or in a newsletter is fully appropriate, based on the language of the Open Meetings Law, it would be insufficient to comply with that statute. Section 104 pertains to notice of meetings and states that:

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

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

Although §104 does not specify where notices of meetings must be posted, it requires that notice be "conspicuously posted in one or more designated public locations." Consequently, I believe that a public body must designate, presumably by resolution, the location or locations where it will routinely post notice of meetings. To meet the requirement that notice be "conspicuously posted", notice must in my view be placed at a location that is visible to the public.

With respect to notice given to the news media, subdivision (3) of §104 specifies that a public body is not required to pay to place a legal notice in a newspaper prior to a meeting. Notice must merely be "given" to the news media; whether a newspaper, for example, chooses to print notice of a meeting is within the discretion of its management. In my view, the State Legislature intended to ensure that the Open Meetings Law would not create financial hardship to public bodies or newspapers, and the provision indicating that notice of a meeting need not be legal notice is intended to ensure that public bodies should not have to pay place a legal notice in a newspaper prior to every meeting. In terms of the news media, in many instances, there may be hundreds of public bodies within the coverage area of a newspaper, and requiring a newspaper to print notices of meetings relating to perhaps dozens of meetings on a particular day would be financially burdensome.

I hope that I have been of assistance.

RJF:jm

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July 27, 2006

Mr. Paul Olynk
[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. Olynk:

As you are aware, we have received your correspondence in which you raised a variety of issues relating to the Town of Urbana. Please note that the advisory jurisdiction of the Committee on Open Government pertains to public access to meetings of public bodies and records of government agencies.

The matter that you raised that is relevant to the work of this office involves your complaint that "certain individuals were told they couldn't speak while others were addressed." 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, such as the Town Board, does not want to answer questions or permit the public to speak or otherwise participate at its meetings, I do not believe that it would be obliged to do so. On the other hand, a public body may choose to answer questions and permit public participation, and many do so. When a public body does permit the public to speak, I believe that it should do so based upon reasonable rules that treat members of the public equally.

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

I note, too, 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.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board

STATE OF NEW YORK
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July 27, 2006

E-MAIL

TO: Rachel Baer

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. Baer:

As you know, I have received your letter in which you questioned the status of the Horseheads Traffic Commission under the Open Meetings Law.

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

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

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

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

also New York Public Interest Research Group v. Governor's Advisory Commission, 507 NYS 2d 798, aff'd with no opinion, 135 AD 2d 1149, motion for leave to appeal denied, 71 NY 2d 964 (1988)]. In one of the decisions, Poughkeepsie Newspaper, supra, a task force was designated by then Mayor Koch consisting of representatives of New York City agencies, as well as federal and state agencies and the Westchester County Executive, to review plans and make recommendations concerning the City's long range water supply needs. The Court specified that the Mayor was "free to accept or reject the recommendations" of the Task Force and that "[i]t is clear that the Task Force, which was created by invitation rather than by statute or executive order, has no power, on its own, to implement any of its recommendations" (id., 67). Referring to the other cases cited above, the Court found that "[t]he unifying principle running through these decisions is that groups or entities that do not, in fact, exercise the power of the sovereign are not performing a governmental function, hence they are not 'public bod[ies] subject to the Open Meetings Law..."(id.).

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

> "In determining whether an entity is a public body, various criteria and benchmarks are material. They include the authority under which the entity was created, the power distribution or sharing model under which it exists, the nature of its role, the power it possesses and under which it purports to act, and a realistic appraisal of its functional relationship to affected parties and constituencies.
>
> "This Court has noted that the powers and functions of an entity should be derived from State law in order to be deemed a public body for Open Meetings Law purposes (*see, Matter of American Socy. for Prevention of Cruelty to Animals v Board of Trustees of State Univ. of N.Y.*, 79 NY2d 927, 929). In the instant case, the parties do not dispute that CUNY derives its powers from State law and it surely is essentially a public body subject to the Open Meetings Law for almost any imaginable purpose. The Association, Inc. contends, on the other hand, that is a separate, distinct, subsidiary entity, and does not perform any governmental function that would render it also a public body.
>
> "It may be that an entity exercising only an advisory function would not qualify as a public body within the purview of the Open Meetings Law...More pertinently here, however, a formally chartered entity with officially delegated duties and organizational attributes of a substantive nature, as this Association, Inc. enjoys, should be deemed a public body that is performing a governmental function (*compare,*

> *Matter of Syracuse United Neighbors v. City of Syracuse*, 80 AD2d 984, 985, *appeal dismissed* 55 NY2d 995). It is invested with decision-making authority to implement its own initiatives and, as a practical matter, operates under protocols and practices where its recommendations and actions are executed unilaterally and finally, or receive merely perfunctory review or approval...This Association, Inc. possessed and exercised real and effective decision-making power. CUNY, through its by-laws, delegated to the Association, Inc. its statutory power to administer student activity fees (*see*, Education Law §6206[7][a]). The Association, Inc. holds the purse strings and the responsibility of supervising and reviewing the student activity fee budget. (CUNY By-Laws §16.5[a]). CUNY's by-laws also provide that the Association, Inc. 'shall disapprove any allocation or expenditure it finds does not so conform, or is inappropriate, improper, or inequitable,' thus reposing in the Association, Inc. a final decision-making authority... [Smith v. CUNY, 92 NY2d 707; 713-714 (1999)].

It has also been advised that an advisory body that performs a necessary step in the process of decision making constitutes a public body subject to the Open Meetings Law. For example, the entities created by the regulations promulgated by the Commissioner of Education, §100.11, "shared decision making" committees, may not have the authority to take final and binding action; nevertheless, before a board of education may take action, it must first seek the views of a shared decision making committee in some circumstances.

In sum, if the Commission has the authority to make decisions, to take final and binding action, or if, by law, it performs a necessary step in the decision making process, I believe that it constitutes a "public body" required to comply with the Open Meetings Law.

I hope that I have been of assistance.

RJF:tt

cc: Board of Trustees

STATE OF NEW YORK
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July 28, 2006

E-MAIL

TO: Patrick Nelligan

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. Nelligan:

I have received your letter and must offer apologies for the delay in response. To be completely honest, it was misplaced and found today.

Your question involves the scope and intent of §105(1)(h), one of the grounds for entry into executive session. That provision permits a public body to enter into executive session to discuss:

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

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

A key question, in my view, involves the extent to which information relating to possible real property transactions has become known to the public. The more that is known, the less likely it is that publicity would have an impact on the value of a parcel or in some way damage the interests of taxpayers. I note that the language of §105(1)(h) does not refer to negotiations *per se* or the impact of publicity upon negotiations relating to a parcel; rather its proper assertion is limited to situations in which publicity would have a *substantial* effect on the *value* of the property. It has been advised, for example, that when a municipality is seeking to purchase a parcel and the public is unaware of

the location or locations under consideration, it is possible if not likely that premature disclosure or publicity would indeed substantially affect the value of the property. In that kind of situation, publicity might result in speculation or offers from others, thereby precluding the municipality from reaching an optimal price on behalf of the taxpayers. However, when details concerning a potential real property transaction, such as the location and potential uses of the property, are known to the public, publicity would have a lesser effect or impact on the value of the parcel. Again, the more that is known to the public, the less likely it is that publicity would affect the value of a parcel.

I hope that I have been of assistance.

RJF:tt

From: Robert Freeman
To: MULLEN, VICTORIA
Date: 7/28/2006 11:21:09 AM
Subject: Re: <SMILE>

Hi - -

There is in fact a provision in the Town Law that deals with situations in which neither a town clerk nor a town clerk's deputy can be present at a meeting. Section 30(10) of the Town Law states in relevant part that:

"In the event that the town clerk is absent or unable to act and there is no duly appointed and qualified deputy town clerk present and able to act, the town board may appoint as deputy town clerk any person other than a member of the town board, provided, however, that such person be qualified as provided in section three of the public officers law and section twenty-three of this chapter."

As I understand the foregoing, if neither the clerk nor a deputy clerk is available to take minutes at a town board meeting, the board can designate any resident of the town, other than a member of the board, to do so.

I hope that this is helpful to you.

Robert J. Freeman
Executive Director
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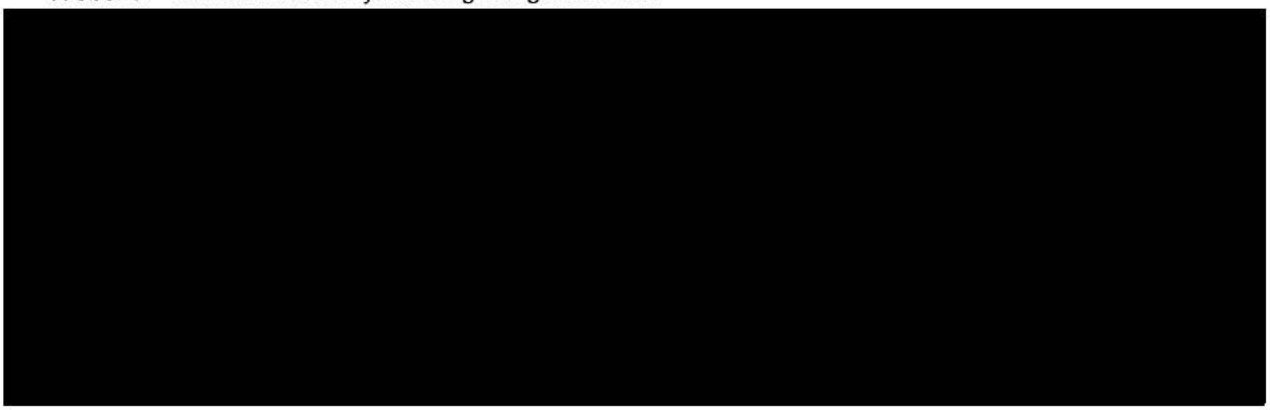

STATE OF NEW YORK
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August 7, 2006

E-Mail

TO: Mr. William F. Kehoe

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. Kehoe:

I have received your letter in which you asked whether minutes of meetings of subcommittees of a town library board of trustees must be prepared and distributed.

In this regard, first, the boards of trustees of a variety of entities characterized as "public libraries" are required to give effect to the Open Meetings Law. Some are governmental entities; others are not-for-profit corporations that typically have a relationship with government but which are not governmental entities. The boards of trustees of both the governmental and non-governmental public libraries are required to comply with the Open Meetings Law pursuant to §260-a of the Education Law, which states that:

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

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

Second, §102(2) of the Open Meetings Law defines the phrase "public body" to mean:

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

Based on the foregoing, the Open Meetings Law clearly applies to the governing bodies of governmental entities, and in addition, the last clause in the definition indicates that committees, subcommittees and similar bodies of a public body are themselves public bodies required to comply with the Open Meetings Law. In contrast, while the board of trustees of a public library that is not a governmental entity is required to conduct its meetings in accordance with the Open Meetings Law, §260-a of the Education Law provides, by implication, that committees and subcommittees of boards of trustees, except those in New York City, are not required to give effect to the Open Meetings Law.

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

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

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

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

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

Lastly, the Open Meetings Law contains what might be characterized as minimum requirements concerning the contents of minutes. Section 106 states that:

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

Based on the foregoing, it is clear that minutes need not consist of a verbatim account of everything said or expressed. On the contrary, so long as they include the items referenced in §106, I believe that a public body would be acting in compliance with law.

Lastly, there is nothing in any provision of law of which I am aware that requires that minutes be distributed.

I hope that I have been of assistance.

RJF:jm

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August 8, 2006

E-MAIL

TO: Trudy Bloomquist

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. Bloomquist:

As you are aware, I have received your correspondence. You have asked whether "zoning board minutes", including minutes of executive sessions, are accessible under the Freedom of Information Law. You also inquired with respect to access to tape recordings of meetings.

In this regard, two statutes are pertinent in considering your questions. First, the Open Meetings Law is applicable to "public bodies", entities that consist of two or more members that perform a governmental function and conduct public business. A zoning board of appeals clearly constitutes a public body required to comply with the Open Meetings Law. Second, the Freedom of Information Law pertains to agency records. A unit of local government is an agency, and §86(4) of that law defines the term "record" expansively to include:

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

Based on the foregoing, when a municipal board, such as a zoning board of appeals, maintains a tape recording of a meeting, the tape would constitute a "record" that falls within the coverage of the Freedom of Information Law.

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

my view, a tape recording of an open meeting is accessible, for any person could have been present, and none of the grounds for denial would apply. Moreover, case law indicates that a tape recording of an open meeting is accessible for listening and/or copying under the Freedom of Information Law [see Zaleski v. Board of Education of Hicksville Union Free School District, Supreme Court, Nassau County, NYLJ, December 27, 1978].

A tape recording ordinarily will capture every word expressed during a meeting. Minutes of meetings need not be so detailed. 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)].

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

RJF:tt

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August 8, 2006

Mr. James S. Buswell
[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. Buswell:

I have received your letter concerning meetings of the Utica Urban Renewal Agency, particularly the location of its meetings, its entry into executive session to discuss "sensitive items", and a refusal to provide access to minutes and other records. In this regard, I offer the following comments.

First, §553 of the General Municipal Law states in subdivision (2) that an urban renewal agency "shall be a corporate governmental agency, constituting a public benefit corporation." A public benefit corporation is a kind of public corporation (see General Construction Law, §66). Therefore, an urban renewal agency is an "agency" that falls within the coverage of the Freedom of Information Law [Public Officers Law, §86(3)], and a "public body" subject to the Open Meetings Law [Public Officers Law, §102(2)]. Subdivision (3) of §553 states that "A majority of the members of an [urban renewal] agency shall constitute a quorum. As you are aware, §616 of the General Municipal established the Utica Urban Renewal Agency (hereafter "the Agency").

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

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

> governmental process to operate for the benefit of those who created it."

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

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

The preceding paragraph appeared in an advisory opinion rendered in 1993 and was relied upon in Crain v. Reynolds (Supreme Court, New York County, NYLJ, August 12, 1998). In that decision, the Board of Trustees of the City University of New York conducted a meeting in a room that could not accommodate those interested in attending, even though other facilities were available that would have accommodated those persons. The court in Crain granted the petitioners' motion for an order precluding the Board of Trustees from implementing a resolution adopted at the meeting at issue until certain conditions were met to comply with the Open Meetings Law.

It is also noted that §103(b) of the Open Meetings Law states that:

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

Based upon the foregoing, there is no obligation upon a public body to construct a new facility or to renovate an existing facility to permit barrier-free access to physically handicapped persons. However, I believe that the Law does impose a responsibility upon a public body to make "all reasonable efforts" to ensure that meetings are held in facilities that permit barrier-free access to physically handicapped persons. Therefore, if, for example, the Agency has the capacity to hold its meetings in a room that is accessible to handicapped persons, I believe that the meetings should be held in the room that is most likely to accommodate the needs of those people.

Third, it is emphasized that every meeting of a public body, such as the Agency, 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, 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)].

In a somewhat related vein, I point out that §87(3)(a) of the Freedom of Information Law provides that:

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

Based upon the foregoing, when a final vote is taken by an "agency" subject to the Freedom of Information Law [see §86(3), a record must be prepared that indicates the manner in which each member who voted cast his or her vote. Ordinarily, records of votes will appear in minutes.

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

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

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

Lastly, the Freedom of Information Law pertains to all records kept by or for a government agency and is based on 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.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Utica Urban Renewal Agency

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4238

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

August 9, 2006

E-M,AIL

TO: Timothy Chittenden

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. Chittenden:

I have received your letter in which you asked whether "the Rye City Council is in compliance with the Open Meetings Law when they list on their Council agenda that they are adjourning int Executive Session to discuss pending litigation without detailing what the litigation is." The agenda attached to your states as follows: "The Council will convene at 7:00 p.m. and it is expected they will adjourn into Executive Session to discuss pending litigation at 7:01 p.m."

I do not believe that the language quoted from the agenda is inconsistent with law. In this regard, I offer the following comments.

First, there is nothing in the Open Meetings Law pertaining to agendas. A public body may choose to develop an agenda, but there is no statutory requirement that an agenda be prepared. Further, even when an agenda exists, I know of no law that requires that it be followed.

Second, more significant than the agenda in relation to the Open Meetings Law is the language of a motion to conduct an executive session. As you may be aware, the Open Meetings Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, §105(1) states in relevant part that:

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

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

before such a session may validly be held. The ensuing provisions of §105(1) specify and limit the subjects that may appropriately be considered during an executive session.

In construing the exception concerning litigation, it has been held that:

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

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

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

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

The emphasis in the passage quoted above on the word "*the*" indicates that when the discussion relates to litigation that has been initiated, the motion must name the litigation. For example, a proper motion might be: "I move to enter into executive session to discuss our litigation strategy in the case of the XYZ Company v. the City of Rye." If the Council seeks to discuss its litigation strategy in relation to a person or entity that it intends to sue, and if premature identification of that person or entity could adversely affect the interests of the City and its residents, it has been suggested that the motion need not identify that person or entity, but that it should indicate that the discussion will involve the litigation strategy. Only by means of that kind of description can the public know that the subject matter may justifiably be considered during an executive session.

Notwithstanding the foregoing, it is reiterated that the language of the agenda is, in my view, largely irrelevant.

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

RJF:tt

cc: City Council

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1160/06
OML-AO-4239

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August 10, 2006

Mr. Richard A. Binner
Assistant Superintendent for Business
Frontier Central School District
5120 Orchard Avenue
Hamburg, NY 14075-5657

The staff of the Committee on 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. Binner:

I have received your letter and the materials attached to it. In your capacity as Assistant Superintendent and Records Access Officer for the Frontier Central School District, you have sought an advisory opinion concerning rights of access to certain records requested pursuant to the Freedom of Information Law. The records sought include:

> "1. Cover letter, signed contract, John Montesanti's email and Dave Farmelo's Proposal for Services to be rendered pertaining to the contract and any and all amendments regarding the contract between FCSD and Bernard P. Donegan, Inc, authorized by Janet Plarr, President of the FSCD Board of Education, dtd 2/7/06.
>
> "2. Analysis and written report to the FCSD Board of Education regarding the above-mentioned contract which was presented to the Board of Education during their executive session on Monday, July 24, 2006.
>
> "3. Any and all written correspondence between Mr. Donegan and/or Bernard P. Donegan, Inc and Robert Guiffreda and any and all Board of Education members regarding the above mentioned services."

The materials indicate that Mr. Guiffreda is the Superintendent, and that Mr. Montesani is the BOCES Finance and Legislation Coordinator.

You wrote and the minutes of a meeting of the Board of Education indicate that the "analysis and written report" were presented and considered an executive session held to discuss "contractual matters." Executive sessions were also conducted, citing "contractual matters" as the reason, to discuss approval of the terms and conditions of the Superintendent's separation agreement.

You have raised a series of question in relation to the foregoing, and in this regard, I offer the following comments.

First, because some of the records at issue were apparently discussed during executive sessions, I point out that the rationale for conducting executive sessions as reflected in the minutes is questionable. As you are likely aware, §105(1) of the Open Meetings Law specifies and limits the subjects that may properly be discussed during an executive session. Nowhere does the phrase "contractual matters" appear in that statute. The provision most closely related, §105(1)(e), authorizes a public body, such as a board of education, to conduct an executive session concerning "collective negotiations pursuant to article fourteen of the civil service law." Article 14 is commonly known as the Taylor Law, and it deals with the relationship between public employers and public employee unions. That being so, it is clear that §105(1)(e) would not have served as a proper basis for entry into executive session in relation to the matters to which the minutes refer.

While I am unfamiliar with the content of the "analysis and written report", if there was no basis for consideration of the report in executive session, and if it had been discussed in public, it is likely that public discussion would have resulted in the effective disclosure of portions of the report. In my view, to the extent that public discussion results or should have resulted in disclosure of the content of the report, there would effectively be or have been a waiver of the District's ability to deny access to those portions of the report.

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

The contracts to which reference is made in your questions and the minutes, those involving the terms and conditions of the Superintendent's separation from service, and the contract between the District and Bernard P. Donegan, Inc. (hereafter "Donegan"), including amendments thereto, in my opinion, are clearly public. In short, none of the grounds for denial of access could be asserted to withhold a contract between the District and either its employee or an outside entity, such as Donegan.

With respect to the agreement with the Superintendent, the provision in the Freedom of Information Law of greatest significance, §87(2)(b), permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". While the standard concerning privacy is flexible, 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.

In a discussion of the intent of the Freedom of Information Law by the state's highest court, the Court of Appeals in Capital Newspapers, supra, found that the statute:

> "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" [67 NY 2d 562 (1986)].

In short, I believe that any agreement involving compensation, benefits and the like between an agency and an individual, or a collective bargaining agreement between a public employer and a public employee union, must be disclosed. Those documents reflect the manner in which public monies are being allocated and spent and relate directly to the functioning and accountability of government.

In the case of a contract with an entity, such as Donegan, because it involves a corporation, the provision pertaining to the protection of personal privacy is irrelevant, and again, I do not believe that any of the grounds for denying access could properly be asserted to withhold a record of that nature.

With regard to access to the report, Donegan's proposal was expressed in a letter addressed to the Superintendent on January 13 and describes its services in summary as follows:

> "To examine the current policies, procedures and practices of the Frontier Central School District in order to assist the Board of Education, along with administration, in assuring that proper systems are in place to provide both appropriate internal controls and on-going oversight of the finances and financial operations of the School District."

The proposal further states that the analysis would include of a review of past and current policies, practices and procedures relating to the operation of the District business office, and that Donegan would report its findings, prepare an analysis and offer recommendations to the Board.

The report, in my view, would constitute "intra-agency material" that falls within the scope of §87(2)(g). While that provision potentially serves as a basis for a denial of access, due to its structure, it often requires substantial disclosure. The cited 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.

The documentation refers to Donegan as a financial consultant, and the same provision would apply with respect to records prepared by consultants for agencies, for the Court of Appeals has held that:

> "Opinions and recommendations prepared by agency personnel may be exempt from disclosure under FOIL as 'predecisional materials, prepared to assist an agency decision maker***in arriving at his decision' (McAulay v. Board of Educ., 61 AD 2d 1048, aff'd 48 NY 2d 659). Such material is exempt 'to protect the deliberative process of government by ensuring that persons in an advisory role would be able to express their opinions freely to agency decision makers (Matter of Sea Crest Const. Corp. v. Stubing, 82 AD 2d 546, 549).

> "In connection with their deliberative process, agencies may at times require opinions and recommendations from outside consultants. It would make little sense to protect the deliberative process when such reports are prepared by agency employees yet deny this protection when reports are prepared for the same purpose by outside consultants retained by agencies. Accordingly, we hold that records may be considered 'intra-agency material' even though prepared by an outside consultant at the behest of an agency as part of the agency's deliberative process (see, Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD 2d 546, 549, supra; Matter of 124 Ferry St. Realty Corp. v. Hennessy, 82 AD 2d 981, 983)" [Xerox Corporation v. Town of Webster, 65 NY 2d 131, 132-133 (1985)].

Based upon the foregoing, records prepared by a consultant for an agency may be withheld or must be disclosed based upon the same standards as in cases in which records are prepared by the staff of an agency. It is emphasized that the Court in Xerox specified that the contents of intra-agency materials determine the extent to which they may be available or withheld, for it was added that:

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

Therefore, a record prepared by a consultant for an agency would be accessible or deniable, in whole or in part, depending on its contents.

The Court of Appeals has 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)" [Gould v. New York City Police Department, 89 NY2d 267, 276-277 (1996)].

Based on the foregoing, it would appear that portions of the analysis and written report that consist of statistical or factual information must be disclosed, while opinions, advice and recommendations may be withheld. However, that outcome would likely be different if the Board had discussed the report in public, rather than during an executive session. Again, in consideration of the subject matter, I do not believe that an executive session could properly have been held to discuss the report. Therefore, insofar as compliance with the Open Meetings Law would have resulted in disclosure of portions of the report, it would be appropriate in my opinion to disclose those portions of the report that might otherwise be withheld.

One of your questions involves access to correspondence between Donegan and the Superintendent or Board members. From my perspective, if the correspondence involves communications involving Donegan in its capacity as consultant, the records would constitute intra-agency materials that would be accessible or deniable in whole or in part in accordance with the preceding commentary concerning §87(2)(g). If, however, the communications preceded Donegan being retained or do not involve its duties as consultant, I believe that they would be accessible, for none of the grounds for denial would apply.

Correspondence between an employee of the BOCES and the Superintendent would constitute inter-agency materials also falling with §87(2)(g) that would be accessible or deniable depending on their content.

Lastly, you referred to a communication from the District's attorney to the Board that you assume to be a legal opinion. If your assumption is accurate, §87(2)(a), concerning records that are "specifically exempted from disclosure by state or federal statute", would be pertinent. 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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1607
OML-AO-4240

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August 11, 2006

Mr. Richard L. Kinney
[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. Kinney:

I have received your letter in which you complained that the Ballston Town Planning Board adopted a series of recommendations at its May 4 meeting and forwarded them to the Town Board. Having requested the minutes of that meeting, you were informed by the Chair of the Planning Board that a letter containing the recommendations served as the minutes. Further, the letter apparently states that the Planning Board unanimously voted to adopt the recommendations included in the letter. However, according to correspondence sent to the Town Supervisor by an attorney representing a citizens' group, "at least two members of the Planning Board were opposed to the recommendations and have stated so publicly..."

In this regard, I offer the following comments.

First, because the Planning Board constitutes a "public body" required to comply with the Open Meetings Law [see Open Meetings Law, §102(2)], it is required to prepare minutes in accordance with that statute. Section 106 pertains to minutes of meetings and directs that:

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

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

As the situation has been described, the adoption of recommendations that were transmitted to the Town Board in my view represent action taken by the Planning Board that must be memorialized in minutes. While the letter containing the recommendations might reflect the essence of the Board's action, I do not believe that the letter may be characterized or serve as a substitute for minutes. Often issues arise years after action is taken and there is a need to review minutes, the official record of action taken by a public body. Without minutes, there may be no way of learning of the nature of governmental actions or even if actions were indeed taken. In addition, as you suggested, §106 requires that minutes be prepared and made available within two weeks of meetings.

Second, in a related vein, §87(3)(a) of the Freedom of Information Law requires that:

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

Based upon the foregoing, when a final vote is taken by an "agency" subject to the Freedom of Information Law [see §86(3), a record must be prepared that indicates the manner in which each member who voted cast his or her vote. Ordinarily, records of votes will appear in minutes.

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

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

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)]. Most recently, the Court of Appeals confirmed that the law requires that a record of votes of the members must be prepared when action is taken by a public body and precludes secret ballot voting by its members [Perez v. City University of New York, 5 NY3d 522 (2005)].

In an effort to enhance compliance with and understanding of the matter, copies of this opinion will be forwarded to Town officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Planning Board

From: Robert Freeman
To: [redacted]
Date: 8/11/2006 3:09:26 PM
Subject: http://www.dos.state.ny.us/coog/otext/o2213.htm

http://www.dos.state.ny.us/coog/otext/o2213.htm

Dear Ms. Lukas:

I have received your letter concerning the status of a gathering of the newly designated Schuylerville Planning Board to engage in "Board Training." The Board indicated that the gathering would not be open to the public, but it was also stated that a matter involving the approval of a change in a driveway would be discussed during the event.

