OML-AO-4317

From: Robert Freeman
To: Bob Arnold
Date: 1/3/2007 8:19:17 AM
Subject: Re: FW: interesting articles

Hey Bob - -

It's great to hear from you. Thirty-two weeks - - but who's counting!

The context of your question is interesting - - mixing high tech with
a commission focuses on events that occurred before so much of what we take for granted could have been imagined.

For the moment, the Open Meetings Law requires that notice of the time and place of meetings be given to the news media and posted in one or more designated, conspicuous public locations. Among the legislative proposals offered in our recent annual report to the Governor and the Legislature is a recommendation to require public bodies to post notice of their meetings on their websites when they have the ability to do so. Certainly a public body may choose to do so now, but for the time being, notice must continue to be given the old fashioned way - - to the news media and by means of posting in a physical location.

I hope that this will clarify. If you'd like to review the language of the applicable provision, it is §104 of the Public Officers Law.

Be well.
Bob

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4318

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January 8, 2007

Ms. Wendy Lukas
[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. Lukas:

Thank you for the article regarding the motion for entry into executive session. We appreciate your feedback on these issues. As you know, we are in receipt of your request for an advisory opinion and hope that you will accept our apologies for the delay in response.

You initially asked whether a public body is required to maintain minutes for workshop meetings of the Schuylerville/Victory Water Board of Management, and then later, you specifically inquired, "Is it not the responsibility of the Water Board to appoint someone to be responsible for ensuring that minutes will be accurate and recorded when the Water Board Secretary is not available to take minutes." You also asked whether "when tape recorders are used and malfunction, is it not the responsibility of the Water Board to have an alternate method of recording minutes and that someone should be responsible for these actions, even if it is a Board member?" In this regard, we offer the following comments.

First, as you are likely aware, the Open Meetings Law is applicable to public bodies, and §102(2) defines the phrase "public body" to mean:

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

Because the Water Board constitutes a "public body" required to comply with the Open Meetings Law, 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."

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

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 municipal officials), upon their preparation and review perhaps years later, to ascertain the nature of action taken by a public body, such as the Water Board. While an audio or video recording would likely contain the elements of minutes, we believe that minutes must nonetheless be reduced to writing in order that they constitute a permanent, written record. We point out, too, that in an opinion rendered by the State Comptroller, it was found that, although tape recordings may be used as an aid in compiling minutes, they do not constitute the "official record" (1978 Op. St. Compt. File #280).

You referred to a situation in which the Water Board tape recorded a meeting that the Secretary was not able to attend. The tape recorder failed at some point during the meeting, and the minutes, prepared from the tape recording, "do not reflect that the Board immediately went into executive session" or that the meeting was ever adjourned.

While we do not believe there is a responsibility to re-enact the meeting, the Water Board, like every public body, has a responsibility to prepare minutes of meetings in accordance with the requirements imposed by the Open Meetings Law. We note that while there is no obligation to tape record meetings, there is an obligation to prepare minutes. If a motion was made, the law requires that minutes be prepared to include that fact. In this instance, it is suggested that an attempt be made to rely on the memory of those present in an effort to prepare minutes as a means of complying with law.

We generally agree with the opinion offered by the New York Conference of Mayors, that if a record does not exist or cannot be found there is no statutory requirement to create such a record. However, we stress that there is a specific obligation set forth under §106 to prepare minutes of all meetings.

Further, 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".

Finally, in response to your query about training for members of planning and zoning boards, we note that the Legislature recently amended the General Municipal Law (§239-c), the General City Law (§§27, 81), the Town Law (§267, 271) and the Village Law (§§7-712, 7-718) to set forth minimum training requirements for members of planning boards and zoning boards of appeals. Under the changes, these officials are required to take four hours of training per year in a course or courses approved by their respective legislative bodies. The law also applies to people appointed as alternates to a board. More information is available at www.dos.state.ny.us/lgss/mandatorytraining.htm. Additionally, it is our policy to accept invitations to speak and/or present educational seminars to those interested in application of the Freedom of Information and Open Meetings Laws. We ask that you submit your request in writing, proposing multiple dates and times that would be convenient to your group, and we will do our best to accommodate.

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: Schuylerville/Victory Water Board of Management

STATE OF NEW YORK
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OML-AO-4319

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January 9, 2007

Mr. Dominick Calsolaro
[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. Calsolaro:

We are in receipt of your request for an advisory opinion concerning application of the Open Meetings Law to certain proceedings of the Board of Education of the Albany City School District. Please accept our apologies for the delay in responding.