As suggested in the attached opinion, the question is whether the gathering would constitute a "meeting" that falls within the coverage of the Open Meeting Law. A "meeting" is a gathering a majority of a public body, such as a planning board, for the purpose of conducting public business. If the sole purpose of a gathering is to be educated, it is unlikely that the Open Meetings Law would apply. However, insofar as the Board discusses matters of public business, those that would fall within the scope of its duties or jurisdiction, I believe that the gathering would constitute a meeting subject to the Open Meetings Law. That would be so, even if there is no intent to take action, and regardless of the manner in which the gathering is characterized. In my view, the consideration of an application to change a driveway would clearly constitute a matter of public business, and that, as well as any other issues within the Board's authority, can validly be discussed only during an open meeting.

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

Robert J. Freeman
Executive Director
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FOIL-AO-16108
OML-AO-4242

From: Robert Freeman
To: [redacted]
Date: 8/14/2006 8:29:24 AM
Subject: Dear Ms. Rockwell:

Dear Ms. Rockwell:

I have received your letter in which you raised several questions.

In the first, you asked whether there is "a time constraint in offering an opinion on a violation of foil." In this regard, there is no time limitation concerning an individual's capacity to complain or seek an advisory opinion under the Freedom of Information Law.

Second, you asked what you might do when a school indicates that it is not in possession of records of your interest. By "school" is it assumed that you are referring to records that may be maintained by a public school district; if you are referring to a private school, the Freedom of Information Law would not apply.

Assuming that you are referring to a public school district, I point out that the Freedom of Information Law includes within its coverage records kept for an agency, as well as those in its physical possession. Therefore, if, for example, records are kept for the district at the offices of its consultant or attorney, they are district records falling within the scope of the Freedom of Information Law. In that event, the district's records access officer must either direct the person in possession of the records to disclose them in a manner consistent with law or obtain them so that he/she can review them to determine rights of access. The records access officer has the duty of coordinating the agency's response to requests for records.

If it is contended that records are neither kept by nor for an agency, you may seek a certification in writing in which such an assertion is made. Section 89(3) states in relevant part that an agency, on request, "shall certify that it does not have possession of such record or that such record cannot be found after diligent search."

Lastly, you asked whether "schools have their own set of rules iinvolving Board Meetings..." In this regard, boards of education constitute "public bodies" subject to the Open Meetings Law. That being so, they are generally required to comply with the same provisions as other public bodies, such as town boards, city councils, etc. In short, the Open Meetings Law is based on a presumption of openness. Stated differently, meetings of public bodies must be conducted open to the public, unless there is a basis for entry in to a closed or "executive" session. Section 105(1) of the Open Meetings Law specifies and limits the subjects that may properly be considered during an executive session.

I hope that I have been of assistance.

Robert J. Freeman
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From: Robert Freeman
To: [redacted]
Date: 8/14/2006 10:56:08 AM
Subject: Dear Ms. Johnston:

Dear Ms. Johnston:

I have received your letter and appreciate your kind words. It is gratifying to know that you find our website to be useful.

You have asked whether tape recordings of open meetings "are within the domain of FOIL." In this regard, first, a tape recording maintained by or for an agency, such as the governing body of a municipality, constitutes a "record" as that term is defined in §86(4) of the Freedom of Information Law. Second, since the comments captured on tape were made during a public proceeding, there would be no basis for denying a request to listen or copy a recording of an open meeting. Attached is an advisory opinion that deals with the question more expansively.

Your second question relates to minutes of an executive session conducted by a committee. Here I point out that minutes of executive session must be prepared only when action is taken during an executive session. If a matter is merely discussed but no action is taken, there is no obligation to prepare minutes of the executive session. It is also noted that minutes of executive session need not include material that may be withheld pursuant to the Freedom of Information Law.

Lastly, the Open Meetings Law is applicable to public bodies. A governing body of a municipality clearly constitutes a public body, and the definition of "public body" [see Open Meetings Law, §102(2)] includes any committee, subcommittee or similar body of such body that consists of two or more members. Therefore, for example, a county legislature with 11 members is a public body that would have a quorum of 6; if it designates a committee consisting of 3 of its members, the committee would be a public body with a quorum of 2.

With respect to your question, a committee that is a public body must abide by the same requirements imposed by the Open Meetings Law, such as those involving notice, openness, procedure for entry into executive session and the taking of minutes, as the governing body.

I hope that I have been of assistance.

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

FOIL-AO-4244

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August 14, 2006

E-MAIL

TO: Oksana Fuller

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. Fuller:

I have received your letter in which you raised a variety of questions relating to the Open Meetings Law and its implementation in the Town of Canandaigua.

First, you asked whether Town Board members are "allowed to attend" meetings of the Town Planning Board. You wrote that Town Board members who have attended "do not verbally participate in any discussions, nor do they make any comments." In this regard, §103 of the Open Meetings Law states that meetings of public bodies "shall be open to the general public." A "public body" is an entity consisting of at least two members that conducts public business and performs a governmental function (i.e., a town board, planning board, city council, board of education, etc.). From my perspective, members of town boards have the same right to attend planning board meetings as any member of the public. So long as town board members who attend meetings of other public bodies but do not function as a town board, I know of no valid reason for suggesting that they be excluded or discouraged from attending meetings of other public bodies.

Second and in a related vein, you asked whether "Town Board members [are] allowed to attend staff meetings where planning and zoning issues are discussed regarding development projects." Here I point out that the Open Meetings Law is applicable to meetings of public bodies. A "meeting" is a gathering of a majority of a public body for the purpose of conducting public business collectively, as a body. The staff meetings as you described them are not meetings of a public body and, therefore, the Open Meetings Law would not apply. That being so, the matter is beyond the advisory jurisdiction of this office. I note, however, that a Board member could recommend that the Board adopt a policy or rule on the subject.

Third, you referred to an executive session held to discuss changes in a zoning map, as well as changes made in the map by the Supervisor with Town engineers, following the executive session. In my opinion, there would have been no basis for discussing changes in the zoning map during an executive session. Section 105(1) of the Open Meetings Law specifies and limits the grounds for entry into executive session, and none in my opinion would have been applicable in consideration of the subject. Further, the Supervisor is one of five (or in some instances seven) members of the Town Board. In my view, the Supervisor could not take action unilaterally; only the Board, at a meeting, by means of an affirmative vote of a majority of the total membership may validly take action. As stated in §63 of the Town Law: "Every act, motion or resolution shall require for its adoption the affirmative vote of a majority of all the members of the town board."

I hope that I have been of assistance.

RJF:tt

cc: Town Board

STATE OF NEW YORK
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August 15, 2006

E-MAIL

TO: Robert Multer

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. Multer:

As you aware, I have received your letter concerning the ability of a public body to enter into executive session. Specifically, you raised the following question:

> "Is it permissable (sic) for a County to hold an executive session discussing personnel issues which involve lack of performance for individuals and as a result create additional positions for the departent (sic) with the vote to create the positions recorded and made available to the news media?"

If I understand the question correctly, there are two parts. The first pertains to a discussion concerning the performance of particular individuals, and the second to the creation of positions. For reasons to be offered in the following remarks, I believe that the former may properly be considered during an executive session, while the latter should be discussed in public.

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

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

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

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

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

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

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

When a discussion concerns matters of policy, such as the manner in which public money will be expended or allocated, the functions of a department, the creation or elimination of positions, or matters relating to the budget, I do not believe that §105(1)(f) could be asserted, even though the discussion may relate to "personnel". For example, if a discussion of possible layoffs relates to positions and whether those positions should be retained or abolished, the discussion would involve the means by which public monies would be allocated. In short, in order to enter into an executive session pursuant to §105(1)(f), I believe that the discussion must focus on a particular person (or persons) in relation to a topic listed in that provision. As stated judicially, "it would seem that under the statute matters related to personnel generally or to personnel policy should be discussed in public for such matters do not deal with any particular person" (Doolittle v. Board of Education, Supreme Court, Chemung County, October 20, 1981).

On the other hand, insofar as a discussion involves the performance of a particular person, as in the case of consideration of the deficiencies of a particular employee, I believe that an executive session may properly be held. In the situation you described, one issue would involve the employment history of a particular person or perhaps a matter leading to the discipline or removal of a particular person. To that extent, I believe that an executive session may properly be held. Insofar as consideration of creating a position is separate from the issue of performance, I do not

believe that there would be a basis for entry to executive session. However, insofar as the two issues cannot be segregated or discussed separately, I believe that §105(1)(f) would validly serve as a means of entering into executive session.

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

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

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

> reference to a 'personnel issue' is the functional equivalent of identifying 'a particular person'" [Gordon v. Village of Monticello, 620 NY 2d 573, 575; 209 AD 2d 55, 58 (1994)].

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

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
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August 16, 2006

E-MAIL

TO: Richard Abel

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. Abel:

We are in receipt of your request for an advisory opinion concerning town meetings, and whether they are required to be held within the town limits.

Ordinarily, we would advise that there is nothing in the Open Meetings Law that specifies that meetings of municipal boards must be conducted within the boundaries of the municipality. Although our authority is limited to rendering legal advice with respect to the Open Meetings Law, we point out that Town Law §62(2) requires that town board meetings shall be held within the town, as follows:

> "All meetings of the town board shall be held within the town at such place as the town board shall determine by resolution, except that where provision is made by law for joint meetings of two or more town boards such joint meetings may be held in any of the towns to be represented thereat."

On behalf of the Committee on Open Government we hope this is helpful to you.

CSJ:tt

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August 16, 2006

E-MAIL

TO: Wendy Lukas

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. Lukas:

As you are aware, I have received your letter concerning the propriety of an executive session held by the Schuylerville/Victory Board of Water Management. The minutes of the meeting indicate that a motion was made to enter into executive session to discuss "personnel issues." Following the executive session, motions were passed to approve a benefit package, a clothing allowance, and to reimburse an employee each month for the text messaging service expenses on his cell phone bills.

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

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

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

Second, although it is used frequently, the term "personnel" appears nowhere in the Open Meetings Law. Although one of the grounds for entry into executive session often relates to personnel matters, from my perspective, the term is overused and is frequently cited in a manner that

is misleading or causes unnecessary confusion. To be sure, some issues involving "personnel" may be properly considered in an executive session; others, in my view, cannot. Further, certain matters that have nothing to do with personnel may be discussed in private under the provision that is ordinarily cited to discuss personnel.

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

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

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

Assuming that the actions taken did not involve consideration of how well or poorly particular public employees were carrying out their duties, I do not believe that there would have been a basis for conducting an executive session.

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

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

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

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

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

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

I hope that I have been of assistance.

RJF:tt

cc: Schuylerville/Victory Board of Water Management

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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August 22, 2006

Mr. Clarence J. Williams
[redacted]

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

Dear Mr. Williams:

We are in receipt of your request for an advisory opinion concerning records maintained by the Lee Center Fire District and the Lee Center Fire Department. Before addressing issues raised with respect to access to records, in an effort to clarify the differences between fire districts and fire departments, we offer the following comments.

Based on General Construction Law §66 and Town Law §174(7), a fire district is a public corporation. The board of fire commissioners, the governing body of a fire district, is a publicly elected body, with all the rights and responsibilities inherent in governing the fire district as set forth in §176 of the Town Law, including the authority to audit and pay all claims against the fire district based on itemized vouchers. Pursuant to §176(11), fire departments and fire companies within the district may be subject to rules and regulations of a board of fire commissioners.

Records of fire districts are subject to the Freedom of Information Law, based on the statutory definition of "agency" (§86[3]), which includes public corporations. Unlike the records of a fire district, the records of a fire department or volunteer fire company are subject to the Freedom of Information Law based on a decision rendered by the state's highest court. In Westchester-Rockland Newspapers v Kimball (50 NYS2D 575 [1980]), the Court of Appeals, found that despite their status as not-for-profit corporations, volunteer fire companies are "agencies" subject to the Freedom of Information Law. Accordingly, records of both the Fire District and the Fire Department are subject to the Freedom of Information Law.

Town Law governs the nomination and appointment of fire department members to the offices of chief and assistant chief(s) of the fire department. It is our understanding, based on the statutory law, that officers of the governing body of a fire department or fire company, after having been nominated by the members of the fire department by ballot, are appointed to office by the board of fire commissioners pursuant to Town Law §176(11-a, 11-b and 11-c).

It appears that the records you requested, therefore may be maintained by either the Fire District or the Fire Department, or perhaps both. Specifically, you have requested the following records for the years 2003, 2004 and 2005:

> 1. A list of names of persons serving on the Board of Directors (Executive Board) of the Fire Department;
> 2. Copies of minutes of each Board of Directors (Executive Board) meeting of the Fire Department;
> 3. Copies of minutes of each meeting of the general membership of the Fire Department during which the membership voted to spend "2% insurance monies" received from the Board of Fire Commissioners;
> 4. Records reflecting how much "2% insurance money" was received by the Fire Department from the Board of Fire Commissioners, and to whom it was paid, including a copy of the disbursement check(s);
> 5. A copy of the record which reflects the total amount of money received through the Fire Department's annual fund drive;
> 6. A copy of the record which reflects the total amount of money raised by Bingo;
> 7. A copy of the record which reflects the total amount of money raised by Bell-Jar;
> 8. A copy of the record which reflects the total amount of money raised by 50-50 sales, how such money was disbursed and "proof of approval to conduct 50-50 activity."

From our perspective, insofar as the records requested exist, they must be disclosed. If both the District and the Department maintain any of the requested records, each is required to disclose them. Further, in consideration of the representations by the Department's attorney, Mr. Bradley Pinsky, that the Department does not maintain minutes of meetings of its Board of Directors, pursuant to §107 of the Open Meetings Law, we believe that a court could determine that any and/or all actions taken at such meetings are void. In this regard, we offer the following comments.

First, the Freedom of Information Law is expansive in its coverage, for it pertains to all agency records. Section 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."

Based on the foregoing, the kinds of materials that you requested that are maintained by or for the Fire Department or the Fire District, irrespective of their origin or function, in our view, clearly constitute "records" that fall within the coverage of the Freedom of Information Law.

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

While one of the grounds for denial is relevant to an analysis of rights of access, due to its structure, we believe that it requires disclosure of the kinds of records in which you are interested. Section 87(2)(g) permits an agency to withhold records that:

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

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

The records that you are seeking would constitute "inter-agency or intra-agency" materials. However, we believe that they must be disclosed, for they would appear to consist of "statistical or factual tabulations or data" available under §87(2)(g)(i).

With respect to your request for a list of the names of those persons serving on the Board of Directors or the governing body of the Fire Department, we believe the record must be disclosed for the following reasons.

With certain exceptions, the Freedom of Information Law does not require an agency to create records. Section 89(3) of the Law states in relevant part that:

> "Nothing in this article [the Freedom of Information Law] shall be construed to require any entity to prepare any record not in possession or maintained by such entity except the records specified in subdivision three of section eighty-seven..."

However, a list of every officer and their office addresses is included among the records required to be kept pursuant to "subdivision three of section eighty-seven" of the Law. Specifically, that provision states in relevant part that:

> "Each agency shall maintain...
>
> (b) a record setting forth the name, public office address, title and salary of every officer or employee of the agency... "

As such, a record that identifies all officers or employees by name, public office address, title and salary must be prepared to comply with the Freedom of Information Law. Further, even if those persons of your interest are not paid, such as the members of governing bodies, it is difficult to imagine that there is no record including their identities, or the identities of the members of a volunteer fire company. 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.

Although by failing to respond to your request for records, the Fire District engaged in a constructive denial of access, the Fire Department denied access to a list of names of those holding office in the Fire Department "as they may not be solicited". This appears to be based on §89(2)(b)(iii) of the Freedom of Information Law, which permits an agency to withhold "lists of names and addresses if such lists would be used for commercial or fund-raising purposes," on the ground that disclosure would constitute an unwarranted invasion of personal privacy.

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

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

Farbman pertained to a situation in which a person involved in litigation against an agency requested records from that agency under the Freedom of Information Law. In brief, it was found that one's status as a litigant had no effect upon that person's right as a member of the public when using the

Freedom of Information Law, irrespective of the intended use of the records. Similarly, unless there is a basis for withholding records in accordance with the grounds for denial appearing in §87(2), the use of the records, is ordinarily irrelevant.

The only exception to the principles described above involves the protection of personal privacy. By way of background, §87(2)(b) of the Freedom of Information Law permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." Further, §89(2)(b) of the Law provides a series of examples of unwarranted invasions of personal privacy, one of which pertains to:

> "sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes" [§89(2)(b)(iii)].

This provision represents what might be viewed as an internal conflict in the law. As indicated earlier, the status of an applicant or the purposes for which a request is made are irrelevant to rights of access, and an agency cannot inquire as to the intended use of records. Due to the language of §89(2)(b)(iii), however, rights of access to a list of names and addresses, or equivalent records, may be contingent upon the purpose for which a request is made [see Federation of NYS Rifle and Pistol Clubs, Inc., v. New York City Police Department, 73 NY 2d 92 (1989); Scott, Sardano & Pomeranz v. Records Access Officer of Syracuse, 65 NY 2d 294, 491 NYS 2d 289 (1985); Goodstein v. Shaw, 463 NYS 2d 162 (1983)].

In a case involving a list of names and addresses in which the agency inquired as to the purpose of which the list was requested, it was found that an agency could make such an inquiry. Specifically, in Golbert v. Suffolk County Department of Consumer Affairs (Supreme Court, Suffolk County, September 5, 1980), the Court cited and apparently relied upon an opinion rendered by this office in which it was advised that an agency may appropriately require that an applicant for a list of names and addresses provide an indication of the purpose for which a list is sought.

In your case, however, you have only sought a list of the names of officers of the Fire Department. Based on your familiarity with the members and officers of the Fire Department and the Fire District and the issues you are raising with respect to the election of officers within the Fire Department, it appears clear that your request is not made for either a commercial or fund-raising purpose.

Further, from our perspective, the provision dealing with lists of names and addresses is intended to enable agencies to withhold lists that would be used to solicit individuals at their residences. In the case of this record, however, the residence address would not be included; rather the record would include the "public office address", the location where public employees or members of a fire company carry out their governmental duties. In our view, there is nothing "personal" or intimate about their work location and that kind of information should be made available on request.

With respect to the Fire Department's denial of your request for copies of minutes reflecting certain actions taken by the Board of Directors of the Fire Department, we note that §106 of the Open Meetings Law requires the production of minutes and provides direction concerning the contents of minutes and the time within which they must be prepared and disclosed. Specifically, that provision states that:

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

Based upon the foregoing, minutes must be prepared and made available within two weeks of meetings.

Since its enactment in 1974, the Freedom of Information Law has included an "open vote" requirement. Section 87(3)(a) states that "[e]ach agency shall maintain a record of the final vote of each member in every agency proceeding in which the member votes." Therefore, in each instance in which a public body, such as the governing body of the Fire Department or the Board of Commissioners of the Fire District, takes action, a record must be prepared specifying the manner in which each member cast his or her vote. Typically, the record of votes appears in minutes of meetings.

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."

In short, despite Mr. Pinky's assertion, to comply with law, minutes of meetings must be prepared and made available.

On behalf of the Committee on Open Government, we hope this is helpful to you. We have issued at least one other advisory opinion with respect to the Lee Center Fire Department, a copy of which is enclosed for your information.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

Enc.

cc: Mr. Pinsky
Hon. Eliot Spitzer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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August 24, 2006

E-MAIL

TO: Dan Kuchta

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. Kuchta:

I have received your letter in which you raised questions concerning the application of the Freedom of Information and Open Meetings Laws.

You wrote that the government of the town in which you reside is a member of a private organization, the local chamber of commerce ("the COC"). If the Town "has a paid membership...and these dues were paid using Town funds," you asked whether that would "entitle residents of the Town to be able to access any records related to the Town's involvement" in the COC. You also asked whether "[i]f more than 3 Town board members attend a COC meeting, does this constitute a quorum?"

In this regard, I offer the following comments.

First, the Freedom of Information Law applies to agencies, and §86(3) defines the term "agency" to mean:

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

Based on the foregoing, an agency typically is an entity of state or local government, such as a town; not-for-profit and other corporate entities are generally not subject to the Freedom of Information Law. In my view, the COC clearly does constitute an agency and, therefore, is not required to comply with the Freedom of Information Law.

Second, and notwithstanding COC's status under the Freedom of Information Law, records pertaining to it may nonetheless be available. That statute is applicable to agency records, and §86(4) defines the term "record" expansively to include:

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

Due to the breadth of the definition, when records involving the COC or the Town's relationship with the COC come into the possession of a Town official in his or her capacity as such, in my opinion, they constitute agency records that fall within the coverage of the Freedom of Information Law.

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

Next, the presence of three or more members of the Town Board at a COC meeting may or may not constitute a Town Board meeting, depending on the facts associated with their presence. The issue relates to the Open Meetings Law, which pertains to meetings of public bodies, and §102(1) of the Open Meetings Law defines the term "meeting" to mean "the official convening of a public body for the purpose of conducting public business". The definition of "meeting" has been broadly interpreted by the courts, and 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, collectively, as a body, for the purpose of conducting public business, such a gathering would, in my opinion, constitute a meeting subject to the requirements of the Open Meetings Law. However, if there is no intent that a majority of public body gather for purpose of conducting public business, as a body, but rather for the purpose of gaining education, or to listen to a speaker as part of an audience or group, I do not believe that the Open Meetings Law would be applicable.

Analogous questions have arisen in the past, and in some instances, the manner in which members of public bodies are situated suggests whether a meeting is being held. If a majority of the Town Board attending a COC meeting sits at a dais or table together in the front of the room and functions as the Board, I believe that it would be conducting a "meeting" that falls within the coverage of the Open Meetings Law. On the other hand, if Board members are merely attendees,

and not functioning as a body, in my view, their presence would not constitute a "meeting." Similarly, if one Board member is sitting at one table, a second member sits at a different table, and a third is situated apart from the other two, the three Board members clearly would not be functioning as a body, and again, the Open Meetings Law in my opinion would not apply.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
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August 25, 2006

Ms. Beth Braun
[redacted]

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

Dear Ms. Braun:

I have received your letter concerning a gathering attended by six members of the City of Syracuse Common Council "prior to the special session meeting that was held on Thursday, June 22, 2006 for the Settlement Agreement regarding the Destiny USA project." You wrote that it "is [your] understanding that a meeting with city councilors in one room constitutes a 'quorum' which means it is by law 'open to the public'", and you "assure[d] [me] that it was not." You asked that I "investigate these accusations."

It is noted at the outset that the Committee on Open Government is authorized by §109 of the Public Officers Law to "issue advisory opinions" relating to the Open Meetings Law; the Committee has neither the authority nor the resources to conduct what might be characterized as an "investigation." Nevertheless, based on your letter and related materials, I offer the following comments.

First, it is my understanding that the Common Council consists of ten members. That being so, a quorum, according to §41 of the General Construction Law entitled "Quorum and majority", would be six. Based on that provision as well as §102(2) of the Open Meetings Law, the Common Council clearly constitutes a "public body" required to comply with that statute.

Second, the primary issue is whether the gathering of the six members of the Council constituted a "meeting" of a public body that fell within the coverage of the Open Meetings Law. In this regard, 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 Common Council is present to discuss City business, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law.

Next, every meeting of a public body must be preceded by notice given in accordance with §104 of the Open Meetings Law. That provision states that:

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

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

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

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

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

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

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

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

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

Therefore, when a majority of the Council reaches a "consensus" 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

cc: Common Council

STATE OF NEW YORK
DEPARTMENT OF STATE
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August 28, 2006

E-MAIL

TO: Barbara Humphrey

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. Humphrey:

As you are aware, I have received your letter and news media accounts pertaining to a meeting of the Syracuse Industrial Development Agency (SIDA) held on July 5. You wrote that "SIDA failed to give proper notice of its meeting, held the meeting in an unusual location, and failed to alert all of its members of the meeting", and you asked that "the conduct of SIDA be investigated."

In this regard, §109 of the Open Meetings Law (Public Officers Law, Article 7) authorizes the Committee on Open Government to prepare advisory opinions. The Committee has neither the jurisdiction nor the resources to conduct what might be characterized as an "investigation." Nevertheless, based on your comments and the news articles that you forwarded, I offer the following comments.

According to an article appearing in the *Post-Standard* on July 6:

> "Late Tuesday evening, a notice from Economic Development director David Michel was faxed to members of the Syracuse Industrial Development Agency, an unelected board appointed by Driscoll. The notice said a 'special' meeting of the agency's board would be held at 11 a.m. the next day.
>
> The meeting would not be held at its usual location Common Council chambers on the third floor of City Hall. Instead, SIDA met in the less-conspicuous conference room of the Office of Community Development on the sixth floor of City Hall Commons a building kitty-corner to City Hall.

> Notice of the meeting was not faxed to news outlets until 7:25 a.m. Wednesday. No phone calls were made or e-mails sent.
>
> Vito Sciscioli, one of the five members of the agency, saw the fax sent to him on the holiday at 8 a.m. Wednesday..."

The article also referred to a "briefing" that began an hour before the meeting "to learn what the last-minute meeting was all about", and one of the members, Vito Sciscioli, said, in the words of the *Post-Standard*, that "To avoid having a quorum of the agency present and thus making the briefing public under the state Open Meetings Law board member E. Carlyle Smith was briefed separately." It was also reported, identifying each of the five members of SIDA, that:

> "Only Sciscioli, Davis and Smith attended the agency's meeting. Bright did not receive notice of the meeting and did not learn about it until after it was over. The board's only other member, real estate investor, Gary Pickard, was in Watertown."

During the 11 a.m. meeting that followed the briefing, "The three board members unanimously approved three resolutions implementing the new tax deal part of an agreement that would not be subject to the council's approval", referring to the City of Syracuse Common Council.

"Bright" is Terri Bright, who had served as the City's Corporation Counsel. In a July 9 article, it was reported that Mayor Matt Driscoll appeared "in Terri Bright's kitchen early Wednesday", July 5, the day of the SIDA meeting. Although the article indicates that the Mayor "said he handed her a notice of the development agency meeting when he arrived at her house", Bright "said she later found the folded paper on her dining room table." She added that, "Even if she had known where and when the development agency was meeting Wednesday, she would not have gone".

In an article of July 8 concerning the meeting of July 5, it was reported that an attorney retained by SIDA "said quick approval" was needed, but thereafter "acknowledged that the city faced no immediate court deadline, penalty or fines if it had waited three days as required under the open meetings law."

There are several issues involving the Open Meetings Law that relate to the scenario described in the preceding remarks.

First, the provisions concerning industrial development agencies are found in Article 18-A of the General Municipal Law, and §856(2) of the General Municipal Law states in part that an industrial development agency "shall be a corporate governmental agency, constituting a public benefit corporation." A public benefit corporation is a "public corporation" as that term is defined by §66(1) of the General Construction Law. Further, §856(3) of the General Municipal Law states that a majority of the members of an industrial development agency "shall constitute a quorum."

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

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

Based upon the foregoing, it is clear in my view that the members of an industrial development agency constitute a "public body" subject to the Open Meetings Law, for they perform a governmental function for a public corporation. Moreover, §926 of the General Municipal Law established the Syracuse Industrial Development Agency and states that it is "a body corporate and politic", that its members "shall be appointed by the Mayor body of the City of Syracuse", and that it is governed by the provisions of Article 18-A of the General Municipal Law.

Third, from my perspective, a public body, such as a SIDA, may validly conduct a meeting or carry out its authority only at a meeting during which a majority of its members has physically convened or during which a majority has convened by means of videoconferencing, and even then, only when reasonable notice is given to all of the members.

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

Based upon the direction given by the courts, if a majority of the SIDA gathers to discuss public business, collectively as a body and in their capacities as Agency members, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings 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 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" (emphasis added).

Based on the foregoing, again, a valid meeting may occur only when a majority of the total membership of a public body, a quorum, has "gathered together in the presence of each other or through the use of videoconferencing." Only when a quorum has convened in the manner described in §41 of the General Construction Law would a public body have the authority to carry out its powers and duties. Consequently, it is my opinion that a public body may not take action or vote unless reasonable notice is given to all the members. If that does not occur, even if a majority is present, I do not believe that a valid meeting could be held or that action may validly be taken.

In the context of the facts as described in the news articles, a key question is whether "reasonable notice" was given to all of the members. If a court were to determine that reasonable notice was not given to Ms. Bright, I believe that it would, of necessity, find that the gathering of July 5 was not validly held, and that action purportedly taken at that gathering is a nullity and of no effect.

Next, separate from the notice requirement involving the members of a public body and §41 of the General Construction Law are those imposed by the Open Meetings Law. Section 104 of that statute provides that:

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

Stated differently, if a meeting is scheduled at least a week in advance, notice of the time and place must be given to the news media and to the public by means of posting in one or more designated public locations, not less than seventy-two hours prior to the meeting. If a meeting is scheduled less than a week an advance, again, notice of the time and place must be given to the news media and

posted in the same manner as described above, "to the extent practicable", at a reasonable time prior to the meeting. Although the Open Meetings Law does not make reference to "special" or "emergency" meetings, if, for example, there is a need to convene quickly, the notice requirements can generally be met by telephoning or faxing notice of the time and place of a meeting to the local news media and by posting notice in one or more designated locations.

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

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

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

Lastly, 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, one might interpret the passage quoted above to mean that, 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 was an intent to circumvent the Open Meetings Law in the context of the situation of your concern, it is possible that a court would find that the Open Meetings Law has been infringed.

I hope that I have been of assistance.

RJF:tt

cc: Syracuse Industrial Development Agency

OML-AO-4125

From: Janet Mercer
To: Joseph Cerrone
Date: 8/30/2006 3:46:05 PM
Subject: Re: open meetings

Dear Mr. Cerrone:

I have received your email in which you asked whether the Open Meetings Law applies to the boards that govern condominiums.

In this regard, §102(3) of the Open Meetings Law defines the term "public body" to mean:

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

Since the condominium boards are not governmental entities and do not perform a governmental function, those boards, in my view, would not be subject to the Open Meetings Law.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director

Committee on Open Government
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[redacted]

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4252

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August 31, 2006

Hon. Alphonso Lanzetta
Supervisor
Town of Marlborough
1650 Route 9W
Milton, NY 12547

The staff of the Committee on 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 Lanzetta:

I have received your letter and the materials attached to it. You asked for my views concerning the validity of a special meeting held by the Marlborough Town Board in consideration of questions raised by Mr. Joseph Amodeo. You also requested correspondence that this office has received from Mr. Amodeo, as well as any responses to him.

In this regard, although I recall having spoken with Mr. Amodeo, I do not remember the details of our conversation. Further, having reviewed our files, we have not received a request for a written advisory opinion, and none has been prepared. If we have received other materials from Mr. Amodeo, because our correspondence is filed chronologically, we cannot locate them with reasonable effort without an approximate date or time period during which he might have written to this office.

With respect to the special meeting, as I understand the situation, it was originally scheduled to begin at 6:30 on June 1. Due to a conflict, the meeting time was changed to 5:30. You wrote that:

> "The deputy supervisor advised the Town Clerk to post the change and notify the media. The public posting was done, but the Clerk assumed, since the official newspaper was past publication date, that she didn't have to call them. Regardless, the fact remains, that a local reporter was on hand, at the state of the meeting, to record all action taken at the meeting."

In consideration of the foregoing, I offer the following comments.

First, there are two statutes that relate to notice of special meetings held by town boards. The phrase "special meeting" is found in §62(2) of the Town Law. That provision, from my perspective, deals with unscheduled meetings, rather than meetings that are regularly scheduled, and states in relevant part that:

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

The provision quoted above pertains to notice given to members of a town board, and the requirements imposed by §62 are separate from those contained in the Open Meetings Law.

Section 104 of the Open Meetings Law provides that:

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

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

Second, because the Town Clerk mistakenly did not provide notice to the news media, I point out that §107(1) of the Open Meetings Law states in part that:

> "Any aggrieved person shall have standing to enforce the provisions of this article against a public body by the commencement of a proceeding pursuant to article seventy-eight of the civil practice law and rules, and/or an action for declaratory judgment and injunctive

> relief. In any such action or proceeding, the court shall have the power, in its discretion, upon good cause shown, to declare any action or part thereof taken in violation of this article void in whole or in part."

However, the same provision states further that:

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

As such, when a legal challenge is initiated relating to a failure to provide notice, a key issue is whether a failure to comply with the notice requirements imposed by the Open Meetings Law was "unintentional". That appears to have been so in this instance. Further, you wrote that a member of the news media was present at the meeting.

Lastly, there is nothing in the Open Meetings Law or any other law of which I am aware that deals specifically with agendas. While many public bodies prepare agendas, the Open Meetings Law does not require that they do so. Similarly, the Open Meetings Law does not require that a prepared agenda be followed. Therefore, I know of no law that would have prohibited the Town Board from discussing or acting upon matters that were not referenced in an agenda.

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-4253

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August 31, 2006

E-MAIL

TO: Gale Hatch

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. Hatch:

I have received your letter in which you asked whether a village board may "hold an executive session to discuss a particular commission or commissioner in the village." You wrote that commissioners are volunteers, and asked whether they may be "subject to discipline, demotion or removal as are employees."

In this regard, as you may be aware, a public body, such as a village board of trustees, must conduct its meetings in public, unless there is a basis for entry into executive session. Section 105(1) specifies and limits the grounds for entry into executive session, and pertinent to the matters you raised is paragraph (f). That provision 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."

I do not believe that an executive session could be held under §105(1)(f) to discuss a particular commission. The focus in that situation would not involve any "particular person." However, in my view, that provision would justify entry into executive session to discuss a particular commissioner in relation to one or more of the qualifiers expressed in its terms. It is possible, for example, that a commissioner's medical history might be considered in relation to his/her capacity to perform the duties inherent in the position; if there is a possibility of a conflict of interest, a commissioner's financial history may be discussed; if a commissioner is not performing his/her duties appropriately, it is likely that the appointing body may have the authority to remove that

person from a commission. In each of those instances, I believe that §105(1)(f) of the Open Meetings Law could be cited justifiably for entry into executive session.

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

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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September 1, 2006

Ms. Claire McKeon
[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. McKeon:

As you are aware, I have received your letter concerning "FOIL / E- Mails." Having requested email communications sent between school board members and administration during certain dates, you wrote that you "received 8 copies of e-mails from Administration to the Board, no e-mails between Board members and no written explanation as to why [your] request in essence has been denied." It is your belief that the Board "has been conducting business via e-mail" and "that is a violation of law." You have asked what recourse there may be.

In this regard, although the subject of access to email communications between board members was addressed in an opinion sent to you on August 14, I offer the following additional comments.

First and perhaps most significantly, the scope of the Freedom of Information Law is expansive, for it encompasses all government agency records within its coverage. Section 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, documentary materials need not be in the physical possession of an agency, such as a school district, to constitute agency records; so long as they are produced, kept or filed for an agency, the law specifies and the courts have held that they constitute "agency records", even if they are maintained apart from an agency's premises.

In a decision rendered by the Court of Appeals, the state's highest court, it was found that materials received by a corporation providing services for a branch of the State University pursuant to a contract were kept on behalf of the University and constituted agency "records" falling within the coverage of the Freedom of Information Law. It is emphasized 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)].

Also pertinent is the first decision in which the Court of Appeals dealt squarely with the scope of the term "record", in which the matter involved documents pertaining to a lottery sponsored by a fire department. Although the agency contended that the documents did not pertain to the performance of its official duties, i.e., fighting fires, but rather to a "nongovernmental" activity, the Court rejected the claim of a "governmental versus nongovernmental dichotomy" and found that the documents constituted "records" subject to rights of access granted by the Law. Moreover, the Court determined that:

> "The statutory definition of 'record' makes nothing turn on the purpose for which it relates. This conclusion accords with the spirit as well as the letter of the statute. For not only are the expanding boundaries of governmental activity increasingly difficult to draw, but in perception, if not in actuality, there is bound to be considerable crossover between governmental and nongovernmental activities, especially where both are carried on by the same person or persons" [Westchester-Rockland Newspapers v. Kimball, 50 NY2d 575, 581 (1980)].

The point made in the final sentence of the passage quoted above appears to be especially relevant, for there may be "considerable crossover" in the activities of board members. In my view, when board members communicate with one another in writing, in their capacities as board members, any such communications constitute agency records that fall within the framework of the Freedom of Information Law.

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

> "...the procedure permitting an unreviewable prescreening of documents - which respondents urge us to engraft on the statute - could be used by an uncooperative and obdurate public official or agency to block an entirely legitimate request. There would be no way to prevent a custodian of records from removing a public record

> from FOIL's reach by simply labeling it 'purely private.' Such a construction, which would thwart the entire objective of FOIL by creating an easy means of avoiding compliance, should be rejected" (id., 254).

Any "prescreening" of records to determine whether they fall within the coverage of the Freedom of Information Law would, in my view, conflict with the clear direction provided by the Court of Appeals and the language of the law itself.

Moreover, the definition of the term "record" also makes clear that email communications between or among board members fall within the scope of the Freedom of Information Law. Based on its specific language, if information is maintained by or for an agency in some physical form, it constitutes a "record" subject to rights of access conferred by the Freedom of Information Law. The definition includes specific reference to computer tapes and discs, and it was held soon after the reenactment of the statute that "[i]nformation is increasingly being stored in computers and access to such data should not be restricted merely because it is not in printed form" [Babigian v. Evans, 427 NYS2d 688, 691 (1980); aff'd 97 AD2d 992 (1983); see also, Szikszay v. Buelow, 436 NYS2d 558 (1981)]. Whether information is stored on paper, on a computer tape, or in a computer, it constitutes a "record." In short, email is merely a means of transmitting information; it can be viewed on a screen and printed, and I believe that the email communications at issue must be treated in the same manner as traditional paper records for the purpose of their consideration under the Freedom of Information Law.

The foregoing is not intended to suggest that the email communications that you requested must be disclosed in their entirety. As indicated in the earlier opinion, like other records, the content of those communications is the primary factor in ascertaining rights of access.

When records falling within the scope of a request are denied, the agency is required to inform the applicant of the denial in writing and of his/her right to appeal the denial [see Freedom of Information Law, §89(3) and (4); 21 NYCRR §1401.7]. Further, 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 may seek such a certification.

Second, with respect to "conducting business via e-mail", I direct your attention to the Open Meetings Law. There is nothing in that statute that would preclude members of a public body, such as a board of education, from conferring individually, by telephone, via mail or e-mail. However, a series of communications between individual members or telephone calls among the members which results in a collective decision, a meeting or vote held by means of a telephone conference, by mail or e-mail would in my opinion be inconsistent with law.

From my perspective, voting and action by a public body may be carried out only at a meeting during which a quorum has physically convened, or during a meeting held by

videoconference. It is noted that the Open Meetings Law pertains to public bodies, and §102(2) defines the phrase "public body" to mean:

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

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

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

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

The provisions in the Open Meetings Law concerning videoconferencing are newly enacted (Chapter 289 of the Laws of 2000), and in my view, those amendments clearly indicate that there are only two ways in which a public body may validly conduct a meeting. 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 first 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..."

More recently, the Appellate Division confirmed that a valid meeting cannot be held by telephonic means and that a member of a public body cannot vote by use of the telephone [see Town of Eastchester v. NYS Board of Real Property Services, 23 AD3d 485 (2005)].

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

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

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
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September 5, 2006

Ms. Jo Moseley-Wall
[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. Moseley-Wall:

I have received your letter in which you raised issues concerning the Village of Naples' authority to limit your ability to speak at meetings of the Board of Trustees, and an unanswered request made under the Freedom of Information Law.

As I understand the situation, members of the public in the past could be placed on the agenda for the purpose of addressing the Board, but that practice was recently changed. It unclear from your letter whether the new practice was the result of action taken unilaterally by the Mayor, or whether action was taken by the Board. In this regard, I offer the following comments.

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

Although public bodies have the right to adopt rules to govern their own proceedings, the courts have found in a variety of contexts that such rules must be reasonable. By means of example, in a decision rendered in 1963 concerning the use of tape recorders, it was found that the presence of a tape recorder, which then was a large and obtrusive device, would detract from the deliberative process and that, therefore, a policy prohibiting its use was reasonable [Davidson v. Common Council, 40 Misc.2d 1053]. However, when changes in technology enabled the public to use portable, hand-held tape recorders, it was found that their use would not detract from the deliberative

process, because those devices were unobtrusive. Consequently, it was also determined that rules adopted by public bodies prohibiting their use were unreasonable [People v. Ystueta, 99 Misc.2d 1105 (1979); Mitchell v. Board of Education of the Garden City Union Free School District, 113 AD 2d 924 (1985). Specifically, in Mitchell, it was held that: "While Education Law §1709(1) authorizes a board of Education to adopt by laws and rules for its government and operations, this authority is not unbridled. Irrational and unreasonable rules will not be sanctioned."

If, for example, the Board adopted a rule or policy indicating that members of the public could be placed on the agenda if they request to do so within a specific time prior to a meeting, such a rule would, in my view, be valid, so long as it applied equally to everyone. Similarly, in the context of the situation that you described, I believe that the Board could have authorized you to give a speech for whatever length it chose; I do not believe, however, that you would have had the right to do so. Further, if the Board's new practice permits those in attendance to speak for up to three minutes or some other particular time period, and if that practice is carried out uniformly, the Board in my opinion would have the authority to do so.

Considering the matter from a different vantage point, it is unlikely that the Mayor has the authority to adopt policy or rules unilaterally. Pertinent to the matter are requirements involving a quorum and the ability to take action. Specifically, §41 of the General Construction Law 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 on exercised by them jointly or as a board or similar body, a majority of the whole number of such persons or officers, at a meeting duly held at a time fixed by law, or by any by-law duly adopted by such board or body, or at any duly adjourned meeting of such meeting, or at a any meeting duly held upon reasonable notice to all of them, shall constitute a quorum and not less than a majority of the whole number may perform and exercise such power, authority or duty. For the purpose of this provision the words 'whole number' shall be construed to mean the total number which the board, commission, body or other group of persons or officers would have were there no vacancies and were one of the persons or officers disqualified from acting."

Based upon the foregoing, in order to carry a motion or take action, there must be an affirmative vote of a majority of the total membership of a public body. In addition, when the Open Meetings Law is read in conjunction with §41 of the General Construction Law, I believe that action may be taken only at a meeting during which a majority of the total membership of a public body is present.

In my view, unless there is some statutory basis to do so, the Mayor has no authority to render a decision or make policy unilaterally. Policy can be made by the Board only by means of a majority vote of its total membership taken at a meeting conducted in accordance with the Open Meetings Law.

Second, with respect to your request for a "decibel rating of the fire siren," if such a record exists, I believe that it must be disclosed. As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, none of the grounds for denial of access would enable the Village to deny such a record, if it exists.

Next, 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, 2005 (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 note that on August 16, 2006, Governor Pataki signed into law, effective immediately, legislation that broadens the authority of the courts to award attorney's fees (hereafter referenced "attorneys fees") when government agencies fail to comply with the Freedom of Information Law (S. 7011-A, Chapter 492). Under the amendments, when a person initiates a judicial proceeding under the Freedom of Information Law and substantially prevails, a court has the discretionary authority to award costs and reasonable attorney's fees when the agency had no reasonable basis for denying access to records, or when the agency failed to comply with the time limits for responding to a request.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Trustees

OML-AO- 4256

From: Robert Freeman
To: Ann Leber
Date: 9/26/2006 3:03:53 PM
Subject: Town Board Work Sessions

Dear Ann - -

I do not believe that your understanding is accurate. The phrase "work session" does not appear in any provision of law. The phrase typically refers to a gathering of a public body, such as a town board, held for the purpose of discussion only, and with no intent to take action. However, it was determined by the courts years ago that a work session is a "meeting" subject to the Open Meetings Law in all respects. That being so, unless a public body adopts rules or procedures to the contrary, there is no distinction between a work session and a meeting.

With respect to public participation, the Open Meetings Law is silent on the issue. That being so, a public body is not required to permit the public to speak at meetings. It may choose to do so, and if it does, it has been advised that it should adopt reasonable rules that treat members of the public equally. If a board wants to preclude public participation during its so-called work sessions, it may do so.

Again, unless a public body adopts a rule to the contrary, it may vote during work sessions.

And finally, the Open Meetings Law contains minimum requirements concerning the contents of minutes. According to §106, minutes must consist of a record or summary of motions, proposals, resolutions, action taken and the vote of the members. If none of those events occurs at a work session, technically, there need not be minutes. On the other hand, if any of those events do occur, minutes must be prepared.

Attached is an advisory opinion dealing with the issue more expansively.

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

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

OML-AO-4257

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September 11, 2006

Ms. Grace Searby
[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. Searby:

We are in receipt of your request for an advisory opinion concerning application of the Open Meetings Law to a meeting of the Oyster Bay-East Norwich Central School District on June 6, 2006. In your request you present various items of information which may not pertain to that meeting, all of which we will attempt to address. First, you described the Vice President's characterization of the meeting as "an Audit Committee Meeting and all Board members comprise this committee" and inquired as to the appropriateness of an executive session held, as the Superintendent indicated, "to discuss new accounting procedures". And finally, the agenda that you submitted reflects a meeting of the Board with reference to an executive session for "Audit Committee". In this 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 June 6th gathering that you described, once a quorum of the Board had convened, which would presumably involve a gathering of four of the seven school board members, the gathering in our view constituted a meeting of the Board, and the Open Meetings Law would have applied.

Second, as recently defined in §2116-c of the Education Law (L. 2005, Chap. 263), audit committees, in our opinion, are public bodies and may enter into executive session only for enumerated purposes set forth in Open Meetings Law §105(1)(a) through (h) and Education Law, §2116-c(5)(b), (c) and (d). In addition to the presumption that the Open Meetings Law applies as set forth in the statute, 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 itself constitutes a "public body."

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

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

Due to the determination rendered in Daily Gazette, supra, which was in apparent conflict with the stated intent of the sponsor of the legislation, a series of amendments to the Open Meetings Law 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)]. Here, the Audit Committee is made up entirely of Board members.

Further, we believe that the Legislature intended the Open Meetings Law to apply against audit committees based on the language contained in Education Law §2116-c(7), which provides as follows:

> "7. Notwithstanding any provision of article seven of the public officers law or any other law to the contrary, a school district audit committee may conduct an executive session pursuant to section one hundred five of the public officers law pertaining to any matter set forth in paragraphs b, c, and d of subdivision five of this section."

In our opinion, this language presumes the applicability of Article 7 of the Public Officers Law, known as the Open Meetings Law, and creates additional grounds for entry into executive session for use by audit committees only.

With respect to your questions concerning executive session, as you may be aware, the Open Meetings Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Section 105(1) states in relevant part that:

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

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

The additional grounds for entry into executive session as created by Education Law §2116-c are as follows:

> "5. ... to (b) meet with the external auditor prior to commencement of the audit;
>
> (c) review and discuss with the external auditor any risk assessment of the district's fiscal operations developed as part of the auditor's responsibilities under governmental auditing standards for a financial statement audit and federal single audit standards if applicable;
>
> (d) receive and review the draft annual audit report and accompanying draft management letter and, working directly with the external auditor, assist trustees or board of education in interpreting such documents;...."

It has been held judicially that :

> "...the public body must identify the subject matter to be discussed (See, Public Officers Law § 105 [1]), and it is apparent that this must

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

In sum, it is reiterated that the Audit Committee may validly conduct an executive session only to discuss one or more of the subjects listed in Open Meetings Law §105(1) or Education Law §2116-c(5)(b), (c) or (d), and that a motion to conduct an executive session must be sufficiently detailed to enable the public to know that there is a proper basis for entry into the closed session. A discussion of new or proposed accounting procedures, in our opinion, is not one of the permitted topics of discussion for executive session. Very simply, the subject matter of a discussion of that nature would not fall within any of the grounds under which an audit committee may enter into an executive session.

You further inquired as to the availability of minutes from the executive session. 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)]. Only in rare instances may a board of education take action during an executive session. 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.

Further, we note that the Board's by-laws indicate that "Matters discussed in executive sessions must be treated as confidential; that is, never discussed outside of that executive session." Because a meeting of the Audit Committee is a meeting of a public body, and because, if we have understood the facts correctly, there was no basis for entering into executive session, it is our opinion that this by-law would not have applied.

Finally, please note that while the Committee on Open Government is authorized to issue advisory opinions concerning application of the Open Meetings Law, this office has no authority to enforce the law or compel an entity to comply with the statutory provisions. The enforcement mechanism within the Open Meetings Law, §107(1), states in part that:

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

On behalf of the Committee on Open Government we hope this is helpful to you. At your request, a copy of this opinion will be sent to the Superintendent.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

cc: Phyllis Harrington, Superintendent

STATE OF NEW YORK
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September 12, 2006

Ms. Carole A. Dwyer
[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. Dwyer:

I have received your correspondence in which you indicated that are a newly elected member of the LaFayette Central School District Board of Education and raised a series of questions. As you may be aware, the advisory jurisdiction of the Committee on Open Government relates to matters involving access to and the disclosure of government information. Insofar as your questions pertain to those matters, I offer the following remarks.

In your initial communication you referred to a "scheduled executive work session, part of a scheduled district retreat." The terms "work session" and "retreat" are not found in any aspect of the Open Meetings Law or any other statute of which I am aware, and the issue, in short, is whether the gathering in question constituted a "meeting" that fell within the coverage of the Open Meetings Law.

By way of background, the Open Meetings Law applies to meetings of public bodies, and a board of education clearly constitutes a public body required to comply with that statute. Section 102(1) 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, such as a board of education, will convene for the purpose of conducting public business, such a gathering would, in my opinion, constitute a meeting subject to the requirements of the Open Meetings Law.

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

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

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

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

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

It appears that the gathering to which you referred constituted a "meeting" subject to the Open Meetings Law. If that is so, it should have been preceded by notice given to the news media and posted in accordance with §104 of the Open Meetings Law and conducted open to the public, except to the extent that an executive session might properly have been held.

You asked whether the president of a board of education may "force executive session at the mere mention of an employee's name, claiming it would violate contractual matters." In my opinion, the answer must clearly be in the negative. The Open Meetings Law, not the terms of a contract, provide the grounds for conducting an executive session. Stated differently, if there is no basis for entry into executive session that is authorized by the Open Meetings Law, a contractual provision cannot authorize a board of education to eliminate the public's right to attend a meeting. Section 110 deals

with the relationship between the Open Meetings Law and other provisions and 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."

Moreover, although it is used frequently, it is emphasized that a careful reading of the Open Meetings Law indicates that the word "personnel" appears nowhere in that statute. To be sure, there are some issues that relate to "personnel" that may properly be considered during executive sessions. Nevertheless, there are many others that do not fall within any of the grounds for entry into executive session. Moreover, there is simply nothing in the Open Meetings Law that specifies that personnel-related issues are confidential.

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

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

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

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

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

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

In short, the characterization of an issue as a "personnel matter" is inadequate, for it fails to enable the public or even members of the Board to know whether subject at hand may properly be considered during an executive session. Similarly, even though an employee's names is mentioned, unless the subject matter falls within the language of §105(1)(f) or a different basis for entry into executive session, the discussion must occur in public.

Even when there is a basis for entry into executive session, there is no obligation to convene in private. Section 105(1) prescribes a procedure that must be accomplished in public before an executive session may be held. 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,

> provided, however, that no action by formal vote shall be taken to appropriate public moneys..."

If no motion is made to enter into executive session, or if a motion to conduct an executive session is not approved, a public body is generally free to discuss issues in public.

The only instances, in my view, in which members of a public body are prohibited from disclosing information would involve matters that are indeed confidential. W hen a public body has the discretionary authority to discuss a matter in public or in private, I do not believe that the matter can properly be characterized as "confidential."

Many judicial decisions have focused on access to and the ability to disclose records, and this office has considered the New York Freedom of Information Law, the federal Freedom of Information Act, and the Open Meetings Law in its analyses of what may be "confidential." To be confidential under the Freedom of Information Law, I believe that records must be "specifically exempted from disclosure by state or federal statute" in accordance with §87(2)(a). Similarly, §108(3) of the Open Meetings Law refers to matters made confidential by state or federal law as "exempt" from the provisions of that statute.

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

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

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

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

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

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

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

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

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

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

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

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

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

Finally with respect to the Open Meetings Law, you questioned whether the president of a board of education may "send letters out representing the other members without their signatures or even participation." It is my understanding that many activities of a president of a board of education are ministerial in nature or are carried out through a delegation of authority by a board. However, I do not believe that a president of a board alone or fewer than a majority of its members may take

action on behalf of the board when only the board has the authority to do so. Further, from my perspective, voting or action by a board 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" in its entirety 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, or a convening that occurs through videoconferencing.

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

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

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

Based on the foregoing, again, a valid meeting may occur only when a majority of the total membership of a public body, a quorum, has "gathered together in the presence of each other or through the use of videoconferencing." Moreover, only when a quorum has convened in the manner described in §41 of the General Construction Law would a public body have the authority to carry out its powers and duties.

Moving to issues involving records, you referred to "challenging student discipline records" and expressed the belief that "FERPA regulations would allow a parent/guardian the opportunity to contest and correct records". You asked how a parent enforces those regulations when a school district official denies a parent the ability to do so. The regulations promulgated by the U.S. Department of Education pursuant to FERPA (34 CFR Part 99), as you suggest, include provisions concerning the ability of a parent of a student or an "eligible student", a student 18 years of age or who is attending an institution of postsecondary education to seek to amend records. Specifically, §99.20 states that:

> "(a) If a parent or eligible student believes the education records relating to the student contain information that is inaccurate, misleading, or in violation of the student's rights of privacy, he or she may ask the educational agency or institution to amend the record.
>
> (b) The educational agency or institution shall decide whether to amend the record as requested within a reasonable time after the agency or institution receives the request.
>
> (c) If the educational agency or institution decides not to amend the record as requested, it shall inform the parent or eligible student of its decision and of his or her right to a hearing under §99.21."