You indicated that on Sunday, September 24, 2006, there was a meeting of the School Board that the public was not permitted to attend. The Mayor and the Police Chief attended, and you were informed by the School Board President that the meeting was an executive session. Immediately following the meeting the participants held a press conference, during which the public was told that the discussion concerned specific students, and that the Board had adopted certain policy changes that were to take effect at the start of the school day on Monday, September 25, 2005. You also indicated that the Academy Park building used for the meeting is not accessible to physically handicapped persons. In this regard, we offer the following comments.

First, we 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. As such, it is clear that an executive session is not separate and distinct from an open meeting, but rather that it is 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.

Based on your description that part of the discussion concerning individual students' behavior, we believe that the Board would have the ability to discuss the discipline of specific students in executive session. Section 105(1)(f) of the Open Meetings Law permits a public 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..."

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

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

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

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

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

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

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

Based upon the foregoing, disclosure of students' names or other aspects of records that would make a student's identity easily traceable must in our view be withheld from the public in order to comply with federal law. However, and more importantly, please note that there is a provision of FERPA that permits the Board to release information "in connection with an emergency . . . if the knowledge of such information is necessary to protect the health or safety of the student or other persons". 42 USC §1232g(b)(1)(I). Based on this provision, it is our understanding that information necessary to address or minimize the repercussions of an emergency situation, including information pertaining to an individual student's behavior, may be released to appropriate persons.

It is clear from your description of the press conference conducted after the meeting that the Board adopted certain policy changes during the course of this meeting. As previously stated, executive sessions may only be held for the purposes enumerated in §105(1); FERPA would prohibit disclosure of information about individual students, except in particular circumstances, i.e., for purposes of protecting life and safety. However, if such a discussion turned from matters pertaining to individual students into those pertaining to security measures at the school and steps that the Board might take to address such concerns, it is our belief that such discussions would be subject to the Open Meetings Law. Accordingly, to the extent that the Board discussed policies and procedures to protect students and others present at the school from harm, in our opinion, that discussion should have been held at a meeting that was open to the public.

Depending on the nature of the discussion, it is possible that a different ground for entry into executive session might have been pertinent. Section 105(1)(a) authorizes a public body to conduct an executive session to discuss "matters which will imperil the public safety if disclosed." If, for example, a discussion generally involved the adoption of a policy relative to the use of metal detectors, there would likely be no basis for conducting an executive session. If, however, details concerning the evasion of security measures were discussed, i.e., consideration of materials or substances that cannot be detected, it would appear that §105(1)(a) would justify the holding of an executive session.

With respect to your observation that the building used for the meeting is not handicapped accessible, we note that subdivision (a) of §103 of the Open Meetings Law states in relevant part that "Every meeting of a public body shall be open to the general public..." Subdivision (b) provides that:

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

Based on 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, we believe that the law does impose a responsibility upon a public body to make "all reasonable efforts" to ensure that meetings and hearings are held in facilities that permit barrier-free access to physically handicapped persons. Therefore, if, for example, the Board has the capacity to hold its meetings in a facility that is accessible to handicapped persons, we believe that the meetings should be held in the location that is most likely to accommodate the needs of those persons.

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

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

cc: Board of Trustees
Dr. Eva C. Joseph, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4320

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January 16, 2007

E-MAIL

TO: Ms. Laurinda M. Crawford

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 facts presented in your correspondence.

Dear Ms. Crawford:

We are in receipt of your email requesting assistance. Please be advised that the Committee on Open Government is authorized to issue advisory opinions concerning application of the Freedom of Information, the Open Meetings and the Personal Privacy Protection Laws. That being so, it is suggested that you direct employment related questions to your union representative and/or a private attorney.

Among other matters, you indicated that in the midst of a dispute concerning your employment, that you "have been disallowed from attending meetings that related to [you] and [your] job performance." It is not clear from your description whether those gatherings were meetings of a public body subject to the Open Meetings Law, or whether they were administrative meetings among County employees. In this regard we offer the following comments.

First, the Open Meetings Law is applicable only 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 our 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. For example, the County Board of Supervisors is a public body subject to the Open Meetings Law. A staff meeting or similar gathering would fall beyond the coverage of that law.

Second, when the Open Meetings Law applies, it 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.

Third, we believe that a discussion of possible disciplinary action against an employee or matters leading to an employee's termination, could appropriately be conducted in executive session. Section 105(1)(f) permits a public body to enter into executive session to discuss:

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

Additionally, §105(1)(d) of the Open Meetings Law permits a public body to enter into an executive session to discuss "proposed, pending or current litigation". In construing the language quoted above, it has been held that:

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

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

Lastly, even if the discussion during an executive session pertains to you, you would not have the right to be present. Section 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."