Section 99.21 states in relevant part that:

> "(b)(1) If, as a result of the hearing, the educational agency or institution decides that the information is inaccurate, misleading or otherwise in violation of the privacy rights of the student, it shall:
>
> (i) Amend the record accordingly; and
>
> (ii) Inform the parent or eligible student of the amendment in writing."

Section 99.22 requires that a hearing be held "within a reasonable time" after it has been requested, that a decision must be rendered within a reasonable time, and that the decision "must be based solely on the evidence presented at the hearing, and must include a summary of the evidence and the reasons for the decision."

When an educational agency fails to comply with FERPA, it has been suggested that the unit of the U.S. Department of Education that oversees FERPA, the Family Policy Compliance Office, be contacted at (202)260-3887.

You also asked whether an individual member of a board of education my gain access to records relating to a determination in a disciplinary hearing "without consensus by the Board." In my opinion, the only method of so doing would involve obtaining an authorization from a parent of the student who is the subject of the determination. In essence, the parent in that situation would transfer rights accorded to him/her by FERPA to a third party, such as a board member.

In a somewhat related vein, you asked how parents can request copies of police reports involving a school and their children. When such records are maintained by a school district, either the Freedom of Information Law or FERPA would govern rights of access. FERPA pertains to education records identifiable to students, and the phrase "education record" is defined in federal regulations to mean records relating to a student that are maintained by an educational agency or institution (34 CFR §99.3). However, the definition specifically excludes:

> "Records of a law enforcement unit of an educational agency or institution, but only if education records maintained by the agency or institution are not disclosed to the unit, and the law enforcement records are -
>
> (i) Maintained separately from education records;
>
> (ii) Maintained solely for law enforcement purposes; and
>
> (iii) Disclosed only to law enforcement officials of the same jurisdiction..."

In addition, §99.8(b)(1) states that:

> "Records of a law enforcement unit means those records, files, documents, and other materials that are -
>
> (i) Created by a law enforcement unit;
>
> (ii) Created for a law enforcement purpose; and
>
> (iii) Maintained by the law enforcement unit."

Based on the foregoing, if a report can be characterized as a record of a law enforcement unit, FERPA would not apply. In that case, the record would be subject to whatever rights exist under the Freedom of Information Law.

If no law enforcement unit has been developed and FERPA applies, I believe that a police report or other document pertaining to a student is in possession of school district would be accessible to a parent of the student. I note, however, that those portions of those records that include personally identifiable information pertaining to other students must be deleted to protect the privacy of those students, unless consent to disclose is given by parents of those students.

If FERPA does not apply because the record is maintained by a law enforcement unit, or if the record is not maintained by a school district but rather by a police department, a request should be made by a parent to the department pursuant to the Freedom of Information Law. In brief, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the Law.

Several grounds for denial of access might be relevant in considering rights of access or the ability of a police department to deny access. For instance, if a police report identifies students other than the child of a parent seeking access, identifying details might properly be deleted on the ground that disclosure would result "an unwarranted invasion of personal privacy [§87(2)(b)]. Insofar as disclosure would interfere with a law enforcement investigation, records may be withheld [§87(2)(e)(i)]. Other exceptions might also be pertinent, depending on the contents of the record, the nature of an event and the effects of disclosure.

You asked whether the public has "a right to know of major incidences occuring on school property, for example: lockdowns, incidents of violence, drugs or alcohol charges, vandalism." Some of the events to which you referred, such as lockdowns or vandalism, are clearly not secret; students and others are aware of those events. That being so, records that relate to those events are subject to rights of access conferred by the Freedom of Information Law. Again, the content of the records serves as the primary factor in determining the extent to which they must be disclosed or, contrarily, to which they may be withheld in accordance with the exceptions to rights of access appearing in §87(2) of the Freedom of Information Law.

Also relevant may be §2802 of the Education Law, which pertains to the "Uniform violent incident reporting system." Under that section, school districts are required to prepare reports regarding violent or disruptive incidents. As in the case of FERPA, §2802 of the Education Law specifies that portions of those reports identifiable to students must be kept confidential. That provision refers to the obligation of the Commissioner of Education to promulgate regulations that require "the confidentiality of all personally identifiable information"[see §2802(6)], and the regulations in §100.2(gg)(6) states that "all personally identifiable information included in a violent or disruptive incident report shall be confidential."

Lastly, following the deletion of personally identifiable information, I believe that the reports, irrespective of whether they have been communicated to the State Education Department, are accessible to the public. In short, following those deletions, the remainder of the reports would consist of factual information available under subparagraph (iii) of §87(2)(g) of the Freedom of Information Law. That provision states that statistical or factual information contained within internal governmental communications are accessible.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Education

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September 15, 2006

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:

We are in receipt of your July 28, 2006 request for an advisory opinion concerning application of the Open Meetings Law to a meeting of the Board of Trustees of the Village of Ossining. The minutes from the meeting attached to your request indicates that the meeting was "adjourned into Executive Session for personnel." In this regard, we offer the following comments.

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. 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)]

On behalf of the Committee on Open Government we hope this is helpful to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

cc: Board of Trustees

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September 15, 2006

Mr. John Linney
[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. Linney:

We are in receipt of your request for an advisory opinion concerning application of the Open Meetings Law to gatherings of the Plattsburgh City Council. You inquired about the legality of a contract and subsequent amendments to the contract which were signed by the Mayor pursuant to authority granted by the Council at various meetings. You indicated that these meetings "occurred at 4:30pm prior to regular Council meetings and that no public notice was given regarding these meetings and there are no minutes recorded for these meetings," adding that [t]here were at least 4 of the 6 Councilors in attendance at all of these meetings." You also indicated that there are no records of any votes taken authorizing the Mayor to sign the contract or the amendments. In this regard, we offer the following comments.

From our perspective, if notice was given indicating that a meeting would begin at a certain time, the Council should have waited until that time to begin conducting its business. Alternatively, if there was a need to convene earlier than the time specified in the original notice, we believe that the Council should have given additional notices to the news media and at the location where notice is posted to reflect the actual time when the meeting would begin. If no notice was given of the actual time that the meeting convened, it would appear that the meeting was held, in effect, in private. When action is taken in private in violation of the Open Meetings Law, a court is authorized to invalidate such action.

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

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

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

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

Further, 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.

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".

On behalf of the Committee on Open Government we hope this is helpful to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

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September 19, 2006

E-MAIL

TO: Christie Jo Lang

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. Lang:

I have received your letter in which you indicated that you serve as a member of the Patchogue-Medford School District Board of Education. You have requested "an opinion on four school board members (1- President and 3 newly elected) attending a social gathering at a community member's house where were so called conversations on how to remove the Superintendent and negotiation with an employee involved in a 3020 proceeding."

In this regard, it is unclear whether the three "newly elected" persons had yet become members of the Board. If they were not yet members of the Board, the Open Meetings Law clearly would not have applied. On the other hand, since the Board consists of seven members, if all four, including the three newly elected persons, were members of the Board when the conversations occurred, the Open Meetings Law might have been implicated.

In this regard, that statute pertains to meetings of public bodies, such as boards of education, and the courts have construed the term "meeting" [§102(1)] expansively. In a landmark decision rendered in 1978, the state's highest court, the Court of Appeals, held that any gathering of a quorum of a public body for the purpose of conducting public business constitutes a "meeting" subject to the Open Meetings Law, whether or not there is an intent to take action, and regardless of the manner in which a gathering may be characterized [see Orange County Publications, Division of Ottoway Newspapers, Inc. v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. In my opinion, inherent in the definition of "meeting" is the notion of intent. If a majority of a public body gathers in order to conduct public business collectively, as a body, I believe that such a gathering would constitute a "meeting" subject to the Open Meetings Law. In the decision cited earlier, the Court affirmed a decision rendered by the Appellate Division that dealt specifically with

so-called "work sessions" and similar gatherings during which there was merely an intent to discuss, but no intent to take formal action. In so holding, the court stated:

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

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

> "We agree that not every assembling of the members of a public body was intended to be included within the definition. Clearly casual encounters by members do not fall within the open meetings statutes. But an informal 'conference' or 'agenda session' does, for it permits 'the crystallization of secret decisions to point just short of ceremonial acceptance'" (id. at 416).

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 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.

I hope that I have been of assistance.

RJF:tt

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September 19, 2006

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 request for an advisory opinion concerning application of the Freedom of Information Law to requests made to the Town of Mamakating. You sought copies of minutes of meetings of the Town Board and the Zoning Board of Appeals and were provided some but not others. You indicated your frustration with the Town's "record of likely noncompliance with the Freedom of Information Law and Open Meetings Law" and inquired whether, short of filing a lawsuit, there are courses of action to take to force the Town to comply with the law.

While the Committee on Open Government is authorized to issue advisory opinions concerning application of the Freedom of Information and Open Meetings Laws, this office has no authority to enforce the law or compel an entity to comply with the statutory provisions. It is our hope that these opinions are educational and persuasive, and that they serve to resolve problems and promote understanding of and compliance with the law. In this regard, we offer the following comments.

First, the Open Meetings Law requires that minutes of meetings be prepared and made available in accordance with §106 of that statute. That section states that:

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

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

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

We point out 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 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.

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

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, 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, 2005 (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.

Further, in a related vein, on August 16, 2006, Governor Pataki signed into law, effective immediately, legislation that broadens the authority of the courts to award attorney's fees when government agencies fail to comply with the Freedom of Information Law (S.7011-A, Chapter 492). Under the amendments, when a person initiates a judicial proceeding under the Freedom of Information Law and substantially prevails, a court has the discretionary authority to award costs and reasonable attorney's fees when the agency had no reasonable basis for denying access to records, or when the agency failed to comply with the time limits for responding to a request.

Finally, from our perspective, insofar as the requested records exist, they must be disclosed. If the Town does not maintain minutes of meetings of the Town Board or the Zoning Board of Appeals, a court could compel those boards to perform functions that are mandated by law.

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."

Lastly, since its enactment in 1974, the Freedom of Information Law has included an "open vote" requirement. Section 87(3)(a) states that "[e]ach agency shall maintain a record of the final vote of each member in every agency proceeding in which the member votes." Therefore, in each instance in which a public body, such as the Town Board or the Zoning Board of Appeals, takes action, a record must be prepared specifying the manner in which each member cast his or her vote. Typically, the record of votes appears in minutes of meetings.

On behalf of the Committee on Open Government we hope this is helpful to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
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OML-AO-4263

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September 22, 2006

Ms. Maria V. Johnson
Chairperson, Board of Directors
Syracuse United Neighbors
1540 South Salina Street
Syracuse, NY 13205-1149

The staff of the Committee on 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. Johnson:

I have received your letter and the materials attached to it. You referred to a meeting held on July 5 by the Syracuse Industrial Development Agency (SIDA) and wrote that "there was no public notice of this meeting and the meeting was not held at the usual location..."

In this regard, the issue concerning notice of the meeting and related matters were considered in an advisory opinion prepared last month. Rather than repeating the points offered in that opinion, I have enclosed a copy for your review.

With respect to the site of the meeting, there is nothing in the Open Meetings Law that would preclude a public body, such as SIDA, from conducting at meeting at other than its "usual location." However, as indicated in the prior opinion, every meeting must be preceded by notice of the time and place given to the news media and posted in one or more designated conspicuous public locations. In addition, it is noted that §103(b) of the Open Meetings Law states that:

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

Based upon the foregoing, there is no obligation upon a public body to construct a new facility or to renovate an existing facility to permit barrier-free access to physically handicapped persons. However, I believe that the Law does impose a responsibility upon a public body to make "all reasonable efforts" to ensure that meetings are held in facilities that permit barrier-free access to physically handicapped persons. Therefore, if, for example, a public body has the capacity to hold

its meetings at a location that is accessible to handicapped persons, I believe that the meetings should be held in a facility that accommodates the needs of those people.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

Enc.

cc: Syracuse Industrial Development Agency

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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September 29, 2006

E-MAIL

TO: Peter Ward

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. Ward:

I have received your letter in which you asked whether the minutes of a library board meeting had to include a notation as to how each member actually voted on all items of business for which a vote was taken."

In this regard, first, §87(3)(a) of the Freedom of Information Law provides that:

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

Based upon the foregoing, when a final vote is taken by an "agency" subject to the Freedom of Information Law [see §86(3), a record must be prepared that indicates the manner in which each member who voted cast his or her vote.

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

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

> performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy. The people must be able to remain informed if they are to retain control over those who are their public servants."

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

There is nothing in either the Freedom of Information or Open Meetings Laws that specifies that a vote must be accomplished by means of a roll call or that a vote be "announced exactly as the same time it is cast." In my view, so long as a record is prepared that indicates the manner in which each member cast his or vote, an entity would be acting in compliance with the open vote requirements imposed by those statutes. I note that the decision cited above referred to "open voting" in the context of both open and executive sessions. Since the Open Meetings Law permits public bodies to vote in proper circumstances during an executive session [see §§105(1) and 106(2) and (3)], it is clear in my view that roll call voting in public is not required. That being so, I believe that the procedure that you proposed would be consistent with law.

Lastly, while the record of votes by members ordinarily is included in minutes, there is no requirement that it be included in minutes. While such a record must be prepared and made available, the Court of Appeals, the state's highest court, has held that such a record may be maintained separate from the minutes [Perez v. City University of New York, 5 NY3d 522, 530 (2005)].

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
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October 5, 2006

Ms. Carol Thompson
The Valley News
117 Oneida Street
Fulton, NY 13069

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

Dear Mr. Thompson:

As you are aware, I have received your letter concerning a motion to enter into executive session during a meeting of the Schroeppel Town Board in which the motion cited "Number six, apparently referring to the agenda item #6 which was 'personnel'."

From my perspective, a motion to enter into executive session must include sufficient information to enable those present to consider that the subject to be discussed may properly be considered in an executive session.

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

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

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

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

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

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

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

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

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

> "...the public body must identify the subject matter to be discussed (See, Public Officers Law § 105 [1]), and it is apparent that this must be accomplished with some degree of particularity, i.e., merely reciting the statutory language is insufficient (see, Daily Gazette Co. v Town Bd., Town of Cobleskill, 111 Misc 2d 303, 304-305). Additionally, the topics discussed during the executive session must remain within the exceptions enumerated in the statute (see generally, Matter of Plattsburgh Publ. Co., Div. of Ottaway Newspapers v City of Plattsburgh, 185 AD2d §18), and these exceptions, in turn, 'must

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

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
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October 5, 2006

E-Mail

TO: Mr. Barlow Humphreys

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 Mr. Humphreys:

I have received your letter in which you raised issues relating to both the Open Meetings Law and the Freedom of Information Law.

You wrote that you serve on the Town of Somers Master Plan Committee and "asked that a 2 minute exchange of conversation in a recent meeting be included in the minutes of the meeting." Your request to do so was denied by the Chairman, as was your request for "the tape transcription of the meeting."

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

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

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

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

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

Based on the foregoing, minutes need not consist of a verbatim account of everything said at a meeting; on the contrary, so long as the minutes include the kinds of information described in §106, I believe that they would be appropriate and meet legal requirements.

I point out that in an opinion issued by the State Comptroller, it was advised that when a member of a public body requests that a statement or exchange be entered into the minutes, the body must determine, under its rules of procedure, whether to record the statement in writing, which would then be entered as part of the minutes (1980 Op.St.Comp. File #82-181). From my perspective, a special board, like other public bodies, functions by means of action taken by a majority vote of its total membership. Pertinent is §41 of the General Construction Law, entitled "Quorum and majority", which states that:

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

Based upon the language quoted above, a quorum is a majority of the total membership of a public body, notwithstanding absences or vacancies. Further, in order to carry a motion or take action, there must be an affirmative vote of a majority of the total membership of a public body.

In the context of the issue presented, I do not believe that a single member could insist or require that his/her comments or an exchange be included in minutes. However, I believe that you or any member of the Committee could introduce a motion to include the exchange in the minutes. If the motion is approved by a majority vote of the Committee's total membership, I believe that the minutes must be amended accordingly, notwithstanding the preference of the Chairman.

Lastly, based on the language of the law and judicial precedent, a tape recording of an open meeting is accessible to any person under the Freedom of Information Law.

That statute pertains to agency records, and §86(4) of the Law defines the term "record" expansively to include:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever

> including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based on the foregoing, when a municipal board maintains a tape recording of a meeting, the tape would constitute a "record" that falls within the coverage of the Freedom of Information Law, irrespective of the reason for which the recording was prepared.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my view, a tape recording of an open meeting is accessible, for any person could have been present, and none of the grounds for denial would apply. More importantly, judicial precedent 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.

RJF:jm

STATE OF NEW YORK
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October 5, 2006

E-MAIL

TO: Patricia O'Rourke

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'Rourke:

As you are aware, I have received your letter relating to the Open Meetings Law. You wrote as follows:

> "I read a letter form 3 of 5 village Board members in the 8/17 issue of The Gazette, a local weekly newspaper. I wonder if it is legitimate for a partial group of the board to meet and send out a letter with no indication that the other members were aware of, in agreement with or disagreement with the contents. Since the letter was signed with the official titles of Village Trustee, would the contnets [sic] have had to be discussed in an Open Meeting with all Board members heard from?"

In this regard, from my perspective, voting and action by a public body may be carried out only at a meeting during which a quorum has physically convened, or during a meeting held by videoconference.

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

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

In view of that definition and others, I believe that a meeting, i.e., the "convening" of a public body, involves the physical coming together of at least a majority of the total membership of such a body, i.e., the CEC, or a convening that occurs through videoconferencing.

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

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

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

Based on the foregoing, again, a valid meeting may occur only when a majority of the total membership of a public body, a quorum, has "gathered together in the presence of each other or through the use of videoconferencing." Moreover, only when a quorum has convened in the manner described in §41 of the General Construction Law would a public body have the authority to carry out its powers and duties. Section 41 states that a quorum can be concerned only upon reasonable notice to all the members. Consequently, three of five members of the board cannot, in my view, conduct a valid meeting or take action as a board when there is a failure to provide notice to one or more of its members.

Further, it is my opinion that a public body may not take action or vote through the use of a telephone of via e-mail, for example, or by means of the members signing a letter at different times. Conducting a vote or taking action in that manner or via e-mail or a series of telephone calls, would not, according to case law, constitute a valid meeting. In a decision dealing with a vote taken by

phone, Cheevers v. Town of Union (Supreme Court, Broome County, September 3, 1998), which cited and relied upon an opinion rendered by this office, the court stated that:

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

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

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

Based on the foregoing, the Open Meetings Law is intended to provide the public with the right to *observe* the performance of public officials in their deliberations. That intent cannot be realized if

members of a public body conduct public business as a body or vote by phone, by mail, by e-mail or by signing a letter outside the confines of a meeting validly held.

In short, should there be a judicial challenge to action taken outside of a meeting held with a majority physically present or by means of videoconference as described earlier, I believe that a court would find such action be a nullity and of no effect.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
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October 5, 2006

Mr. Timothy A. Farley, P.C.
[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. Farley:

I have received your letter and the materials attached to it. You indicated that you represent the Carthage Industrial Development Corporation ("the Corporation") and that you were asked to request an advisory opinion concerning its status under the Open Meetings Law. The Corporation is a not-for-profit corporation created under §1411 of the Not-for-Profit Corporation Law, which pertains to "local development corporations." You referred to and enclosed a copy of the by-laws of the Corporation, which indicates in Article III, §1, that a majority of its members are either appointed by government agencies or are officials of government agencies.

In this regard, while I know of no judicial decision concerning the status of a local development corporation under the Open Meetings Law, the Court of Appeals has considered the matter under the Freedom of Information Law. The guidance offered in that decision is, in my view, most pertinent in consideration of the issues presented here.

The Freedom of Information Law pertains to agencies, 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" [§86(3)].

Section 1411 of the Not-for-Profit Corporation Law describes the purpose of local development corporations and states in part that:

> "it is hereby found, determined and declared that in carrying out said purposes and in exercising the powers conferred by paragraph (b)

> such corporations will be performing an essential governmental function."

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

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

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

Because at least seven of the nine members of the Corporation, who also serve as its board of directors, are appointed by or are government officials, it is clear that government agencies exercise substantial control over the Corporation. Because that is so, I believe that the Corporation would constitute an "agency" required to comply with the Freedom of Information Law.

If the Corporation is an agency that falls within the scope of the Freedom of Information Law, I believe that it and its board of directors would also constitute a "public body" for purposes of the Open Meetings Law. Section 102(2) defines that phrase to mean:

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

By breaking the definition into its components, I believe that each condition necessary to a finding that the board of the Corporation 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. Further, based upon the language of §1411(a) of the Not-for-Profit Corporation Law, which was quoted in part earlier, and the degree of governmental control reflected in the Corporation's membership, I believe that it conducts public business and performs a governmental function for several public corporations, including two villages, a town, a county, a public authority and industrial development agency.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4208

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October 5, 2006

E-MAIL

TO: Eric Young

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. Young:

As you are aware, I have received your inquiry concerning notice of meetings. Specifically, you wrote that "[t]he Marcus Whitman Board of Education has been posting their meeting on the board room door." If the meetings were not posted properly", you asked whether "the business conducted by the board [is] legal."

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."

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.

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

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

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

However, the same provision states further that:

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

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

I hope that I have been of assistance.

RJF:tt

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
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OML-AO-4269

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October 5, 2006

Ms. Margaret C. Kearney
[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. Kearney:

I have received your letter and the materials attached to it. You have sought guidance concerning a request made to the Village of Fleischmanns for "minutes and other Village documents."

In this regard, with respect to minutes of meetings, in my opinion, 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 draft or final.

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.

A potential issue relating to another aspect of your request involves whether it "reasonably describes" the records sought as required by §89(3) of the Freedom of Information Law. I refer to that portion of the request involving building permits and certificates of occupancy issued by the Village from January through August 25, 2006. The matter involves the manner in which those records are kept and retrieved. If they are kept chronologically, they may be easy to locate. If, however, they are kept by address, and if hundreds of files would have to be reviewed individually to locate the records at issue, it might be found by a court that that portions of your request does not reasonably describe the records [see Konigsberg v. Coughlin, 68 NY2d 245 (1986)].

Lastly, with respect to records other than minutes that can be found with reasonable effort, 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, 2005 (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

cc: Hon. Lorraine DeMarfio

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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OML-AO-4270

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October 5, 2006

Mr. Herbert R. Runyon, Jr.
[redacted]

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

Dear Mr. Runyon:

I have received your letter in which you requested an advisory opinion concerning "compliance or non-compliance...with the Open Meetings Law" by the Board of Assessment Review of the Town of Greenport.

According to your letter, when you arrived at Town Hall to protest your assessment before the Board, The Board conducted its business in a "conference room...kept closed except to allow persons grieving their tax assessment to enter and exit." You wrote that you "asked the clerk if [you] could observe the proceedings and was told no, that only the person grieving was allowed entry into the conference room."

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, as well as a record of the votes of each member in conjunction with §87(3)(a) of the Freedom of Information Law, which are often included in the minutes.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Assessment Review

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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OML-AO-4271

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October 10, 2006

Mr. William Motovick
[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. Motovick:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information and Open Meetings Laws to questions you raised at a public meeting of the Hancock Town Board. Specifically, you indicate that you were 'not allowed to ask questions at the monthly Board meeting," that the Town attorney directed Board members not to answer your questions, and that you were required to submit your questions in writing to the Town Attorney. Accordingly, you submitted the following written requests:

> "1. Who is responsible for obtaining floodplain development permits - the landowner or the contractor doing the work?
>
> 2. Why haven't I received my Certificate of Compliance for my pond work? I have met all of the Town's requirements.
>
> 3. Why was a permit issued to Mr. Rubera (#2-02) after the work was done and while I was complaining of property damage?
>
> 4. Myself and two neighbors moved our r.o.w. (a private road) to avoid mud. Only I was ticketed and fined $250. Why weren't my neighbors?
>
> 5. If I see unpermitted and/or non-compliant floodplain work going on that could cause problems during a flood who do I report it to?
>
> 6. Who does the Code Enforcement Officer answer to? Does he communicate with Board members regarding his job at all during the week?"

By return correspondence the Town attorney refused to provide the requested information.

With respect to your questions about speaking at a public meeting, 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. 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, we 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 likely 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 our 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 we are aware provides the public with the right to speak during meetings, we do not believe that a public body is required to permit the public to do so during meetings. Certainly a public body may permit the public to speak, and if it does so, it has been suggested that rules and procedures be developed regarding the privilege to speak that are reasonable and that treat members of the public equally. From our perspective, a rule authorizing any person in attendance to speak no longer than 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.

Second, and with respect to the written questions which you submitted, we note that the title of the Freedom of Information Law may be somewhat misleading, for it is not a vehicle that requires agencies to provide information per se; rather, it requires agencies to disclose records to the extent provided by law. As such, while agency officials may in many circumstances choose to answer questions or to provide information by responding to questions, those steps would represent actions beyond the scope of the requirements of the Freedom of Information Law. Moreover, the Freedom of Information pertains to existing records. Section 89(3) of that statute states in part that an agency need not create a record in response to a request. In short, Town officials in our view would not be obliged to provide the information sought by answering questions or preparing new records in an effort to be responsive.

On behalf of the Committee on Open Government we hope this is helpful to you. At your request, a copy of this opinion will be sent to the Town Supervisor and the Town Attorney.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt
cc: Supervisor Sam Rowe
Leonard Sienko

OML-AO-4272

From: Robert Freeman
To: [redacted]
Date: 10/12/2006 10:04:38 AM
Subject: I have received your correspondence. Since you requested a "quick answer" and clarification, very s

I have received your correspondence. Since you requested a "quick answer" and clarification, very simply, the Open Meetings Law is applicable when a majority, a quorum, of a public body (such as the City Council) gathers for the purpose of conducting public business, collectively, as a body.

As I understand the nature of the gathering to which you referred, although some City Council members, as well as other government officials, would be participants, there would not be a quorum of any particular public body. If that is so, the Open Meetings Law would not apply.

I hope that I have been of assistance.

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

OML-AO-4273

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October 12, 2006

E-MAIL

TO: David Decker

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. Decker:

I have received your letter in which you sought an opinion concerning the inclusion of reference to an executive session on a town board's agenda and to "a private meeting between the board and its attorney."

In this regard, I offer the following comments.

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

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

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

> "The respondent Board prepared an agenda for each of the five designated regularly scheduled meetings in advance of the time that

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

For the reasons expressed in the preceding commentary, a public body cannot in my view schedule an executive session in advance of a meeting. In short, because a vote to enter into an executive session must be made and carried by a majority vote of the total membership during an open meeting, technically, it cannot be known in advance of that vote that the motion will indeed be approved. However, an alternative method of achieving the desired result that would comply with the letter of the law has been suggested in conjunction with similar situations. Rather than scheduling an executive session, the Board on its agenda or notice of a meeting could refer to or schedule a motion to enter into executive session to discuss certain subjects. Reference to a motion to conduct an executive session would not represent an assurance that an executive session would ensue, but rather that there is an intent to enter into an executive session by means of a vote to be taken during a meeting.

Second, there are two vehicles that may authorize a public body to discuss public business in private. One involves entry into an executive session. The other vehicle for excluding the public from a meeting involves "exemptions." Section 108 of the Open Meetings Law contains three exemptions. When an exemption applies, the Open Meetings Law does not, and the requirements that would operate with respect to executive sessions are not in effect. 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 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

FOIL-AO-16210
OML-AO-4274

From: Robert Freeman
To: [redacted]
Date: 10/13/2006 3:02:23 PM
Subject: I have received your inquiry in which you asked "whether there is any sort of prohibition on town bo

I have received your inquiry in which you asked "whether there is any sort of prohibition on town board members discussing persons by name as examples of persons who may have in the past violated or may currently be violating a town code...."

In short, I do not believe that there is any such prohibition.

When a record indicates that a person has engaged in a violation of the town code or a local law, that record, in my view, is clearly accessible under the Freedom of Information Law. Moreover, it has been held that the Freedom of Information Law is permissive, for it permits agencies to deny access to records in certain circumstances, but it does not require that they do so.

Similarly, the Open Meetings Law permits public bodies, such as town boards, to enter into executive session to discuss certain topics in private. However, there is no requirement that they do so. As you may be aware, before a public body may conduct an executive session, a motion to do so must be made in public, indicating the subject, and approved by a majority vote of the total membership of the body. That being so, if a motion to enter into executive session fails to be approved, a public body may choose to discuss the matter in public.

In sum, again, I know of no law that would prohibit town board members from publicly identifying or discussing persons who have violated or are now in violation of a provision of a town code.

I hope that I have been of assistance.

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

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

OML-AO-4275

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October 16, 2006

E-MAIL

TO: Jason Haremza

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. Haremza:

Your inquiry directed to the Department of State has been forwarded to the Committee on Open Government. The Committee, a unit of the Department, is authorized by §109 of the Public Officers Law to provide advisory opinions relating to the Open Meetings Law.

You referred to the appointment of a "Comprehensive Plan Committee" by a town board "to coordinate the comprehensive planning process." Although you expressed the understanding that the Committee is subject to the Open Meetings Law, you asked whether there is "the necessity of a quorum" and whether, if, for example, "there are 10 people on the committee, but only 4 show up", "work [may] be conducted" by the four members.

In this regard, I offer the following comments.

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

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

Although it has been held that advisory bodies are not required to comply with the Open Meetings Law [see e.g., NYPRIG v. Governor's Advisory Commission, 507 NYS2d 798, aff'd with no opinion, 135 AD2d 1149, motion for leave to appeal denied, 71 NY2d 964 (1988); Poughkeepsie

Newspaper v. Mayor's Intergovernmental Task Force on New York City Water Supply Needs. 145 AD2d 65 (1989)], in this instance, the Committee 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 agree with your belief that it would constitute a "public body" subject to the Open Meetings Law.

Second, as you may be aware, unless specific direction is provided by statute to the contrary, a quorum 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.

In the context of the example that you offered, a quorum in a public body consisting of ten members would be six. In that circumstance, the public body would have the authority to carry out its duties only a meeting during which a quorum is present, and a gathering of a quorum would constitute a "meeting" falling within the coverage of the Open Meetings Law. If less than a quorum is present, the Open Meetings Law would not apply. Nevertheless, those present would have the ability to discuss matters of committee business as they see fit, with or without the presence of the

public. Again, however, absent a quorum, they would not have the ability to act as or carry out the duties of the committee as a whole.

I hope that I have been of assistance.

RJF:tt

cc: Larry Weintraub

STATE OF NEW YORK
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October 16, 2006

E-MAIL

TO: Hon. Patrick J. Clear

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 Councilman Clear:

We are in receipt of your request for an advisory opinion concerning application of the Open Meetings Law to recent proceedings of the Gloversville Common Council, on which serve. You wrote that you and the media received notice of a special meeting of the Council four days prior to the meeting, for the purpose of "an executive session". On the morning of the meeting, when you informed the Mayor that you were not able to attend, he informed you that the meeting time would be delayed one hour. Following the meeting, you were informed that one of the members in attendance "made a motion to suspend the rules and then proceeded to pass amendments to the current Transit Union contract." You inquired whether notice of the meeting constituted an agenda for the meeting and whether action taken at the meeting was legal. In this regard, we offer the following comments.

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

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

Based on the foregoing, the Common Council is clearly a public body, and a quorum must convene for a public body to conduct public business.

Second, the term "quorum" is defined in §41 of the General Construction Law, which has been in effect since 1909. The cited provision states that:

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

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

Based upon language quoted above, a quorum is a majority of the total membership of a public body, notwithstanding absences or vacancies, for example; the number of the total membership determines what a quorum is, and absences or vacancies do not alter quorum requirements. Further, in order to carry a motion or take action, there must be an affirmative vote of a majority of the total membership. Therefore, if a public body consists of seven members, four affirmative votes would be needed to approve a motion, even if as few as four members are present.

In sum, we believe that the Council may carry motions and take action only by means of an affirmative vote of a majority of its total membership. To the extent that the Council's motion "to suspend the rules" was in reference to Roberts Rules of Order, we note that Robert's Rules do not represent the law of this state, and insofar as those rules may be inconsistent with law, we believe that they would be superseded.

Third, while there is nothing in the Open Meetings Law that directly addresses the matter of notice of special meetings, that statute requires that notice be posted and given to the news media prior to every meeting of a public body. Specifically, §104 of that statute provides that:

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

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

We 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.

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

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

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

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

For the reasons expressed in the preceding commentary, a public body cannot in 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. However, an alternative method of achieving the desired result that would comply with the letter of the law has been suggested in conjunction with similar situations. Rather than scheduling an executive session, the Board on its agenda or notice of a meeting could refer to or schedule a motion to enter into executive session to discuss certain subjects. Reference to a motion to conduct an executive session would not represent an assurance that an executive session would ensue, but rather that there is an intent to enter into an executive session by means of a vote to be taken during a meeting.

With respect to your question concerning the ability of the Council to address issues which are not on the agenda, 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 agendas. Whether the Council's rules of procedure may address the issue involves a matter beyond the jurisdiction of this office.

Finally, while the Committee on Open Government is authorized to issue advisory opinions concerning application of the Freedom of Information Law, this office has no authority to enforce the law or compel an entity to comply with the statutory provisions. It is our hope that these opinions are educational and persuasive, and that they serve to resolve problems and promote understanding of and compliance with the law.

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".

On behalf of the Committee on Open Government, we hope this is helpful to you.

CSJ:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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October 16, 2006

E-MAIL

TO: Kathryn Burke

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. Burke:

We are in receipt of your request for a written advisory opinion concerning application of the Open Meetings Law to various proceedings of the SUNY/Farmingdale Student Government. You included correspondence written to the Vice President of Student Life at Farmingdale University, Mr. Stewart Weinberg, in which you expressed your frustration with a number of items. Chiefly, you are concerned that certain persons are acting in positions of authority without having first been confirmed by the student senate, that meetings held to draft the budget were not in keeping with the provisions of the Open Meetings Law, and that the executive board failed to adhere to the principle of "viewpoint neutrality" when voting on the budget.

While the Committee on Open Government is authorized to issue advisory opinions concerning application of the Freedom of Information and Open Meetings Laws, this office has no authority to enforce the law or compel an entity to comply with the statutory provisions. It is our hope that our opinions are educational and persuasive, and that they serve to resolve problems and promote understanding of and compliance with the law.

As you know from the March 27, 2006 advisory opinion issued to you with respect to application of the Open Meetings Law, we believe that the provisions of the Open Meetings Law are applicable to the Farmingdale Student Government. Accordingly, we offer the following comments.

First, 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 executive 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.

The issue in the context of your inquiry involves application of the Open Meetings Law to a situation in which members of the executive board may have met to conduct public business. If a quorum of the board was not present, 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. If there is or has been an intent to circumvent the Open Meetings Law in the context of the situation of your concern, a court might find that the Open Meetings Law has been infringed.

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

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

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

With respect to information that must be recorded as part of the minutes, the Open Meetings Law contains what might be characterized as minimum requirements concerning the contents of minutes. Specifically, §106 of the Open Meetings Law provides that:

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

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

Based on the foregoing, minutes need not consist of a verbatim account of everything that was said; on the contrary, so long as the minutes include the kinds of information described in §106, we believe that they would be appropriate and meet legal requirements. Most importantly, we believe that minutes must be accurate.

With regard to the enforcement of the Open Meetings Law, §107(1) of the Law states in part that:

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

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".

Finally, and with respect to your last question about the availability of the job description and salary information of Mr. Nick Gordon, who was hired to advise the Farmingdale Student Government, we believe that the records at issue fall within the coverage of the Freedom of Information Law. The scope of the Freedom of Information Law is, in our view, more expansive than the Open Meetings Law, for it pertains to all agency records. Section 86(3) defines "agency" to mean:

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

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

Whether the organization at issue constitutes an agency is unclear. However, we do not believe that the status of such entities as agencies is determinative in relation to your inquiry.

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

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

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

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

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

Insofar as records are kept, held, produced or reproduced by extra-curricular organization, because such organization would not exist but for its relationship with a SUNY/Farmingdale institution, we believe that the records would fall within the coverage of the Freedom of Information Law.

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

From our perspective, contracts, bills, vouchers, receipts and similar records reflective of expenses incurred by an agency or payments made to an agency's staff or outside contractors must generally be disclosed, for none of the grounds for denial could appropriately be asserted to withhold those kinds of records. Likewise, in our opinion, a contract between a professional adviser, for example, and a student government association or a university must be disclosed under the Freedom of Information Law.

On behalf of the Committee on Open Government, we hope this helpful to you. At your request, a copy of this opinion will be sent to Mr. Gordon and Mr. Weinberg.

CSJ:tt

cc: Nick Gordon
Mr. Weinberg

STATE OF NEW YORK
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October 20, 2006

E-MAIL

TO: William D. White

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. White:

I have received your letter in which you wrote as follows:

> "I'm president of the Oswego City Board of Education. I sent an e-mail to an ass't superintendent. In this e-mail I point out to her that Board Policy stated that board president appoints board members to comm. and that Board Policy stated that the board appoints the comm. One of our members found that to be offensive and wanted to discuss the issue in ex-session. As, president I told her that that would have to be discussed in open session. The atty for the board stated that this was a subject for ex-session because it had to do with my conduct. I found nothing in the law that would indicate this was an issue for ex-session. I'm an elected official not an employee. If there is a question of my conduct being wrong then it should be discussed in open session not be hind [sic] closed doors. Do you feel that this issue was an ex-session issue?"

In my view, first, the primary issue appears to relate to a matter of policy, specifically, the means by which Board members are appointed to committees. Second, on the basis of your remarks, there appears to be nothing that relates to your conduct that would justify consideration of the matter during an executive session.

Assuming that the matter involves policy, very simply, there would be no basis, in my view, for entry into executive session. If the matter involves Board members' ability to transmit information or their opinions via email, that, too, would appear to involve a matter relating to policy or procedure which, if discussed by the Board, should be considered in public. If indeed the issue

involves your "conduct", it is unlikely that there would be a ground for entry into executive session. The only provision that may be pertinent, §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..."

Unless I am unaware of the nature of the dispute, I do not believe that an executive session could properly be held relative the matter that you described.

I note, too, that the terms of §105(1)(f) refer to certain matters as they relate to a "particular person." To the extent that those matters pertain to a particular person, whether that person is an official or an employee, a public body would have the authority to enter into executive session.

I hope that I have been of assistance.

RJF:tt

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October 20, 2006

Ms. Ann A. Culligan
[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. Culligan:

We are in receipt of your request for an advisory opinion concerning proceedings before the Town of Thompson Planning Board on May 10, 2006, as memorialized in the minutes of that meeting, and the response to your request for a copy of the environmental impact statement referenced in the minutes, pursuant to the Freedom of Information Law. In this regard, we offer the following comments.

First, §106 of the Open Meetings Law deals directly with minutes of meetings and states that:

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

Based on the foregoing, it is clear that minutes need not consist of a verbatim account of what is said. Rather, at a minimum, minutes must consist of a record or summary of motions, proposals, resolutions, action taken and the vote of each member. In our opinion, inherent in these provisions cited is an intent that they be carried out reasonably, fairly, with consistency, and that minutes be accurate.

Further, as indicated by the Town's response to your request for a copy of the environmental impact statement referenced in the May 10, 2006 minutes and the technical review comments prepared by the engineer, it is apparent that no such environmental impact statement exists. Based on all three records, it appears that either one of two events occurred at the meeting on May 10, 2006. Either the consulting engineer incorrectly referred to the environmental assessment form as an environmental impact statement or the Secretary to the Planning Board incorrectly recorded the engineer's comment. Regardless, it is apparent that the Planning Board utilized the environmental assessment form, and not an environmental impact statement.

On behalf of the Committee on Open Government we hope this is helpful to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

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October 26, 2006

E-MAIL

TO: Bruce Pavalow

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. Pavalow:

Although I believe that the criticism of you reflects a misinterpretation of your motivation, it is true that, in a technical sense, an executive session cannot be scheduled in advance of a meeting. Certainly an executive session may be planned or anticipated, but again, it cannot be scheduled.

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

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

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

> "The respondent Board prepared an agenda for each of the five designated regularly scheduled meetings in advance of the time that those meetings were to be held. Each agenda listed 'executive

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

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

I hope that I have been of assistance.

RJF:tt

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October 26, 2006

E-Mail

TO: Mr. Adam Tabelski

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. Tabelski:

I have received your letter in which you asked whether "a mayor [is] to be counted as a member of the board of trustees for the purposes of establishing a quorum" and whether the mayor may vote as a board member.

In this regard, based upon the Village Law, I believe that the mayor is a member of a board of trustees, that his/her presence is counted to determine the existence of a quorum , and that he or she may vote. Specifically, §4-400 of the Village Law states in paragraph (a) of subdivision (1) that:

> "It shall be the responsibility of the mayor:
>
> a. To preside at meetings of the board of trustees, and may have a vote upon all matters and questions coming before the board and he shall vote in case of a tie, however on all matters and questions, he shall vote only in his capacity as mayor of the village and his vote shall be considered as one vote..."

I hope that I have been of assistance.

RJF:jm

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October 27, 2006

E-Mail

TO: Mr. Bob Minzesheimer

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. Minzesheimer:

I have received your letter in which you sought an opinion concerning the application of the Open Meetings Law. In your capacity as president of Board of Trustees of the Ossining Public Library, you wrote that your organization is "building a new library and every other week, the library director, representatives of the architect and construction manager hold a meeting to review progress of the construction. Two of the five-member library board usually attend those meetings. No votes are taken. But if a third member of the board (hence a quorum) attends the meeting, does that trigger the open meetings requirement?"

Based on the language and judicial interpretation of the Open Meetings Law, I believe that the attendance of three or more trustees at the kind of gathering that you described would constitute a "meeting" falling within the coverage of that statute. By way of background, 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 Board members gather 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.

Conversely, I do not believe that the Open Meetings Law applies unless a quorum is present. Even when a meeting is scheduled and notice is given in accordance with §104, but less than a majority attends, the gathering would not constitute a "meeting" and the public would have no right to attend.

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

RJF:jm

STATE OF NEW YORK
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October 31, 2006

E-MAIL

TO: Timothy Chittenden

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. Chittenden:

I have received your letter in which you asked whether Kevin Plunkett, attorney for the City of Rye, is "correct in his statement that the Rye City Council does not have to publicly announce at a convened Rye City Council meeting what pending, proposed or current litigation they are to discuss in Executive Session because of Attorney/Client privilege."

From my perspective, there is a distinction between a meeting closed based on the assertion of a ground for entry into executive session and closing a meeting due to the assertion of the attorney-client privilege.

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)].

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

If the City Council seeks to discuss its litigation strategy in relation to a person or entity that it intends to sue, and if premature identification of that person or entity could adversely affect the interests of the City and its residents, it has been suggested that the motion need not identify that person or entity, but that it should clearly indicate that the discussion will involve the litigation strategy.

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 Council 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.

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

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

RJF:tt

cc: Rye City Council
Steve Otis
Kevin J. Plunkett

STATE OF NEW YORK
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October 31, 2006

Mr. Jack Boden
[redacted]

Dear Mr. Boden:

I have received your letter and a variety of materials relating to it.

The initial focus of your comments relates to proposals in the Town of Marbletown concerning public hearings. In this regard, it is emphasized that the advisory jurisdiction of the Committee on Open Government relates to the Open Meetings Law, and that, from my perspective, a meeting is different from a hearing. A meeting is generally a gathering of quorum of a public body for the purpose of discussion, deliberation, and potentially taking action within the scope of its powers and duties. A hearing is generally held to provide members of the public with an opportunity to express their views concerning a particular subject, such as a proposed budget, a local law or a matter involving land use. Hearings are often required to be preceded by the publication of a legal notice. In contrast, §104(3) of the Open Meetings Law specifies that notice of a meeting must merely be "given" to the news media and posted. Further, there is no requirement that a newspaper, for example, publish a notice given regarding a meeting to be held under the Open Meetings Law. I note, too, that a meeting of a public body held in accordance with the Open Meetings Law can only occur with the presence of a quorum. A hearing, on the other hand, can be conducted without a quorum present.

While I know of no judicial decisions concerning the ability of those to speak at either meetings or hearings, I believe that the principles pertinent to that issue would be the same. In short, I believe that an entity has the authority to adopt rules or procedures to govern its own proceedings. Those rules or procedures, however, must in my opinion be reasonable. In my view, it would be unreasonable, for example, to authorize those with one point of view to speak for ten minutes or perhaps without limitation, while permitting those with a different view to speak for three minutes or not at all.

If it is contended that a hearing is not conducted reasonably, the potential remedies, if they can be characterized as such, would involve offering complaints to those who conduct the hearing or the initiation of a judicial proceeding with Article 78 of the Civil Practice Law and Rules. In an Article 78 proceeding, a petitioner (a member of the public) must demonstrate that a public officer or governmental entity acted unreasonably, or that such person or entity failed to give effect to a legal

requirement. If, for instance, a provision of law requires that a public hearing be held and that members of the public be given an opportunity to be heard, and if that opportunity is not reasonably granted, a court could find that a public officer or governmental entity failed to comply with law. In that event, I believe that court could issue an order designed to guarantee compliance with law and/or reasonableness.

I cannot offer guidance pertaining to the propriety of the proposals or your contentions relative to hearings because, again, those matters are beyond the jurisdiction or expertise of this office.

The second area of concern to which you referred involves the assertion of the attorney-client privilege. Since you included in the materials a copy of an advisory opinion on that subject rendered by this office in 1995, it appears that you are familiar with our understanding of the issue. To briefly reiterate, there are two vehicles that may enable a public body, such as a town board, to discuss public business in private.

One is an executive session, which 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 you are aware, before a public body may enter into executive session, it must accomplish a procedure in public. The procedure includes the introduction of a motion made in public to enter into executive session, an indication of the subject or subjects to be considered, and approval of the motion by a majority vote of the total membership of the body. Further, paragraphs (a) through (h) of §105(1) specify and limit the subjects that may properly be considered during an executive session.

The other involves "exemptions", situations in which, based on §108, the Open Meetings Law does not apply. When a matter is exempt from the Open Meetings Law, the procedural requirements described in the preceding paragraph do not apply. In the context of the issue that you raised, subdivision (3) of §108 exempts any matter made confidential by law from the coverage of the Open Meetings Law. When a client, such as a municipal board, seeks legal advice from its attorney and the attorney renders legal advice, they engage in an attorney-client relationship under which their communications would be privileged and confidential and, therefore, outside the scope of the Open Meetings Law. In consideration of your comments, the attorney-client privilege may be operable even though the communications are unrelated to litigation. When a member of the public seeks legal advice from attorney concerning a real estate transaction or a will, for example, there is no litigation; nevertheless, their communications may fall within the attorney-client privilege. Similarly, a municipal board may seek legal advice, i.e., concerning the legality of a proposed policy or local law, in which case the communications may be privileged, despite the absence of any actual or proposed litigation.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board

STATE OF NEW YORK
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November 1, 2006

Ms. Roseanne Sullivan
[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. Sullivan:

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

By way of background, you wrote that have served as a member of the Pine Bush Central School District Board of Education for ten years and that you are the parent of three children. You indicated that, following "a construction mishap" occurring during the school day at Pine Bush High School, you were quoted in a local newspaper regarding the matter. The "mishap" involved repair of the roof and the release of chemical fumes from the sealant into classrooms, resulting in sickness on the part of students and staff. Although the area was aired out and students returned, they were exposed to the chemicals and some became sick. You added that, when you spoke to the reporter:

> "At this time, the reporter was already aware of the incident and was writing a story about it. He asked me what I thought about it. First, I asked him if he had contacted my board president for a statement. He said that he didn't but that he did get a statement from our superintendent. I told him that he should contact the president of the board for a general statement. However, I did tell the reporter that I was concerned at the fact that the air quality testing was done too late, five days after the first occurrence. On this he quoted me. I told him that even though the incidents occurred on September 21, 22, 25, 26, I was not notified by district office until the evening of September 27. I told him that we did have a five hour school board meeting on September 26 but that neither the board president nor the superintendent mentioned it. I did acknowledge that I heard from community members that students and staff got ill from the fumes.

> "On Friday evening of September 29, I received an email which was mailed to the rest of the board from our district clerk. It included an attachment which gave us some information regarding the incident. This was the first time the board had been given an update after a brief email on September 27. On this date, we were also notified that there would be an emergency special meeting held on Tuesday, October 3. I asked the district clerk to check with our vice president (who had requested the meeting) to be careful about what we would be discussing in executive session as not all discussions are allowed. Unfortunately, I was never given a response to this.
>
> "During this board retreat, the vice president announced that he called the special meeting because he wanted me to know how angry he was that I spoke to the press. He told me that the board has adopted 'Board Norms' as well as a policy, which subjects me to adherence. I asked him if that meant that the board has a 'gag' order on individual board members and also asked him if he was aware of my First Amendment rights. His reply was 'Oh please, let's not get into that.' Instead, he threatened to have me removed from the board. I felt very threatened and harassed by the conversation and walked out of the meeting."

Based on your description of the matter, I do not believe that you acted inappropriately in any way. On the contrary, it appears that a majority of the members of the Board of Education failed to comply with the Open Meetings Law. In this regard, I offer the following comments.

First, while I am unfamiliar with the "Board Norms" that have been adopted or Board policy concerning the ability of Board members to speak, as a parent, as a citizen, and as a member of the Board of the Education, I believe that you have the right to speak to the news media and others. This is not intended to suggest that you, individually, are authorized to speak on behalf of the Board, but rather, despite the apparent disdain of at least one Board member for constitutional rights, that you have the right to speak and express yourself based on the guarantees provided by the First Amendment. It is inconceivable in my view that a rule limiting your ability, or that of any Board member, to speak on a matter of public concern would be found to be valid, so long as you are not speaking on behalf of the Board without its authorization to do so, or disclosing information which, by statute, cannot be disclosed. Further, from my perspective, as an elected representative of the residents of your school district, it is your responsibility to express your views and to share information regarding matters of public concern. That is the only means by which the public can know your position on the issues or perhaps determine whether you should be reelected should you choose to run.

Second, the "emergency special meeting" was, according to your letter, characterized by the Board's vice president as a "retreat" to be held for the purpose of conducting an executive session. The "retreat", according to judicial precedent, clearly constituted a "meeting" falling within the coverage of the Open Meetings Law.

As you are aware, the Open Meetings Law applies to meetings of public bodies, and a board of education clearly constitutes a public body required to comply with that statute. Section 102(1) 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)].

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

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

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

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

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

Lastly, as I understand the matter, there would have been no basis for entering into executive session. Section 105(1) of the Open Meetings Law states in relevant part that:

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

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

In my opinion, a discussion of the "mishap", air quality or related matters would not constitute subjects that could validly have been considered during an executive session. In short, those subjects would not fall within any of the eight grounds for entry into executive session. Similarly, if during the executive session, "the vice president berated [you] and reminded [you] that the board had a 'legal document – a policy' which states that only two people on the board could speak to the press", again, I do not believe that the subject, the review or reiteration of a policy, would serve as a proper subject for consideration in executive session.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4286

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November 1, 2006

Mr. Sheldon McLaren
[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. McLaren:

We are in receipt of your request for an advisory opinion concerning application of the Open Meetings Law to recent and future proceedings of the Nunda Town Board. You indicated that approximately 20 attendees of the August 8, 2006 meeting of the Board were forced to stand outside due to the large number of people who attended and that it was difficult for them to hear what was discussed at the meeting. You further indicated that the Board entered into an executive session "after indicating that the public portion of the meeting was over," and that, in your opinion, it acted in "less than good faith" by returning, after the executive session was over, to continue its discussion.

At some point during either the executive session or the second portion of the public meeting, the town attorney offered a legal opinion regarding a letter from the Town planning board "referring to their unanimous motion to exclude commercial wind turbines from our community." Minutes from the meeting do not clarify what was discussed when the Board returned to the public meeting. While it is not exactly clear to us when the discussion with the attorney took place, we offer the following comments in an effort to be helpful and to provide guidance.

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

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

> governmental process to operate for the benefit of those who created it."

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

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

The preceding paragraph appeared in an advisory opinion rendered in 1993 and was relied upon in Crain v. Reynolds (Supreme Court, New York County, NYLJ, August 12, 1998). In that decision, the Board of Trustees of the City University of New York conducted a meeting in a room that could not accommodate those interested in attending, even though other facilities were available that would have accommodated those persons. The court in Crain granted the petitioners' motion for an order precluding the Board of Trustees from implementing a resolution adopted at the meeting at issue until certain conditions were met to comply with the Open Meetings Law.

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.
It has been held judicially that :

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

> Additionally, the topics discussed during the executive session must remain within the exceptions enumerated in the statute (see generally, Matter of Plattsburgh Publ. Co., Div. of Ottaway Newspapers v City of Plattsburgh, 185 AD2d §18), and these exceptions, in turn, 'must be narrowly scrutinized, lest the article's clear mandate be thwarted by thinly veiled references to the areas delineated thereunder' (Weatherwax v Town of Stony Point, 97 AD2d 840, 841, quoting Daily Gazette Co. v Town Bd., Town of Cobleskill, supra, at 304; see, Matter of Orange County Publs., Div. of Ottaway Newspapers v County of Orange, 120 AD2d 596, lv dismissed 68 NY 2d 807)"

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

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.

Third, you have questioned the adequacy of the minutes. In this regard, §106(1) of the Open Meetings Law pertains to minutes of open meetings and requires that :

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

session."