Based on the foregoing, a public body may choose to permit the attendance of persons other than its members at an executive session, but it would not be required to do so.

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

CSJ:jm

STATE OF NEW YORK
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FOIL-AO-4321

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January 18, 2007

E-Mail

TO: Ms. Lynn Sutterby

FROM: Camille S. Jobin-Davis, Assistant Director CST

The staff of the Committee on 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. Sutterby:

We are in receipt of your request for an advisory opinion concerning application of the Open Meetings Law to certain proceedings of your town planning board. You indicated that the board held a public hearing on October 25, 2006, and reconvened it on November 1, 2006. On November 8, 2006 you were informed that the regularly scheduled monthly meeting of November 9, 2006 was held after the public hearing on November 1, 2006. You asked that we address the following questions:

"(1) Is it legal to hold a regular monthly meeting at a public hearing?
(2) Does it need to be advertised?
(3) If so, how much notice must be given?
(4) If a hearing is reconvened must it also be advertised?"

With respect to your questions pertaining to hearings, we note that 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. The notice requirements relating to meetings are prescribed in §104 of the Open Meetings Law, and that statute requires that every meeting be preceded by giving notice of the time and place of a meeting to the news media by means of posting. The Open Meetings Law specifies in §104(3) that notice of a meeting need not be a legal notice. In contrast, 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. Similarly, a planning board may be required to hold a public hearing pursuant to the State Environmental Quality Review Act or the Town Law. Perhaps most importantly, statutes concerning hearings often require the publication of a legal notice.

With regard to your questions regarding notice of a meeting of the planning board, we note that §104 of the Open Meetings Law states that:

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

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

It is emphasized that notice must be "conspicuously posted in one or more designated public locations." Consequently, we 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 our view be placed at a location that is visible to the public.

Finally, in response to your question whether it is "legal" to hold a regular monthly meeting on the same night or immediately following a public hearing, we know of no provision of law that would prohibit scheduling the two gatherings on the same night.

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

CSJ:jm

STATE OF NEW YORK
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FOIL-AO-4322

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January 23, 2007

E-Mail

TO: Mr. Martin McGloin and Mr. Aaron Smith

FROM: Robert J. Freeman, Executive Director RJF

Dear Mr. McGloin and Mr. Smith:

I have received copies of your correspondence concerning access to meetings of a public body and Mr. Smith's comment that "whatever draft minutes....[are] prepare[d] today, are not actually the minutes until they are adopted..."

For the purpose of providing clarification, I offer the following remarks.

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

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

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

Second, 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 the foregoing serves to enhance understanding of and compliance with law, and that I have been of assistance.

RJF:jm

FOIL-AO-16420
OML-AO-4323

From: Robert Freeman
To: [redacted]
Date: 1/24/2007 4:03:49 PM
Subject: Dear Ms. Whelan:

Dear Ms. Whelan:

I have received your inquiry in which you asked whether a board of education may"keep [you] from attending a meeting where [y]our child will be discussed." You indicated that the issue involves an appeal of a decision to suspend your child.

In this regard, first, I believe that the board would have the authority to conduct an executive session pursuant to §105(1)(f) of the Open Meetings Law. That provision states in part that public body, such as a board of education, may enter into executive session to discuss "matters leading to the...discipline...of a particular person..." Second, §105(2) indicates that the only people who have the right to attend an executive session are the members of the public body. That provision authorizes a public body to permit the attendance of persons other than members, but does not require that it must do so.

Lastly, notwithstanding the absence of a right to attend the meeting in question, I point out that records identifiable to a minor student are in most instances available to a parent of the student pursuant to the federal Family Educational Rights and Privacy Act ("FERPA"; 20 USC §1232g).

I hope that I have been of assistance.

Robert J. Freeman
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STATE OF NEW YORK
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OML-AO-4324

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January 24, 2007

Mr. John J. Cataldo
[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. Cataldo:

I have received your letter concerning the appointment by the Liverpool Central School District Board of Education of a certain independent contractor. Since you raised a variety of issues, I point out that the Committee on Open Government is authorized to provide advice and opinions pertaining to the Freedom of Information and Open Meetings Laws. Because that is so, the following remarks will be limited to matters relating to those statutes.