From our perspective, every law, including the Open Meetings Law, must be implemented in a manner that gives reasonable effect to its intent. Based on that presumption, we believe that minutes must be sufficiently descriptive to enable the public and others (i.e., future Town officials), upon their preparation and upon review perhaps years later, to ascertain the nature of action taken by a public body, such as a town board. In our opinion, if action was taken during the second part of the public meeting, the minutes must include reference to the action taken and the vote thereon.

With respect to your concerns about the Board reconvening despite its indication that the public portion of the meeting had concluded, it is our view that the Board should have waited until the next properly noticed meeting to conduct further business. Because the Board indicated the public portion of the meeting was over, and that it would not reconvene, it would appear that the meeting was held, in effect, in private. When action was taken in private in violation of the Open Meetings Law, a court is authorized to invalidate such action.

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

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

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

Lastly, with respect to the enforcement of the Open Meetings Law, §107(1) 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".

On behalf of the Committee on Open Government we hope this is helpful to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

cc: Town Board

OML-AO- 4287

From: Robert Freeman
To: [redacted]
Date: 11/6/2006 9:28:56 AM
Subject: There is no requirement that minutes be posted on a website and, therefore, there is no "recommended

There is no requirement that minutes be posted on a website and, therefore, there is no "recommended time" for posting.

I note, however, that §106 of the Open Meetings Law requires that minutes be prepared and made available within two weeks of the meetings to which they pertain. Further, there is no requirement that minutes be approved. Consequently, if it is the practice or policy of board to approve minutes but there is no approval within two weeks of a meeting, it has been advised that the minutes be prepared and made available within the two week time limitation and that they be marked "draft", "unapproved" or "preliminary", for example. By so doing, the recipients can learn generally what transpired while being effectively notified that the minutes are subject to change.

I hope that I have been of assistance.

Robert J. Freeman
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 4288

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November 9, 2006

E-Mail

TO: Hon. Sharon M. Knight

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. Knight:

I have received your letter concerning an "information meeting" to be held by the Town Board during which the Board will not make decisions. You asked whether, as Town Clerk, you must be present and prepare minutes.

In this regard, first, it is noted that the definition of "meeting" [see Open Meetings Law, §102(1)] has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be convened open to the public, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. I point out that the decision rendered by the Court of Appeals was precipitated by contentions made by public bodies that so-called "work sessions", "agenda 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. As such, I believe that the gathering that you described would constitute a meeting subject to the Open Meetings Law in all respects.

Second, the Open Meetings Law contains what might be viewed as minimum requirements concerning the contents of minutes. Specifically, §106 of the Open Meetings Law states that:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.

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

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

Third, §30(1) of the Town Law states in relevant part that the town clerk:

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

Although that provision requires that the clerk be present at each meeting of the town board for the purpose of taking minutes, it might not be reasonable to construe §30(1) to require the presence of a clerk at a gathering during which there are no motions, proposals, resolutions or votes taken. Section 30 of the Town Law was enacted long before the Open Meetings Law went into effect. Consequently, the drafters of §30 could not likely have envisioned the existence of an extensive Open Meetings Law analogous to the statute now in effect. I believe that §30 was likely intended to require the presence of a clerk to take minutes in situations in which motions and resolutions are introduced and in which votes are taken. If those actions clearly will not occur during a meeting, it is in my view unnecessary that a town clerk be present to take minutes.

I hope that I have been of assistance.

RJF:jm

OML-AO-4289

From: Janet Mercer
To: Andrew Woloszyn
Date: 11/10/2006 10:30:19 AM
Subject: Re: Executive Sessions

This is in response to your inquiry. This office has consistently advised that a workshop is a meeting that needs to be open to the public and an executive session is part of an open meeting. A vote needs to be taken and approved by a majority of the public body in order to enter into executive session. Therefore, an executive session cannot be scheduled in advance of a meeting. Also, there are limited grounds for entry into executive session. I am attaching opinions issued by this office to further your understanding of this issue.

If you need further assistance, please do not hesitate to contact us.

Committee on Open Government
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OML-AO-4190

From: Robert Freeman
To: [redacted]
Date: 11/21/2006 8:55:31 AM
Subject: Dear Mr. Pavalow:

Dear Mr. Pavalow:

I have received your letter concerning discussion of a teacher who is not properly certified, which you characterized as a "personnel matter."

In this regard, I note that the term "personnel" appears nowhere in the Open Meetings Law. Some personnel-related issues may be discussed in executive session; others may not. The language of the exception cited to discuss personnel matters, §105(1)(f), is precise and authorizes 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."

I am unaware of the nature of the discussion that may occur. However, only to the extent that one or more of the topics indicated in §105(1)(f) relating to a particular person is discussed would there be a basis for entry into executive session.

It is also noted that a motion describing the issue to be discussed as a "personnel matter" is inadequate. Rather a motion should indicate that the subject to be discussed involves a particular person in relation to one of the topics appearing in paragraph (f), i.e., "I move to enter into executive session to discuss the employment history of a particular person". That person need not be identified in the motion.

I hope that I have been of assistance.

Robert J. Freeman
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OML-AO-4291

From: Camille JobinDavis
To: David Winters
Date: 11/28/2006 3:57:48 PM
Subject: RE: Open Meetings Law - subcommittee of 3 council members

Dave, I can offer comments, basically confirming what we talked about previously, that a committee made up of two or more members of a public body is a public body, based on the definition of public body outlined in the advisory opinion, but if you need more specific comments in writing, I have to put you in the stack of requests for advisory opinions. For now, let me do that, and we'll respond to you as soon as we can. Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
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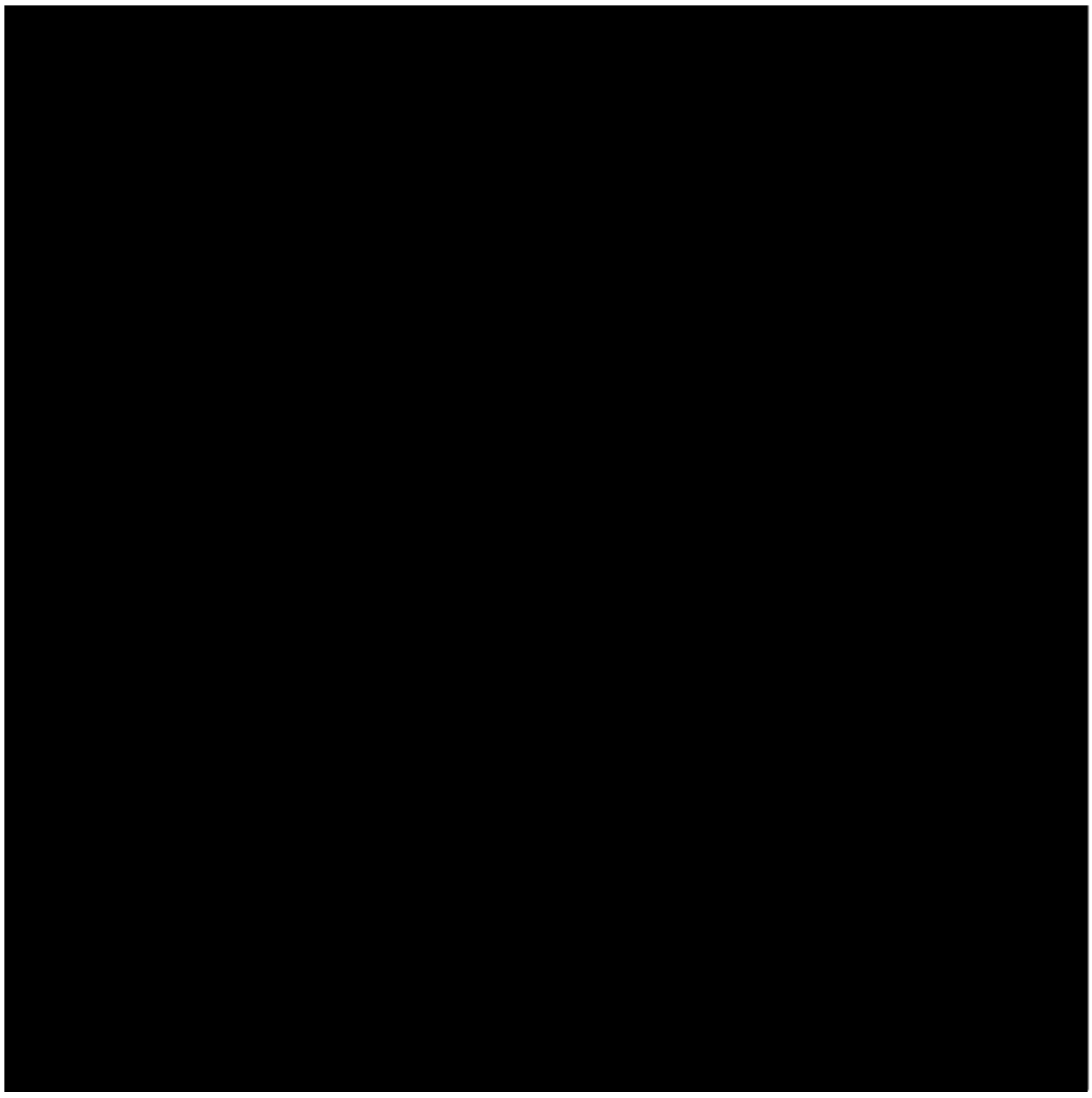

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16311
OML-AO-4292

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December 6, 2006

Ms. Nicole Pilcher
[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. Pilcher:

We are in receipt of your request for an advisory opinion concerning application of the Open Meetings Law to various proceedings of the Town of Vienna, and the Freedom of Information Law to certain requests for records. Please accept my apologies for the delay in responding. You raised a number of issues in your request, all of which we will attempt to address with 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 Town Board, 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. 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, we believe that it should do so based upon reasonable rules that treat members of the public equally.

Although public bodies have the right to adopt rules to govern their own proceedings (see e.g., Town Law, §63 and 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 our view, would be unreasonable.

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, we believe that a court would determine that the Town Board 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 our view that the Town Board may limit comments to matters involving Town business or the operation of Town government and require a brief written summary of the subject intended to be discussed by a person wishing to address the Board. Requiring that a person anticipate and articulate all questions exactly, prior to the meeting, in our opinion seems excessive.

However, from our perspective, while the Supervisor presides over Town Board meetings, it is questionable whether he may validly determine unilaterally whether the subject matter of comment proposed by a person desiring to speak involves Town business. He is but one member of the Town Board and we believe that the Town Board, if necessary, should determine by means of a majority vote of its total members if there is a question or disagreement regarding whether a subject relates to Town business. We believe that the Town Board in that circumstance should determine whether the subject may be raised, rather than the Supervisor reaching a determination alone. It is also noted that §63 of the Town Law states in part that "Every act, motion or resolution shall require for its adoption the affirmative vote of all the members of the town board."

Second, with respect to the issue of turning off the clerk's tape recorder and directing the clerk to discontinue taking minutes while a majority of the Town Board remains gathered and continues to discuss public business, in our opinion such actions are contrary to several provisions of the Open Meetings Law.

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)].

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, when a majority of a public body gathers to discuss public business, or remains gathered to continue to discuss public business, any such gathering, in our opinion, would ordinarily constitute a "meeting" subject to the Open Meetings Law.

Since a gathering to discuss public business held by a majority of a public body is a "meeting", regardless of whether it is characterized as "off the record", it would have the same responsibilities in relation to notice and the taking of minutes as in the case of a formal meeting, as well as the same ability to enter into executive sessions.

With respect to preparation of meeting minutes, the Open Meetings Law contains what might be viewed as minimum requirements concerning the contents of minutes. Specifically, §106 of the Open Meetings Law states that:

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

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

With respect to the question of proper notice, several provisions of law may be pertinent to an analysis of the matter. As you may be aware, two statutes involve notice. 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 provision quoted above pertain to notice given to members of a town board, and the requirements imposed by §62 are separate from those contained in 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 our opinion, changing the start time of a meeting on the day of a meeting without the necessity to do so would be equally unreasonable.

With respect to your questions about executive sessions, as you may be aware, the Open Meetings Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Section 105(1) states in relevant part that:

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

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

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 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 <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 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)]

Now, with respect to the Freedom of Information Law, in your correspondence, you relayed a discussion about the availability of bank statements, and the role of the Town Clerk as records access officer with regard to providing access to records pursuant to the Freedom of Information Law. In this regard, the functions of a "records access officer" is not generally a full-time position; that position is not a civil service title, and there is generally no restriction on who may carry out those functions.

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 (i.e., a county, city, town, village, school district, etc.) to adopt rules and regulations consistent those promulgated by the Committee and with the Freedom of Information Law. Further, §1401.2 of the regulations provides in relevant part that:

> "(a) The governing body of a public corporation and the head of an executive agency or governing body of other agencies shall be responsible for insuring compliance with the regulations herein, and shall designate one or more persons as records access officer by name or by specific job title and business address, who shall have the duty of coordinating agency response to public requests for access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public form continuing from doing so."

Section 1401.2 (b) of the regulations describes the duties of a records access officer and states in part that:

> "The records access officer is responsible for assuring that agency personnel...
>
> (3) upon locating the records, take one of the following actions:
> (i) make records promptly available for inspection; or
> (ii) deny access to the records in whole or in part and explain in writing the reasons therefor.
> (4) Upon request for copies of records:
> (i) make a copy available upon payment or offer to pay established fees, if any; or
> (ii) permit the requester to copy those records..."

In short, the records access officer must "coordinate" an agency's response to requests. Frequently the records access officer is an agency officer or employee who has familiarity with an agency's records. For example, the town clerk is designated as records access in the great majority of towns, for he or she, is also the records management officer and the legal custodian of town records, pursuant to §30(1) of the Town Law.

When an agency denies access to records, the applicant has the right to appeal pursuant to §89(4)(a) of the Freedom of Information Law, which states in relevant part that:

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

Further, the regulations promulgated by the Committee state that:

> "(a) The governing body of a public corporation or the head, chief executive or governing body of other agencies shall hear appeals or shall designate a person or body to hear appeals regarding denial of access to records under the Freedom of Information Law.
>
> (b) Denial of access shall be in writing stating the reason therefor and advising the person denied access of his or her right to appeal to the person or body established to hear appeals, and that person or body shall be identified by name, title, business address and business telephone number. The records access officer shall not be the appeals officer" (section 1401.7).

In consideration of the foregoing, it is clear that a town board, for example, is authorized to determine appeals, or that the head or governing body of an agency may designate a person or body to carry out that function.

Further, 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 pertinent exception with respect to bank account numbers indicated on bank statements in our view is §87(2)(i). For several years, that provision authorized an agency to withhold "computer access codes." Based on its legislative history, that provision was intended to permit agencies to withhold access codes which if disclosed would provide the recipient of a code with the ability to gain unauthorized access to information. Insofar as disclosure would enable a person with an access code to gain access to information without the authority to do so, or to shift, add, delete or alter information, i.e., to make electronic transfers, we believe that a bank account or ID number could justifiably be withheld. Section 87(2)(i) was amended in recognition of the need to guarantee that government agencies have the ability to ensure the security of their information and information systems. That provision states that an agency may withhold records or portions of records which "if disclosed, would jeopardize an agency's capacity to guarantee the security of its information technology assets, such assets encompassing both electronic information systems and infrastructures." If disclosure of a bank account number could enable a person to gain access to or in any way alter or adversely affect an agency's electronic information or electronic information systems, we believe that it may justifiably be withheld.

In light of the number of issues that you raised, you may find our website helpful (http://www.dos.state.ny.us/coog/coogwww.html). On it there are many advisory opinions that address a wide variety of topics, organized by subject and searchable by key terms.

On behalf of the Committee on Open Government we hope this is helpful to you.

Sincerely,

Camille Jobin-Davis
Assistant Director

CSJ:jm

cc: Town Board
Hon. Michael Piper, Supervisor
Hon. Nicol L. Baker, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 7, 2006

E-MAIL

TO: Fausta R.L. McDermott

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. McDermott:

I have received your letter and apologize for the delay in response. In your capacity as Vice President of Somers Library Board of Trustees, you raised the following question:

> "Since the Town of Somers has a population of about 18,000, are we exempt from the requirements of the open meetings law with regard to our committee meetings?"

In this regard, as the boards of trustees of a variety of entities characterized as "public libraries" are required to give effect to the Open Meetings Law. Some are governmental entities; others are not-for-profit corporations that typically have a relationship with government but which are not governmental entities. The boards of trustees of both the governmental and non-governmental public libraries are required to comply with the Open Meetings Law pursuant to §260-a of the Education Law, which states that:

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

> two weeks prior thereto shall be given to the public and news media at least one week prior to such meeting."

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

But for the enactment of §260-a, the boards of trustees of non-governmental or not-for-profit corporations that head public libraries would not fall within the scope of the Open Meetings Law. However, a board of trustees of a public library that is a governmental entity would fall within the coverage of the Open Meetings Law, even if §260-a of the Education Law had not been enacted, for it would constitute a "public body" subject to that statute.

Section 102(2) of the Open Meetings Law defines the phrase "public body" to mean:

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

Based on the foregoing, the Open Meetings Law clearly applies to the governing bodies of governmental entities, and in addition, the last clause in the definition indicates that committees, subcommittees and similar bodies of a public body are themselves public bodies required to comply with the Open Meetings Law. In contrast, when the board of trustees of a public library that is not a governmental entity is required to conduct its meetings in accordance with the Open Meetings Law, §260-a of the Education Law provides, by implication, that committees and subcommittees of boards of trustees, except those in New York City, are not required to give effect to the Open Meetings Law.

In consideration of the preceding commentary, if the Somers Public Library is a governmental entity, i.e., a municipal or school district library, I believe that committees and subcommittees consisting of two or more members of the Board would be required to comply with Open Meetings Law. In my view, the language of that law clearly indicates that the Board of Trustees is a public body and, therefore, that committees consisting of its members are also public bodies required to comply with the Open Meetings Law.

I hope that I have not been of assistance.

RJF:tt

STATE OF NEW YORK
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December 7, 2006

Ms. Kimberly Kennedy
[redacted]

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

Dear Ms. Kennedy:

As you are aware, I have received your correspondence concerning requests for records of the Village of Patchogue.

According to your letter, you submitted a request on June 19, and "thirteen days later", you were informed that "the documents were ready." Upon review of the records, however, "it was evident that all of the documents requested were not made available." Despite both written and telephone contacts, the records have not yet been made available. Additionally, you indicated in a telephone conversation on December 1 that you have received no response to a request for minutes of a Village board meeting held in October.

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

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date, 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, 2005 (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 note that on August 16, 2006, Governor Pataki signed into law, effective immediately, legislation that broadens the authority of the courts to award attorney's fees when government agencies fail to comply with the Freedom of Information Law (S. 7011-A, Chapter 492). Under the amendments, when a person initiates a judicial proceeding under the Freedom of Information Law and substantially prevails, a court has the discretionary authority to award costs and reasonable attorney's fees when the agency had no reasonable basis for denying access to records, or when the agency failed to comply with the time limits for responding to a request.

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

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

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

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

Third, when an applicant requests to inspect records, no fee may be charged when the records are accessible under the law. The specific language of the Freedom of Information Law and the regulations promulgated by the Committee on Open Government indicate that, absent statutory authority, an agency may charge fees only for the reproduction of records. Section 87(1)(b) of the Freedom of Information Law states:

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

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

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees
Hon. Paul Pontieri, Jr.
Patricia Seal, Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 7, 2006

E-MAIL

TO: Virginia Starke

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. Starke:

I have received your letter in which you referred to the designation of subcommittees of the Town of Hurley's Conservation Advisory Council and asked whether it would be "okay for two or three of us to meet in someone's house as a subcommittee just to discuss thing or do we have to publicly announce these meetings and have them in the very overcrowded Town Hall?"

In this regard, first, a conservation advisory council is a creation of law, §239-x of the General Municipal Law; it clearly performs governmental functions for a municipality and constitutes a "public body" subject to the Open Meetings Law. When a committee or subcommittee consists solely of members of a public body, such as the Council, I believe that the Open Meetings Law is applicable.

When that statute 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

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 the Council, would fall within the requirements of the Open Meetings Law, assuming that a committee discusses or conducts public business collectively as a body [see Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984 (1981)]. Further, as a general matter, a quorum consists of a majority of the total membership of a body (see General Construction Law, §41). 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, it has the same obligations regarding notice, openness, and the taking of minutes, for example, as well as the same authority to conduct executive sessions, as a governing body [see Glens Falls Newspapers, Inc. v. Solid Waste and Recycling Committee of the Warren County Board of Supervisors, 195 AD 2d 898 (1993)].

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

RJF:tt

STATE OF NEW YORK
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December 7, 2006

E-MAIL

TO: James Buck

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. Buck:

I have received your letter and apologize for the delay in response. You raised the following questions:

> "Are Boards of Fire Commissioners required to have open meetings. Also are the fire commissioners allowed to meet together weekly even though they only have one publicized meeting per month?"

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

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

Section 174(6) of the Town Law states in part that "A fire district is a political subdivision of the state and a district corporation within the meaning of section three of the general corporation law". Since a district corporation is also a public corporation [see General Construction Law, §66(1)], a board of commissioners of a fire district in my view is clearly a public body subject to the Open Meetings Law.

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

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

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

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

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

Based upon the direction given by the courts, when a majority of a board of fire commissioners 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.

Lastly, the Open Meetings Law requires that notice be given to the news media and posted prior to every meeting. Specifically, §104 of that statute provides that:

> "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be

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

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

I hope that I have been of assistance.

RJF:tt

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December 7, 2006

E-Mail

TO: Susan Edelman, New York Post

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. Edelman:

As you are aware, I have received your letter and a variety of materials relating to it. You have requested an advisory opinion concerning the status of the World Trade Center Captive Insurance Company, Inc. (hereafter "Captive") under the Freedom of Information and the Open Meetings Laws. Based on the analysis offered in the following commentary, I believe that Captive is subject to and required to comply with both of those statutes.

By way of background, a captive insurance company is a company that only insures all or part of the risks of its parent. Captive was required to be created pursuant to a grant agreement executed in November of 2004 and signed by Michael D. Brown, Under Secretary for Emergency Preparedness and Response at the U.S. Department of Homeland Security, and James W. Duffy, Governor Pataki's Authorized Representative. The Agreement identifies the State Emergency Management Office ("SEMO") as the Grantee and New York City as the Sub-Grantee. Article I, paragraph 2 of the Agreement provides that:

> "The Grantee through its Sub-Grant Agreement with the City attached hereto and incorporated by reference (Attachment A) shall ensure that the City will establish and incorporate a captive insurance company to be known as the WTC Captive Insurance Company, Inc. in the State of New York pursuant to the Certificate of Incorporation, the By-Laws, and the Liability Insurance Policy (attached hereto and incorporated herein as Attachments B, C, and D, respectively) to

> insure the City and its debris removal contractors, subcontractors and consultants at every tier, for claims arising from debris removal at the WTC site from September 11, 2001 (post collapse) through August 30, 2002."

A Sub-Grant Agreement was also executed in November 2004 and signed by the Governor's Authorized Representative and Mark Page, the City's Director of the Office of Management and Budget. That agreement states that Captive "would insure the City and the contractors for claims arising from the debris removal project, including for any environmental or professional liability."

Most significantly, its Certificate of Incorporation indicates that Captive is a not-for-profit corporation and that the Mayor of New York City appoints the members of and has control over the Captive's Board of Directors. Specifically, Paragraph Fifth provides that:

> "(a) The Board of Directors shall consist of five directors. All directors of the Company shall be appointed annually by the Mayor of the City of New York prior to the Company's annual meeting; provided, however, that one of such directors shall be appointed by the Mayor upon nomination of a person, which person shall be acceptable to the Mayor, in his sole discretion, by the Representative of the Contractors (as selected in accordance with paragraph (d) of this Article FIFTH); provided, further, that in event a nominee is not acceptable to the Mayor, the Representative, on behalf of the Contractors, shall have the right to select additional nominees until a nominee is deemed acceptable to the Mayor. Each year, immediately following the beginning of the Company's fiscal year, the Mayor shall be notified in writing by the President of the Company of the requirement to make the annual appointments to the Board of Directors of the Company. Directors shall succeed to office at the next annual meeting of the Board of Directors following their appointment.
>
> "(b) Each director shall be an employee, former employee or employee-on-leave of the City of New York or a person experienced in the insurance, construction, financial, professional, or other business or governmental communities of the City of New York. Each director shall be at least eighteen years of age and a citizen of the United States. At least two (2) of the directors shall be residents of New York State.
>
> "(c) The Mayor may appoint an alternate for each director, which alternate, upon written notice to the Secretary, may attend meetings and exercise therein all the rights, powers, and privileges of the absent director; provided that in the event an alternate for the director nominated on behalf of the Contractors is nominated by the

> Representative thereof, such alternate, if acceptable to the Mayor in his sole discretion, shall be appointed by the Mayor; provided, further, that in the event of such nominee is not acceptable to the Mayor, the Representative of the Contractors shall have the right to select additional nominees until a nominee is deemed acceptable to the Mayor."

In consideration of the control of Captive exercised by the Mayor and judicial decisions rendered by the Court of Appeals, the state's highest court, regarding the application of the Freedom of Information and Open Meetings Laws, again, I believe that Captive's records and meetings fall within the coverage of those statutes.

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

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

In consideration of the foregoing, as a general matter, the Freedom of Information Law pertains to entities of state and local government in New York.

Although not-for-profit corporations typically are not governmental entities and, therefore, fall beyond the scope of the Freedom of Information and Open Meetings Laws, the courts have found that the incorporation status of those entities is, alone, not determinative of their status under the statutes in question. Rather, they have considered the extent to which there is governmental control over those corporations in determining whether they fall within the coverage of those statutes.

In the first such decision, Westchester-Rockland Newspapers v. Kimball [50 NYS 2d 575 (1980)], the issue involved access to records relating to a lottery conducted by a volunteer fire company, the Court of Appeals found that volunteer fire companies, despite their status as not-for-profit corporations, are "agencies" subject to the Freedom of Information Law. In so holding, the Court stated that:

> "We begin by rejecting respondent's contention that, in applying the Freedom of Information Law, a distinction is to be made between a volunteer organization on which a local government relies for performance of an essential public service, as is true of the fire department here, and on the other hand, an organic arm of government, when that is the channel through which such services are delivered. Key is the Legislature's own unmistakably broad declaration that, '[a]s state and local government services increase and public problems become more sophisticated and complex and

> therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (emphasis added; Public Officers Law, §84).
>
> For the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objections cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" (id. at 579].

In another decision rendered by the Court of Appeals, Buffalo News v. Buffalo Enterprise Development Corporation [84 NY 2d 488 (1994)], the Court found that a not-for-profit corporation, based on its relationship to an agency, was itself an agency subject to the Freedom of Information Law. The decision indicates that:

> "The BEDC principally pegs its argument for nondisclosure on the feature that an entity qualifies as an 'agency' only if there is substantial governmental control over its daily operations (see, e.g., Irwin Mem. Blood Bank of San Francisco Med. Socy. v American Natl. Red Cross, 640 F2d 1051; Rocap v Indiek, 519 F2d 174). The Buffalo News counters by arguing that the City of Buffalo is 'inextricably involved in the core planning and execution of the agency's [BEDC] program'; thus, the BEDC is a 'governmental entity' performing a governmental function for the City of Buffalo, within the statutory definition.
>
> "The BEDC's purpose is undeniably governmental. It was created exclusively by and for the City of Buffalo...In sum, the constricted construction urged by appellant BEDC would contradict the expansive public policy dictates underpinning FOIL. Thus, we reject appellant's arguments," (id., 492-493).

In the context of your inquiry, again, based on Captive's Certificate of Incorporation, each member of its Board of Directors is appointed by or "acceptable to" the Mayor.

Most recently, in a case involving a not-for-profit corporation, the "CRDC", the court found that:

> "...the CRDC was admittedly formed for the purpose of financing the cost of and arranging for the construction and management of the Roseland Waterpark project. The bonds for the project were issued on behalf of the City and the City has pledged $395,000 to finance capital improvements associated with the park. The CRDC denies the City has a controlling interest in the corporation. Presently the Board has eleven members, all of whom were appointed by the City (see Resolution #99-083). The Board is empowered to fill any vacancies of six members not reserved for City appointment. Of those reserved to the City, two are paid City employees and the other three include the City mayor and council members. Formerly the Canandaigua City Manager was president of the CRDC. Additionally, the number of members may be reduced to nine by a board vote (see Amended Certificate of Incorporation Article V(a)). Thus the CRDC's claim that the City lacks control is at best questionable.
>
> "Most importantly, the City has a potential interest in the property in that it maintains an option to purchase the property at any time while the bonds are outstanding and will ultimately take a fee title to the property financed by the bonds, including any additions thereto, upon payment of the bonds in full. Further, under the Certificate of Incorporation, title to any real or personal property of the corporation will pass to the City without consideration upon dissolution of the corporation. As in Matter of Buffalo News, supra, the CRDC's intimate relationship with the City and the fact that the CRDC is performing its function in place of the City necessitates a finding that it constitutes an agency of the City of Canandaigua within the meaning of the Public Officers Law and therefore is subject to the requirements of the Freedom of Information Law..." (Canandaigua Messenger, Inc. V. Wharmby, Supreme Court, Ontario County, May 11, 2001).

I note that the Appellate Division unanimously affirmed the findings of the Supreme Court regarding the foregoing [aff'd 739 NYS 2d 509, 292 AD2d 835 (2002)].

Even if Captive is not itself an "agency", I believe that its records would fall within the scope of the Freedom of Information Law due to its relationship with the State and the City of New York. As indicated at the outset, that statute pertains to agency records, and §86(4) defines the term "record" expansively to include:

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

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

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

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

The point made in the final sentence of the passage quoted above appears to be especially relevant, for there appears to be "considerable crossover" in the activities of City officials and Captive.

Perhaps most pertinent is a determination rendered by the Court of Appeals in which it was found that materials received by a corporation providing services by contract for a branch of the State University were "kept" on behalf of the University, and, therefore, 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)]. Therefore, if a document is produced for an agency, it constitutes an agency record, even if it is not in the physical possession of the agency.

The foregoing is not intended to suggest that all Captive records must be disclosed. However, 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 (j) of the Law.

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

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

Based on the foregoing, a public body is, in my view, an entity required to conduct public business by means of a quorum that performs a governmental function and carries out its duties collectively, as a body.

In Smith v. City University of New York, the Court of Appeals held that:

> "in determining whether the entity is a public body, various criteria or benchmarks are material. They include the authority under which the entity is created, the power distribution or sharing model under which it exists, the nature of its role, the power it possesses and under which it purports to act, and a realistic appraisal of its functional relationship to affected parties and constituencies" [92 NYS2d 707, 714 (1998)].

A review of the by-laws of Captive clearly indicates that the government exercises substantial if not total control over the corporation and its Board of Directors. That being so, I believe that the Board constitutes a "public body" required to comply with the Open Meetings Law.

In a manner analogous to the Freedom of Information Law, the Open Meetings Law is based on a presumption of openness requiring that meetings of public bodies be conducted open to the public, except to the extent that an executive session may be held in accordance with paragraphs (a) through (h) of §105(1).

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

RJF:jm

cc: David R. Biester

STATE OF NEW YORK
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December 7, 2006

E-Mail

TO: Ms. Carrie Remis

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. Remis:

I have received your letter and the materials relating to it. Please accept my apologies for the delay in response.

You have raised a series of questions concerning the implementation of the Open Meetings Law by the Board of Education of the Rochester City School District. They focus on:

> "1) the use of the ad hoc/'special' meetings that are not sufficiently publicized or justified to the public
> 2) the use of Executive Sessions on controversial issues to limit public input and oversight and
> 3) secret and undocumented decision-making."

First, with respect to the "special" meetings to which you referred, you wrote that a particular special meeting was not publicized on the District's website and the minutes of the meeting "do not explain" the reason or urgency for holding the meeting.

In this regard, there is nothing in the Open Meetings Law that focuses on what might be characterized as special meetings. However, that law requires that notice of the time and place be given prior to every meeting. Specifically, §104 of that statute provides that:

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

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

However, 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.

Although the latest annual report of the Committee on Open Government to the Governor and the State Legislature recommends that the Law be amended to require public bodies to provide notice of the meetings on their websites, there is currently no obligation to do so.

Next, you referred to an executive session held by the Board "to discuss Resolution 20006-07:79 and specific personnel matters" and wrote that the Board voted to adopt the resolution and the "2005-06 Superintendent Evaluation Tool" during the executive session.

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

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

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

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

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

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

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

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

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

If I understand the subject of the executive session accurately, it involved the elements or characteristics of the method by which a superintendent might be evaluated. If that is so, if the discussion would have focused on the "evaluation tool" that would be used to measure or evaluate the performance of any person serving as superintendent, I do not believe that §105(1)(f) or any other ground for entry into executive session would have applied. Discussion of an evaluation tool would, in my view, be separate and distinct from discussion of the performance of the incumbent Superintendent. The former in my opinion could not be validly discussed in executive session, while the latter could, for it would focus on a "particular person."

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).

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

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

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

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

Next, even when there is a proper basis for entry into executive session, rarely can a board of education vote or take action in executive session. Although §106(2) of the Open Meeting s Law 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). 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.

Lastly, judicial precedent indicates that minutes must include an indication of the nature of action taken. Section 106 of the Open Meetings Law pertains to minutes, and subdivision (1) states that minutes of an open meeting must consist, at a minimum, "of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon." In Mitzner v. Goshen Central School District Board of Education [Supreme Court, Orange County, April 15, 1993], the issue involved a series of complaints made by the petitioner that were reviewed by the school board president, and the minutes of the board meeting stated that "the Board hereby ratifies the action of the President in signing and issuing eight Determinations in regard to complaints received from Mr. Bernard Mitzner." The court held that "these bare-bones resolutions do not

qualify as a record or summary of the final determination as required" by §106 of the Open Meetings Law. As such, the court found that the failure to indicate the nature of the determination of the complaints was inadequate. In the context of your inquiry, I believe that, in order to comply with the Open Meetings Law and to be consistent with the thrust of the holding in Mitzner, minutes must indicate in some manner the nature of the action taken by the Board.

In an effort to enhance compliance with and understanding of the Open Meetings Law, copies of this opinion will be sent to the Board and its Executive Assistant.

I hope that I have been of assistance.

RJF:jm

cc: Board of Education
Linda Dunsmoor

STATE OF NEW YORK
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December 7, 2006

E-Mail

TO: Ms. Ruth Tobiassen

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. Tobiassen:

I have received your letter and apologize for the delay in response. You wrote that your "right to videotape town board meetings is being challenged."

In this regard, 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.).

The Court also determined that "[o]nce the information and comments are conveyed to the public, it should be of no consequence that they may subsequently be repeated, by means of replay, to those who were unable to attend" (id.).

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, or the use of a recording following a meeting.

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:jm

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December 7, 2006

E-Mail

TO: Mr. Bruce Pavalow

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. Pavalow:

I have received your letter and apologize for the delay in response. Your inquiries focus on the notion of "confidentiality."

You referred initially to:

> "...groundrules...where the Superintendent's weekly letter to all board members is considered confidential. This letter consists of the Superintendent's statements, opinions, recommendations and comments. Last year I took issue with his letter to belittle myself and other board and community members. Is using a confidential letter to belittle people legal?"

In this regard, first, many judicial decisions have focused on access to and the ability to disclose records, and this office has considered the New York Freedom of Information Law and the federal Freedom of Information Act in its analyses of what may be "confidential." To be confidential under the Freedom of Information Law, I believe that records must be "specifically exempted from disclosure by state or federal statute" in accordance with §87(2)(a).

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

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

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

> "Exemption 3 excludes from its coverage only matters that are:
>
> > *specifically* exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) **requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue**, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.
>
> "5 U.S.C. § 552(b)(3) (1982) (emphasis added). Records sought to be withheld under authority of another statute thus escape the release requirements of FOIA if – and only if – that statute meets the requirements of Exemption 3, including the threshold requirement that it specifically exempt matters from disclosure. The Supreme Court has equated 'specifically' with 'explicitly.' *Baldridge v. Shapiro*, 455 U.S. 345, 355, 102 S. Ct. 1103, 1109, 71 L.Ed.2d 199 (1982). '[O]nly *explicitly* non-disclosure statutes that evidence a congressional determination that certain materials ought to be kept in confidence will be sufficient to qualify under the exemption.' *Irons & Sears v. Dann*, 606 F.2d 1215, 1220 (D.C.Cir.1979) (emphasis added). In other words, a statute that is claimed to qualify as an Exemption 3 withholding statute must, on its face, exempt matters from disclosure"[Reporters Committee for Freedom of the Press v. U.S. Department of Justice, 816 F.2d 730, 735 (1987); modified on other grounds,831 F.2d 1184 (1987); reversed on other grounds, 489 U.S. 789 (1989); see also British Airports Authority v. C.A.B., D.C.D.C.1982, 531 F.Supp. 408; Inglesias v. Central Intelligence Agency, D.C.D.C.1981, 525 F.Supp, 547; Hunt v. Commodity Futures Trading Commission, D.C.D.C.1979, 484 F.Supp. 47; Florida Medical Ass'n, Inc. v. Department of Health, Ed. & Welfare, D.C.Fla.1979, 479 F.Supp. 1291].

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

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

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

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

From my perspective, the Superintendent's weekly letter would not be "confidential" or exempted from disclosure pursuant to a statute that forbids disclosure. Rather, it is likely that some aspects of the letters may be withheld; others would likely be public.

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 (j) of the Law. In my opinion, the contents of the records in question serve as the factors relevant to an analysis of the extent to which the records may be withheld or must be disclosed, and several of the grounds for denial may be relevant to such an analysis in relation to the records in question.

Records prepared by the Superintendent and forwarded to members of the Board would constitute intra-agency materials that fall within the coverage of §87(2)(g) of the Freedom of Information Law. That provision states that an agency may withhold records that:

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

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

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

> "While the reports in principle may be exempt from disclosure, on this record - which contains only the barest description of them - we cannot determine whether the documents in fact fall wholly within the scope of FOIL's exemption for 'intra-agency materials,' as claimed by respondents. To the extent the reports contain 'statistical or factual tabulations or data' (Public Officers Law section 87[2][g][I], or other material subject to production, they should be redacted and made available to the appellant" [Xerox Corp. v. Town of Webster, 65 NY 2d 131, 133 (1985)].

Therefore, as indicated earlier, and as you suggested, intra-agency materials may be accessible or deniable in whole or in part, depending upon their specific contents.

Also relevant may be §87(2)(b), which enables an agency to withhold records or portions thereof which if disclosed would result in an unwarranted invasion of privacy. That provision might be applied with respect to a variety of matters relating to hiring, evaluation or discipline of staff, for example.

Section 87(2)(c) of the Freedom of Information Law permits an agency to withhold records to the extent that disclosure "would impair present or imminent contract awards or collective bargaining negotiations". Items within the letters might in some instances fall within that exception.

Again, it is emphasized that although records or perhaps portions of records may be withheld, there is no requirement that they must be withheld. The Court of Appeals has confirmed that the exceptions to rights of access are permissive, rather than mandatory, stating that:

> "while an agency is permitted to restrict access to those records falling within the statutory exemptions, the language of the exemption provision contains permissible rather than mandatory language, and it is within the agency's discretion to disclose such records, with or without identifying details, if it so chooses" [Capital Newspapers v. Burns, 67 NY 2d 562, 567 (1986)].

Consequently, even if it is determined that a record may be withheld under §87(2)(g), for example, an agency would have the authority to disclose the record.

It is also emphasized that the grounds for withholding records under the Freedom of Information Law and the grounds for entry into executive session are separate and distinct, and that they are not necessarily consistent. In some instances, although a record might be withheld under the Freedom of Information Law, a discussion of that record might be required to be conducted in public under the Open Meetings Law, and vice versa. For instance, if an administrator transmits a memorandum to the Board suggesting a change in policy, that record could be withheld. It would consist of intra-agency material reflective of an opinion or recommendation. Nevertheless, when the Board discusses the recommendation at a meeting, there would be no basis for conducting an executive session. Consequently, there may be no reason for withholding the record even though the Freedom of Information Law would so permit.

In short, while there may be a valid legal reason for withholding some elements of the records at issue, frequently their contents are fully discussed at open meetings, thereby diminishing the need or rationale for withholding.

In your second area of inquiry, you questioned whether:

> "...if a board member were to make a motion to go into executive session to discuss an issue and the board majority refused, would it be permissible for the board member to begin discussing the issue in public?"

Here I point out that even when there is a basis for entry into executive session, there is no obligation to convene in private. Section 105(1) prescribes a procedure that must be accomplished in public before an executive session may be held. 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, provided, however, that no action by formal vote shall be taken to appropriate public moneys..."

If no motion is made to enter into executive session, or if a motion to conduct an executive session is not approved, a public body is generally free to discuss issues in public.

As in the case of the Freedom of Information Law, the only instances, in my view, in which members of a public body are prohibited from disclosing information would involve matters that are indeed confidential. When a public body has the discretionary authority to discuss a matter in public or in private, I do not believe that the matter can properly be characterized as "confidential."

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

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

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

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

RJF:jm

From: Robert Freeman
To: Carl Zatz - Gardiner Citizen
Date: 12/8/2006 3:05:25 PM
Subject: Re: gardiner

Dear Supervisor Zatz:

I can only address the issue as it relates to the Open Meetings Law. Other potential issues would involve matters beyond our advisory jurisdiction.

As your question relates to the Open Meetings Law, assuming that less than a majority of the Town Board has gathered to meet with residents, that law simply would not apply. The application of that law is triggered and a "meeting" occurs only when a majority of a public body gathers for the purpose of conducting public business collectively, as a body.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
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STATE OF NEW YORK
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December 14, 2006

Mr. Carl A. Falk
[redacted]

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

Dear Mr. Falk:

I have received your correspondence and apologize for the delay in response. You referred to meetings held by the Richland Town Board and executive sessions held "to set the salaries for elected officials and other employees and the budget for next year" and asked: "What can be done to make this town follow the open meetings laws?"

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

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

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

Often a discussion concerning the budget has an impact on personnel. Nevertheless, and despite its frequent use, the term "personnel" appears nowhere in the Open Meetings Law. It is true that one of the grounds for entry into executive session often relates to personnel matters. From my perspective, however, the term is overused and is frequently cited in a manner that is misleading or causes unnecessary confusion. To be sure, some issues involving "personnel" may be properly

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

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

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

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

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

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

Due to the insertion of the term "particular" in §105(1)(f), I believe that a discussion of "personnel" may be considered in an executive session only when the subject involves a particular person or persons, and only when at least one of the topics listed in §105(1)(f) is considered.

When a discussion concerns matters of policy, such as the manner in which public money will be expended or allocated, the functions of a department or perhaps the creation or elimination of positions, I do not believe that §105(1)(f) could be asserted, even though the discussion may relate to "personnel". For example, if a discussion involves staff reductions or layoffs due to budgetary concerns, the issue in my view would involve matters of policy. Similarly, if a discussion of possible layoff relates to positions and whether those positions should be retained or abolished, the discussion would involve the means by which public monies would be allocated. In none of the instances described would the focus involve a "particular person" and how well or poorly an individual has performed his or her duties. To reiterate, in order to enter into an executive session pursuant to §105(1)(f), I believe that the discussion must focus on a particular person (or persons) in relation to a topic listed in that provision. As stated judicially, "it would seem that under the statute matters related to personnel generally or to personnel policy should be discussed in public for such matters

do not deal with any particular person" (Doolittle v. Board of Education, Supreme Court, Chemung County, October 20, 1981).

In the context of the information that you presented, when a discussion involves salaries concerning, for example, all Town Board members, the focus would not involve any "particular person", and, in my view, there would be no basis for conducting an executive session. However, when a discussion focuses on a particular employee, that person's performance, and whether he or she merits an increase, the discussion would pertain to a particular person, and I believe that an executive session could properly be held.

I point out, too, that it has been advised that a motion describing the subject to be discussed as "personnel" or "specific personnel matters" is inadequate, and that the motion should be based upon the specific language of §105(1)(f). For instance, a proper motion might be: "I move to enter into an executive session to discuss the employment history of a particular person (or persons)". Such a motion would not in my opinion have to identify the person or persons who may be the subject of a discussion. By means of the kind of motion suggested above, members of a public body and others in attendance would have the ability to know that there is a proper basis for entry into an executive session. Absent such detail, neither the members nor others may be able to determine whether the subject may properly be considered behind closed doors.

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)].

With respect to the correction of deficiencies, although the opinions rendered by this office are not binding, it is our hope that they are educational and persuasive and that they encourage compliance. To enhance understanding of the Open Meetings Law, a copy of this opinion will be sent to the Town Board. If education and persuasion fail, §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."

Lastly, you wrote that the Town "has the practice of scheduling multiple public meetings on the same night", and that individuals do not have the ability to attend all of them. It is suggested that you express your frustration to the Town Board and ask that public bodies within Town government conduct their meetings on different evenings. I note that there is no law of which I am aware that would preclude several entities from convening at the same time or on the same days. However, anyone may record an open meeting of a public body, so long as the use of the recording device is neither disruptive nor obtrusive.

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
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December 15, 2006

E-MAIL

TO: Martin Bregg

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. Bregg:

I have received your letter in which you asked that I confirm in writing a response offered in a recent telephone conversation. Specifically, the question is: "When a motion is made but does not receive a second, do you have to record that motion as part of the official meeting minutes."

In my view, due to the language of §106(1) of the Open Meetings Law, which provides direction concerning the content of minutes of open meetings, reference to a motion, whether seconded, approved or otherwise, must be included in minutes. The cited provision states that:

> "Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon the vote thereon."

Based on the foregoing, even if a motion is defeated or, as in the situation that you described, is not seconded, I believe that the law requires that it be referenced in minutes.

I hope that I have been of assistance. Should any further questions arise, please feel free to contact me.

RJF:tt

STATE OF NEW YORK
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December 18, 2006

E-Mail

TO: Mr. Raphael Spindell

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. Spindell:

As you are aware, I have received your letter in which you sought an opinion concerning your contention that a case planning conference conducted by the New York City Administration for Children's Services is subject to the Open Meetings Law and that, therefore, you have the right to tape record the conference.

In this regard, the Open Meetings Law is applicable to meetings of public bodies, and §102(2) defines the phrase "public body" to mean:

> "...any entity for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body."

Based on the foregoing, a public body generally is an entity consisting of two or more persons who are elected or appointed to conduct public business and perform a governmental function collectively, as a body.

As I understand the matter, no public body would be involved, and the Open Meetings Law would not apply. I believe that a case planning conference is conducted by the staff of the Administration for Children's Services, rather than by an elected board, council or commission, for example.

Notwithstanding the foregoing, I know of no law that would forbid you from recording a gathering during which you are a party to the discussion.

I hope that the foregoing serves to clarify your understanding and that I have been of assistance.

RJF:jm

STATE OF NEW YORK
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December 18, 2006

E-Mail

TO: Mr. Matthew Perry

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. Perry:

I have received your letter in which you referred to notice of regularly scheduled meetings and asked whether "a public notice [should] go in the paper each month and a conspicuous place publicly for each meeting."

In this regard, the Open Meetings Law requires that notice be given to the news media and posted prior to every meeting. Specifically, §104 of that statute provides that:

> "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before each meeting.
>
> 2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.
>
> 3. The public notice provided for by this section shall not be construed to require publication as a legal notice."

Stated differently, if a meeting is scheduled at least a week in advance, notice of the time and place must be given to the news media and to the public by means of posting in one or more designated public locations, not less than seventy-two hours prior to the meeting. If a meeting is scheduled less than a week an advance, again, notice of the time and place must be given to the news media and

posted in the same manner as described above, "to the extent practicable", at a reasonable time prior to the meeting. Therefore, if, for example, there is a need to convene quickly, the notice requirements can generally be met by telephoning the local news media and by posting notice in one or more designated locations.

In the context of your inquiry, if a series of meetings have been scheduled in advance to be held at particular times, the posting of a notice of a schedule of those meetings in a conspicuous public location and transmittal of that notice once to the news media would in my view satisfy §104 of the Open Meetings Law regarding those meetings. The only instances in which additional notice would be required would involve unscheduled meetings that are not referenced in the notice.

Therefore, if, for instance, a public body establishes at its organizational meeting that formal meetings will be held on the second Thursday of each month at 7 p.m. in the town hall, and if notice containing that information is posted continuously and transmitted once to the local news media, I believe that the board would satisfy the notice requirements imposed by the Open Meetings Law. Again, the only additional notice would involve unscheduled meetings. I point out, too, that although notice of meetings must be given to the news media, there is no requirement that the news media print or publicize that a meeting will be held.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
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December 18, 2006

E-Mail

TO: Mr. Matthew Perry

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. Perry:

I have received your letter in which you wrote that you serve as a member of a public body that is subject to the Open Meetings Law, and you asked whether a member of that body "who may be required to stay at home with the children" may vote by phone.

Based on the language of the law and judicial precedent, a member of a public body may not vote by phone. In this regard, I offer the following comments.

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."

As amended in 2000, §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, or a convening that occurs through videoconferencing. I point out, too, that §103(c) of the Open Meetings Law states that "A public body that uses videoconferencing to conduct its meetings shall provide an opportunity to attend, listen and observe at any site at which a member participates."

The amendments to the Open Meetings Law in my view clearly indicate that there are only two ways in which the members of a public body may cast votes or validly conduct a meeting. Any other means of conducting a meeting or voting, i.e., by telephone, by mail, or by e-mail, would be inconsistent with law.

As indicated above, the definition of the phrase "public body" refers to entities that are required to conduct public business by means of a quorum. The term "quorum" is defined in §41 of the General Construction Law, which has been in effect since 1909. The cited provision, which was also amended to include language concerning videoconferencing, states that:

> "Whenever three of more public officers are given any power or authority, or three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of the whole number of such persons or officers, gathered together in the presence of each other or through the use of videoconferencing, at a meeting duly held at a time fixed by law, or by any by-law duly adopted by such board of body, or at any duly adjourned meeting of such meeting, or at any meeting duly held upon reasonable notice to all of them, shall constitute a quorum and not less than a majority of the whole number may perform and exercise such power, authority or duty. For the purpose of this provision the words 'whole number' shall be construed to mean the total number which the board, commission, body or other group of persons or officers would have were there no vacancies and were none of the persons or officers disqualified from acting."

Based on the foregoing, again, voting and a valid meeting may occur only when a majority of the total membership of a public body, a quorum, has "gathered together in the presence of each other or through the use of videoconferencing." Only when a quorum has convened in the manner described in §41 of the General Construction Law would a public body have the authority to carry out its powers and duties. Consequently, it is my opinion that neither a public body nor its members individually may take action or vote by means of telephone calls or e-mail.

In an early 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..."

Recently the Appellate Division nullified action taken by a five person Board, two of whose members could not participate. Two other members met and a third participated by phone. Those three voted, but the Court found that the Open Meetings Law prohibited voting by phone and nullified the action taken [Town of Eastchester v. NYS Board of Real Property Services, 23 AD2d 484 (2005)].

Lastly, I direct your attention to the legislative declaration of the Open Meetings Law, §100, which states in part that:

> "It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy.

Based on the foregoing, the Open Meetings Law is intended to provide the public with the right to *observe* the performance of public officials in their deliberations. That intent cannot be realized if members of a public body conduct public business as a body or vote by phone, by mail, or by e-mail.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
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December 19, 2006

E-MAIL

TO: Joy Canfield

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Ms. Canfield:

I have received your letter in which you referred to a request for resumes of those who sought to fill a vacancy on the Town Board. You indicated that the Board did not take action to fill the vacancy "since two of the applicants were running for election to the office in November."

In this regard, in brief, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the Law. The only ground for denial of significance in my view would be §87(2)(b), which authorizes an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." The Court of Appeals, the state's highest court, held that the intent of the exception is to permit agencies to protect against disclosure of "intimate details" of persons' lives, and that the standard should consider the reasonable person of ordinary sensibilities [Hanig v. State Department of Motor Vehicles, 79 NY 2d 106 (1992)]. From my perspective, the fact that a person has applied to fill a vacancy in what ordinarily is an elective office would not represent a disclosure of an intimate personal detail or would, therefore, constitute an unwarranted invasion of personal privacy.

Similar considerations would be pertinent in determining rights of access to resumes or applications. I note, too, that §89(2)(b) includes a series of examples of unwarranted invasions of personal privacy. Based on those examples, a person's employment history, other than public employment, may be withheld; medical information may be withheld; other details, such as a social security number, may also be withheld in my view. However, some details within the records would not in my opinion rise to the level of an unwarranted invasion of personal privacy if disclosed. For instance, it has been held that one's general educational background must be disclosed [see Ruberti, Girvin & Ferlazzo v. NYS Division of State Police, 641 NYS2d 411, 218 AD2d 494(1996)].

I note in a related vein that, like the Freedom of Information Law, the Open Meetings Law is based on a presumption of openness. In a manner analogous to the Freedom of Information Law, meetings of public bodies must be conducted in public except to the extent that an executive session may appropriately be held. Paragraphs (a) through (h) of §105(1) of the Open Meetings Law specify and limit the subjects that may properly be considered during an executive session.

In my opinion, the only provision pertinent to the matter that you raised is §105(1)(f) of the Open Meetings Law, which permits a public body to enter into an executive session to discuss:

> "the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation..."

Under the language quoted above, it would appear that a discussion focusing on the individual candidates could validly be considered in an executive session, for it would involve a matter leading to the appointment of a particular person. Nevertheless, in the only decision of which I am aware that dealt directly with the propriety of holding an executive to discuss filling a vacancy in an elective office, the court found that there was no basis for entry into executive session. In determining that an executive session could not properly have been held, the court stated that:

> "...respondents' reliance on the portion of Section 105(1)(f) which states that a Board in executive session may discuss the 'appointment...of a particular person...' is misplaced. In this Court's opinion, given the liberality with which the law's requirements of openness are to be interpreted (Holden v. Board of Trustees of Cornell Univ., 80 AD2d 378) and given the obvious importance of protecting the voter's franchise this section should be interpreted as applying only to employees of the municipality and not to appointments to fill the unexpired terms of elected officials. Certainly, the matter of replacing elected officials, should be subject to public input and scrutiny" (Gordon v. Village of Monticello, Supreme Court, Sullivan County, January 7, 1994), modified on other grounds, 207 AD 2d 55 (1994)].

Based on the foregoing, notwithstanding its language, the court in Gordon held that §105(1)(f) could not be asserted to conduct an executive session. I point out that the Appellate Division affirmed the substance of the lower court decision but did not refer to the passage quoted above.

In consideration of the foregoing, again, it would appear that the resumes or applications would be available, except to the extent that they include the kinds of intimate personal information to which allusion was made earlier.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
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December 26, 2006

Mr. Daniel Miner
Tonawanda News
435 River Road
North Tonawanda, NY 14120

The staff of the Committee on 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. Miner:

I have received your correspondence in which you asked that I confirm in writing the advice offered by phone indicating that a motion for entry into executive session pursuant to §105(1)(f) need not include the identity of the person who is the subject of the discussion.

In this regard, by way of background, §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 "personnel" exception, §105(1)(f), states that a public body may enter into an executive session to discuss:

> "...the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation..." (emphasis added).

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)". It has long been advised that a motion would not have to identify the person or persons who may be the subject of a discussion.

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)..." [Gordon v. Village of Monticello, 620 NY 2d 573, 575; 207AD 2d 55, 58 (1994); emphasis added].

The last sentence in the passage quoted above specifies that the Open Meetings Law does not require that a motion for entry into executive session identify the person who is the subject of the discussion by name.

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

cc: Common Council
Ronald C. Trabucco

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 26, 2006

Ms. Rose Mary Warren
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Warren:

I have received your letter and the news articles attached to it. As I understand your remarks, you raised issues concerning your inability to join the Niagara-Wheatfield Board of Education during a tour of District buildings, as well as the public's right to speak during Board meetings. In this regard, I offer the following comments.

First, by way of background, as you may be aware, the definition of "meeting" [see Open Meetings Law, §102(1)] has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that any gathering of a quorum of a public body, such as a board of education, for the purpose of conducting public business is a "meeting" that must be convened open to the public, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

I point out that the decision rendered by the Court of Appeals was precipitated by contentions made by public bodies that so-called "work sessions" and similar gatherings held for the purpose of discussion, but without an intent to take action, fell outside the scope of the Open Meetings Law. In discussing the issue, the Appellate Division, whose determination was unanimously affirmed by the Court of Appeals, stated that:

> "We believe that the Legislature intended to include more than the mere formal act of voting or the formal execution of an official document. Every step of the decision-making process, including the decision itself, is a necessary preliminary to formal action. Formal acts have always been matters of public record and the public has always been made aware of how its officials have voted on an issue.

> There would be no need for this law if this was all the Legislature intended. Obviously, every thought, as well as every affirmative act of a public official as it relates to and is within the scope of one's official duties is a matter of public concern. It is the entire decision-making process that the Legislature intended to affect by the enactment of this statute" (60 AD 2d 409, 415).

The court also dealt with the characterization of meetings as "informal," stating that:

> "The word 'formal' is defined merely as 'following or according with established form, custom, or rule' (Webster's Third New Int. Dictionary). We believe that it was inserted to safeguard the rights of members of a public body to engage in ordinary social transactions, but not to permit the use of this safeguard as a vehicle by which it precludes the application of the law to gatherings which have as their true purpose the discussion of the business of a public body" (id.).

Based upon the direction given by the courts, if a majority of public body gathers to discuss the business of that body, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law.

There is case law, however, dealing with might have been characterized as a field trip or site visit. In the first decision, the members of a public body were in a van, and it was held that "the Open Meetings Law was not violated" [City of New Rochelle v. Public Service Commission, 450 AD 2d 441 (1989)]. In that case, members of the Public Service Commission toured the proposed route of a power line in order to acquire a greater understanding of evidence previously presented. More recently, in Riverkeeper v. The Planning Board of the Town of Somers (Supreme Court, Westchester County, June 14, 2002), it was concluded that a site visit by a Planning Board does not constitute a meeting subject to the Open Meetings Law so long as its purpose is not "for anything other than to 'observe and acquire information.'" The court in that decision cited and apparently relied on advisory opinion rendered by this office in which it was suggested that:

> "...site visits or tours by public bodies should be conducted solely for the purpose of observation and acquiring information, and...any discussions or deliberations regarding such observations should occur in public during meetings conducted in accordance with the Open Meetings Law."

Next, while the Open Meetings Law clearly provides the public with the right "to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy" (see Open Meetings Law, §100), the Law is silent with respect to public participation. Consequently, by means of example, if a public body, 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 hope that the foregoing serves to enhance your understanding and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Judith Howard

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 26, 2006

Ms. Michele D. Rice
District Clerk
Oxford Academy & Central School
P.O. Box 192
Oxford, NY 13830

The staff of the Committee on 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. Rice:

I have received your letter in which you sought guidance concerning "Board of Education workshops." Although you did not fully describe the nature of the workshops, your referred to gatherings involving Board members and teachers conducted "in a relaxing atmosphere to share comments, concerns and ideas..."

In this regard, it is noted that the definition of "meeting" [see Open Meetings Law, §102(1)] has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that any gathering of a quorum of a public body, such as a board of education, for the purpose of conducting public business is a "meeting" that must be convened open to the public, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

I point out that the decision rendered by the Court of Appeals was precipitated by contentions made by public bodies that so-called "work sessions" and similar gatherings held for the purpose of discussion, but without an intent to take action, fell outside the scope of the Open Meetings Law. In discussing the issue, the Appellate Division, whose determination was unanimously affirmed by the Court of Appeals, stated that:

> "We believe that the Legislature intended to include more than the mere formal act of voting or the formal execution of an official document. Every step of the decision-making process, including the decision itself, is a necessary preliminary to formal action. Formal acts have always been matters of public record and the public has

> always been made aware of how its officials have voted on an issue. There would be no need for this law if this was all the Legislature intended. Obviously, every thought, as well as every affirmative act of a public official as it relates to and is within the scope of one's official duties is a matter of public concern. It is the entire decision-making process that the Legislature intended to affect by the enactment of this statute" (60 AD 2d 409, 415).

The court also dealt with the characterization of meetings as "informal," stating that:

> "The word 'formal' is defined merely as 'following or according with established form, custom, or rule' (Webster's Third New Int. Dictionary). We believe that it was inserted to safeguard the rights of members of a public body to engage in ordinary social transactions, but not to permit the use of this safeguard as a vehicle by which it precludes the application of the law to gatherings which have as their true purpose the discussion of the business of a public body" (id.).

Based upon the direction given by the courts, if a majority of a public body gathers to discuss public business, any such gathering, in my opinion, would ordinarily constitute a "meeting" subject to the Open Meetings Law. Since a workshop held by a majority of a public body is a "meeting", it would have the same responsibilities in relation to notice and the taking of minutes as in the case of a formal meeting, as well as the same ability to enter into executive sessions.

With respect to minutes of "workshops", as well as other meetings, the Open Meetings Law contains what might be viewed as minimum requirements concerning the contents of minutes. Specifically, §106 of the Open Meetings Law states that:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.
>
> 2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.
>
> 3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meetings except that minutes taken pursuant to subdivision two hereof shall be

> available to the public within one week from the date of the executive session."

Based upon the foregoing, it is clear in my view that minutes need not consist of a verbatim account of what was said at a meeting; similarly, there is no requirement that minutes refer to every topic discussed or identify those who may have spoken. Although a public body may choose to prepare expansive minutes, at a minimum, minutes of open meetings must include reference to all motions, proposals, resolutions and any other matters upon which votes are taken. If those kinds of actions, such as motions or votes, do not occur during workshops, technically, I do not believe that minutes must be prepared.

Lastly, the Open Meetings Law requires that notice be posted and given to the news media prior to every meeting of a public body, such as a board of education. Specifically, §104 of that statute provides that:

> "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before each meeting.
>
> 2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.
>
> 3. The public notice provided for by this section shall not be construed to require publication as a legal notice."

Stated differently, if a meeting is scheduled at least a week in advance, notice of the time and place must be given to the news media and to the public by means of posting in one or more designated public locations, not less than seventy-two hours prior to the meeting. If a meeting is scheduled less than a week an advance, again, notice of the time and place must be given to the news media and posted in the same manner as described above, "to the extent practicable", at a reasonable time prior to the meeting. Although the Open Meetings Law does not make reference to "special" or "emergency" meetings, if, for example, there is a need to convene quickly, the notice requirements can generally be met by telephoning the local news media and by posting notice in one or more designated locations. I point out, too, that the notice provisions in the Open Meetings Law merely require that notice include reference to the time and place of meetings. While a public body may include additional information, such as an agenda or a description of topics to be considered, there is no obligation to do so.

To obtain additional information concerning the Open Meetings Law, our website includes a variety of material, including the text of the law, frequently asked questions, a basic guide entitled "Your Right to Know", and thousands of advisory legal opinions that are indexed by subject matter.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Mary Ellen Clark

STATE OF NEW YORK
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December 26, 2006

Ms. Judith Hall
[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. Hall:

I have received your letter and apologize for the delay in response. Your remarks focus on a proposed wind power project in the Town of Cohocton, and the issues that you raised relate to both the Open Meetings Law and the Freedom of Information Law.

You focused on a special meeting of the Town Board that was preceded by notice indicating that the topic to be considered would be "the discussion of the PILOT plan with the director of the Steuben County IDA", Mr. James Sherron. Soon after the meeting began, the Board entered into executive session to discuss collective negotiations and "litigations against the town and possible future litigations..." Nevertheless, as you "watched from a window, Mr. Sherron was the person doing all the talking at the session."

In this regard, as a general matter, the Open Meetings Law is based on a presumption of openness. Stated differently, the Law requires that meetings of public bodies be conducted in public, except to the extent that a closed or executive session may properly be held. Paragraphs (a) through (h) of §105(1) of the Law specify and limit the subjects that may be considered in an executive session, and it is clear in my view that those provisions are generally intended to enable public bodies to exclude the public from their meetings only to the extent that public discussion would result in some sort of harm, perhaps to an individual in terms of the protection of his or her privacy, or to a government in terms of its ability to perform its duties in the best interests of the public.

The provision pertaining to litigation, §105(1)(d), permits a public body to enter into executive session to discuss "proposed, pending or current litigation." While the courts have not sought to define the distinction between "proposed" and "pending" or between "pending" and "current" litigation, they have provided direction concerning the scope of the exception in a manner consistent with the description of the general intent of the grounds for entry into executive session

suggested in my remarks in the preceding paragraph, i.e., that they are intended to enable public bodies to avoid some sort of identifiable harm. For instance, it has been determined that the mere possibility, threat or fear of litigation would be insufficient to conduct an executive session. Specifically, it was held that:

> "The purpose of paragraph d is 'to enable a public body to discuss pending litigation privately, without baring its strategy to its adversary through mandatory public meetings' (Matter of Concerned Citizens to Review Jefferson Val. Mall v. Town Bd. Of Town of Yorktown, 83 AD 2d 612, 613, 441 NYS 2d 292). The belief of the town's attorney that a decision adverse to petitioner 'would almost certainly lead to litigation' does not justify the conducting of this public business in an executive session. To accept this argument would be to accept the view that any public body could bar the public from its meetings simply be expressing the fear that litigation may result from actions taken therein. Such a view would be contrary to both the letter and the spirit of the exception" [Weatherwax v. Town of Stony Point, 97 AD 2d 840, 841 (1983)].

Based upon the foregoing, I believe that the exception is intended to permit a public body to discuss its litigation strategy behind closed doors, rather than issues that might eventually result in litigation. Again, §105(1)(d) would not permit a public body to conduct an executive session due to a possibility or fear of litigation. As the court in Weatherwax suggested, if the possibility or fear of litigation served as a valid basis for entry into executive session, there could be little that remains to be discussed in public, and the intent of the Open Meetings Law would be thwarted.

In the instant situation, in my view, only to the extent that the Board discussed its litigation strategy would an executive session have properly been held.

I note, too, that the courts have provided direction with respect to the sufficiency of a motion to discuss litigation, it has been held that:

> "It is insufficient to merely regurgitate the statutory language; to wit, 'discussions regarding proposed, pending or current litigation'. This boilerplate recitation does not comply with the intent of the statute. To validly convene an executive session for discussion of proposed, pending or current litigation, the public body must identify with particularity *the* pending, proposed or current litigation to be discussed during the executive session" [Daily Gazette Co., Inc. v. Town Board, Town of Cobleskill, 44 NYS 2d 44, 46 (1981), emphasis added by court].

In sum, it is questionable whether there would have been a proper basis for discussing the wind project in executive session.

Next, having requested documents from the Town Clerk relating to the project, you were informed that they involve a "confidential disclosure" or that the Clerk does not have access to them. The records sought included recommendations from a consultant to the Planning Board and recommendations prepared by a law firm "to determine the parameters of the windmill law being written and passed by the town."

First, based on several judicial decisions, an assertion, a request for, or a promise of confidentiality, unless it is based upon a statute, is generally meaningless. When confidentiality is conferred by a statute, an act of the State Legislature or Congress, records fall outside the scope of rights of access pursuant to §87(2)(a) of the Freedom of Information Law, which states that an agency may withhold records that "are specifically exempted from disclosure by state or federal statute". If there is no statute upon which an agency can rely to characterize records as "confidential" or "exempted from disclosure", the records are subject to whatever rights of access exist under the Freedom of Information Law [see Doolan v. BOCES, 48 NY 2d 341 (1979); Washington Post v. Insurance Department, 61 NY 2d 557 (1984); Gannett News Service, Inc. v. State Office of Alcoholism and Substance Abuse, 415 NYS 2d 780 (1979)]. As such, an assertion or promise of confidentiality, without more, would not in my view serve to enable an agency to withhold a record.

Second, I believe that any record maintained by or for the Town falls within the coverage of the Freedom of Information Law. Section 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."

In consideration of the language quoted above, documents need not be in the physical possession of an agency to constitute agency records; so long as they are produced, kept or filed for an agency, the courts have held they constitute "agency records", even if they are maintained apart from an agency's premises.

Perhaps most significant is a decision rendered by the Court of Appeals in which it was found that materials maintained by a corporation providing services pursuant to a contract for a branch of the State University that were kept on behalf of the University constituted "records" falling with the coverage of the Freedom of Information Law. I point out that the Court rejected "SUNY's contention that disclosure turns on whether the requested information is in the physical possession of the agency", for such a view "ignores the plain language of the FOIL definition of 'records' as information kept or held 'by, with or for an agency'" [see Encore College Bookstores, Inc. v. Auxiliary Services Corporation of the State University of New York at Farmingdale, 87 NY 2d 410. 417 (1995)].

Insofar as records are "kept, held, filed, produced or reproduced...*for* an agency", such as the Town, I believe that they would constitute "agency records" that fall within the scope of the Freedom of Information Law.

In circumstances in which entities or persons outside of government maintain records for a government agency, it has been advised that requests for those records be made to the records access officer of that agency. Pursuant to regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), the records access officer has the duty of coordinating an agency's response to requests for records. In the context of the situation described in the correspondence, if, for example, a consultant maintains records for the Town, to comply with the Freedom of Information Law and the implementing regulations, the records access officer must either direct the consultant to disclose the records in a manner consistent with law, or acquire the records from the consultant in order that he can review the records for the purpose of determining rights of access.

With respect to rights of access, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

One of the grounds for denial,§87(2)(g), potentially serves as one of the grounds for denial of access to records. However, due to its structure, it often requires substantial disclosure. The cited 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.

The same kind of analysis would apply with respect to records prepared by consultants for agencies, for the Court of Appeals has held that:

> "Opinions and recommendations prepared by agency personnel may be exempt from disclosure under FOIL as 'predecisional materials,

> prepared to assist an agency decision maker***in arriving at his decision' (McAulay v. Board of Educ., 61 AD 2d 1048, aff'd 48 NY 2d 659). Such material is exempt 'to protect the deliberative process of government by ensuring that persons in an advisory role would be able to express their opinions freely to agency decision makers (Matter of Sea Crest Const. Corp. v. Stubing, 82 AD 2d 546, 549).
>
> "In connection with their deliberative process, agencies may at times require opinions and recommendations from outside consultants. It would make little sense to protect the deliberative process when such reports are prepared by agency employees yet deny this protection when reports are prepared for the same purpose by outside consultants retained by agencies. Accordingly, we hold that records may be considered 'intra-agency material' even though prepared by an outside consultant at the behest of an agency as part of the agency's deliberative process (see, Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD 2d 546, 549, supra; Matter of 124 Ferry St. Realty Corp. v. Hennessy, 82 AD 2d 981, 983)" [Xerox Corporation v. Town of Webster, 65 NY 2d 131, 132-133 (1985)].

Based upon the foregoing, records prepared by a consultant for an agency may be withheld or must be disclosed based upon the same standards as in cases in which records are prepared by the staff of an agency. It is emphasized that the Court in Xerox specified that the contents of intra-agency materials determine the extent to which they may be available or withheld, for it was held that:

> "While the reports in principle may be exempt from disclosure, on this record - which contains only the barest description of them - we cannot determine whether the documents in fact fall wholly within the scope of FOIL's exemption for 'intra-agency materials,' as claimed by respondents. To the extent the reports contain 'statistical or factual tabulations or data' (Public Officers Law section 87[2][g][I], or other material subject to production, they should be redacted and made available to the appellant" (id. at 133).

Therefore, a record prepared by a consultant for an agency would be accessible or deniable, in whole or in part, depending on its contents.

Lastly, when an attorney or law firm is retained by an agency, I believe that recommendations consisting of legal advice may be withheld pursuant to the attorney-client privilege. 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 an attorney retained by a municipality may engage in a privileged relationship with a client, the Town Board or the Planning Board, 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.

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, 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.

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

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 26, 2006

E-Mail

TO: Ms. RoseMarie Stark, Superintendent of Pine Bush Schools

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. Stark:

I have received your letter in which you sought an advisory opinion concerning the Open Meetings Law. Please accept my apologies for the delay in response.

You referred to earlier opinions rendered by this office concerning "retreats" that focused on "interpersonal relationships", training, improving team building and communication skills in which it was advised that gatherings held for those purposes would not be subject to the Open Meetings Law. Concurrently, it was advised that a retreat or similar gathering held to discuss board or superintendent's goals, or "ground rules for operating under, before, during or after meetings," would be subject to the Open Meetings Law.

In this regard, our opinion now is consistent with that offered in the past, that it is not the characterization of a gathering that is determinative of its status under the Open Meetings Law, but rather the reason for the gathering and the nature of the discussion.

As you are aware, the Open Meetings Law applies to meetings of public bodies, and a board of education clearly constitutes a public body required to comply with that statute. Section 102(1) of the Open Meetings Law defines the term "meeting" to mean "the official convening of a public body for the purpose of conducting public business", and the definition of "meeting" has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be convened open to the public, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

Inherent in the definition and its judicial interpretation is the notion of intent. If there is an intent that a majority of a public body will convene for the purpose of conducting public business, such a gathering would, in my opinion, constitute a meeting subject to the requirements of the Open Meetings Law.

I point out that the decision rendered by the Court of Appeals was precipitated by contentions made by public bodies that so-called "work sessions" and similar gatherings held for the purpose of discussion, but without an intent to take action, fell outside the scope of the Open Meetings Law. In discussing the issue, the Appellate Division, whose determination was unanimously affirmed by the Court of Appeals, stated that:

> "We believe that the Legislature intended to include more than the mere formal act of voting or the formal execution of an official document. Every step of the decision-making process, including the decision itself, is a necessary preliminary to formal action. Formal acts have always been matters of public record and the public has always been made aware of how its officials have voted on an issue. There would be no need for this law if this was all the Legislature intended. Obviously, every thought, as well as every affirmative act of a public official as it relates to and is within the scope of one's official duties is a matter of public concern. It is the entire decision-making process that the Legislature intended to affect by the enactment of this statute" (60 AD 2d 409, 415).

The court also dealt with the characterization of meetings as "informal," stating that:

> "The word 'formal' is defined merely as 'following or according with established form, custom, or rule' (Webster's Third New Int. Dictionary). We believe that it was inserted to safeguard the rights of members of a public body to engage in ordinary social transactions, but not to permit the use of this safeguard as a vehicle by which it precludes the application of the law to gatherings which have as their true purpose the discussion of the business of a public body" (id.).

Based upon the direction given by the courts, when a majority of a public body gathers to discuss public business, in their capacities as members of the body, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law.

On the other hand, if there is no intent that a majority of public body will gather for purpose of conducting public business, but rather for the purpose of discussing or improving interpersonal relations, training and the like, I do not believe that the Open Meetings Law would be applicable. In that event, if the gathering is to be held solely for those purposes, and not to conduct or discuss matters of public business, and if the members in fact do not conduct or intend to conduct public business collectively as a body, the activities occurring during that event would not in my view constitute a meeting of a public body subject to the Open Meetings Law.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4313

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December 26, 2006

Ms. Marion Cassie
Board Member
Town of Canandaigua
4735 Co. Rd. 16
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 information presented in your correspondence.

Dear Ms. Cassie:

As you are aware, I have received your letter. Please accept my apologies for the delay in response.

You indicated that you serve as a member of the Canandaigua Town Board, and you asked whether "standing committees" designated by the Supervisor consisting of two members of the Board are required to comply with the Open Meetings Law.

In this regard, 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.

However, when a committee consists solely of members of a public body, such as the Town 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 or "similar body" consisting of members of the 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 five, a quorum would be three. If that body designates a committee of two, a quorum of the committee would be two.

Does the applicability of the Open Meetings Law change if a committee consists of two members of a governing body, and in addition, a third person, not a member of the governing body, is designated to serve on the committee? If additions of that nature are made to evade the applicability and intent of the Open Meetings Law, from my perspective, when the core membership

of an entity consists of members of a governing body, that kind of addition would not change the essential character of the entity.

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 27, 2006

Ms. Barbara Burton
[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. Burton:

I have received your letter and the material attached to it. As I understand the matter, the Village of Monticello is forbidding the "reproduction of any given meeting...including picture taking and recording." If that is so, I believe that its policy is contrary to law.

In this regard, there is nothing in the Open Meetings Law that addresses the ability of a person present at an open meeting to photograph, tape record or video record the meeting. 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)], 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 a village board of trustees or other public body 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 language that you forwarded and would 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.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 27, 2006

Hon. Edward P. Romaine
County Legislator, 1st District
Suffolk County Legislature
423 Griffing Avenue
Riverhead, NY 11901

The staff of the Committee on 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 Romaine:

We are in receipt of your request for an advisory opinion concerning application of the Open Meetings Law to a recent "budget hearing" of the Town of Brookhaven. You indicated that the Deputy Supervisor and three Assistant Town Attorneys informed you that "all Ambulance District budget hearings are closed to the public and media." Based on your correspondence, it does not appear that the gathering involved a majority of the members of the Town Board. In this regard, we offer the following comments.

First, from our perspective, a meeting is different from a hearing. A meeting is generally a gathering of quorum of a public body for the purpose of discussion, deliberation, and potentially taking action within the scope of its powers and duties. A hearing is generally held to provide members of the public with an opportunity to express their views concerning a particular subject, such as a proposed budget, a local law or a matter involving land use. Town Law §108, for example, requires a public hearing prior to the adoption of the preliminary budget. Hearings are often required to be preceded by the publication of a legal notice. In contrast, §104(3) of the Open Meetings Law specifies that notice of a meeting must merely be "given" to the news media and posted. Further, there is no requirement that a newspaper, for example, publish a notice given regarding a meeting to be held under the Open Meetings Law. We note, too, that a meeting of a public body held in accordance with the Open Meetings Law can only occur with the presence of a quorum. A hearing, on the other hand, can be conducted without a quorum present.

While we know of no judicial decisions concerning the ability of those to speak at either meetings or hearings, we believe that the principles pertinent to that issue would be the same. In short, we believe that an entity has the authority to adopt rules or procedures to govern its own proceedings. Those rules or procedures, however, must in our opinion be reasonable. In our

opinion, it would be unreasonable, for example, to authorize those with one point of view to speak for ten minutes or perhaps without limitation, while permitting those with a different view to speak for three minutes or not at all. In our opinion it would be unreasonable to prevent members of the public from attending budget hearings required by law.

If it is contended that a hearing was not conducted reasonably, the potential remedies, if they can be characterized as such, would involve offering complaints to those who conducted the hearing or the initiation of a judicial proceeding with Article 78 of the Civil Practice Law and Rules. In an Article 78 proceeding, a petitioner (a member of the public) must demonstrate that a public officer or governmental entity acted unreasonably, or that such person or entity failed to give effect to a legal requirement. If, for instance, a provision of law requires that a public hearing be held and that members of the public be given an opportunity to be heard, and if that opportunity is not reasonably granted, a court could find that a public officer or governmental entity failed to comply with law. In that event, we believe that court could issue an order designed to guarantee compliance with law and/or reasonableness.

Lastly, we believe that an ambulance district is a public corporation and that its governing body is a "public body" required to comply with the Open Meetings Law. Therefore, when a majority of an ambulance district's governing body meets to conduct public business, that gathering would constitute a "meeting" subject to the Open Meetings Law.

On behalf of the Committee on Open Government, we hope this is helpful to you.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

cc: Jack Schnirman, Brookhaven Deputy Supervisor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4136

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December 28, 2006

E-MAIL

TO: Deborah Marie Glover

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. Glover:

As you are aware, I have received your letter. Please accept my apologies for the delay in response. You have questioned whether the Town of Wawayanda Zoning Board of Appeals or its Chairman have the authority to preclude the public from recording or photographing Board meetings hearings and restricting persons from speaking at those gatherings.

In this regard, I offer the following comments.

First, there may be a difference between a meeting and hearing. A meeting is generally a gathering of quorum of a public body for the purpose of discussion, deliberation, and potentially taking action within the scope of its powers and duties. A hearing is generally held to provide members of the public with an opportunity to express their views concerning a particular subject, such as a proposed budget, a local law or a matter involving land use. Although a meeting involves a majority of a public body, such as a town board or zoning board of appeals, there is generally no requirement that a majority of a public body be present during a hearing. When a majority of a public body is present at a hearing, however, that gathering in my view also would constitute a meeting that falls within the coverage of the Open Meetings Law.

Second, 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).

I note that the same conclusion was reached more recently in Csorny v. Shoreham-Wading River Central School District [759 NYS 2d 513, 305 AD2d 83 (2003)].

Lastly, while the Open Meetings Law clearly provides the public with the right "to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy" (see Open Meetings Law, §100), the Law is silent with respect to public participation. Consequently, by means of example, if a public body, 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.

I note that there are federal court decisions indicating that if favorable 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)].

I hope that I have been of assistance.

RJF:tt

cc: Town Board
Zoning Board of Appeals