First, you referred to a meeting of the Board during which the Board considered items that were not identified on its agenda. In this regard, there is nothing in the Open Meetings Law that pertains to agendas. A public body, such as a board of education, may prepare an agenda, but it is not required to do so. Similarly, unless it has adopted a rule or policy to the contrary, a public body is not obliged to adhere to its agenda and may discuss matters that do not appear on an agenda.

Also with respect to the Open Meetings Law, the materials do not clearly indicate how or when the appointment was made. Based on judicial decisions, I believe that any such action could validly have been taken only during an open meeting. 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.

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

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

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

Second, a significant issue appears to involve the background of the contractor appointed by the Board. In this regard, insofar as an agency, such as a school district, maintains records, rights of access to the records would be governed by 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.

With respect to records relating to the contractor, such as a resume, an application or similar records, of primary relevance is §87(2)(b), which authorizes an agency to withhold records to the

extent that disclosure would constitute "an unwarranted invasion of personal privacy." Additionally, §89(2)(b) provides a series of examples of unwarranted invasions of personal privacy.

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

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

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

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

> "was intended by Congress to protect individuals from public disclosure of 'intimate details of their lives, whether the disclosure be of personnel files, medical files or other similar files'. Board of Trade of City of Chicago v. Commodity Futures Trading Com'n supra, 627 F.2d at 399, quoting Rural Housing Alliance v. U.S. Dep't of Agriculture, 498 F.2d 73, 77 (D.C. Cir. 1974); see Robles v. EOA, 484 F.2d 843, 845 (4th Cir. 1973). Although the opinion in Rural Housing stated that the exemption 'is phrased broadly to protect

> individuals from a wide range of embarrassing disclosures', 498 F.2d at 77, the context makes clear the court's recognition that the disclosures with which the statute is concerned are those involving matters of an intimate personal nature. Because of its intimate personal nature, information regarding 'marital status, legitimacy of children, identity of fathers of children, medical condition, welfare payment, alcoholic consumption, family fights, reputation, and so on' falls within the ambit of Exemption 4. Id. By contrast, as Judge Robinson stated in the Chicago Board of Trade case, 627 F.2d at 399, the decisions of this court have established that information connected with professional relationships does not qualify for the exemption" [Sims v. Central Intelligence Agency, 642 F.2d 562, 573-573 (1980)].

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

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

I believe, too, that the thrust of judicial decisions relating to public employees is pertinent in the context of your remarks. While the contractor is not a public employee, his qualifications would be relevant in considering whether to retain him.

In Kwasnik v. City of New York, [Supreme Court, New York County, September 26, 1997; aff'd 262 AD2d 171 (1999)], the court cited an opinion rendered by this office in which it was advised that:

> "If, for example, an individual must have certain types of experience, educational accomplishments or certifications as a condition precedent to serving in [a] particular position, those aspects of a resume or application would in my view be relevant to the

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

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

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

In my opinion, based on the foregoing, the identities of the contractor's private employers may be withheld. Further, §89(2)(b)(i) indicates that an unwarranted invasion of personal privacy includes the disclosure of personal references of applicants for employment. Other items within an application for employment, a resume or similar records that may be withheld in my view would include social security numbers, marital status, home addresses, hobbies, and other details of one's life that are unrelated to the position for which he or she was hired.

In short, I believe that a variety of details concerning the contractor's professional or business background should be disclosed if requested under the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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January 24, 2007

Mr. Kevin Allard
[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. Allard:

I have received your letter in which you raised questions concerning a "special meeting" held on November 6 by the Board of Education of the Hoosick Falls Central School District. According to your letter, notice was posted on Friday, November 3, "outside the District office on a bulletin board in the hallway of the school", which was closed during the weekend that followed. You added that the District "has never designated this place as the official posting place by either notice or resolution."

In this regard, I offer the following comments.

First, §104 of the Open Meetings Law pertains to notice of meetings of public bodies, such as a board 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. 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. In addition to posting, §104 requires that notice be given to the news media prior to every meeting.

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

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
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January 25, 2007

E-Mail

TO: Mr. John Kie

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. Kie:

Your communication sent to the Department of State has been forwarded to the Committee on Open Government. The Committee, a unit of the Department, is authorized to provide advice and opinions relating to the Open Meetings Law.

You asked whether it is "legal to video tape and audio record the zoning and planning board meetings in the town of Canann..."

In this regard, there is nothing in the Open Meetings Law that addresses the issue. However, there is a series of decisions pertaining to the use of recording equipment at meetings and in my opinion, they consistently apply certain principles. One is that a public body, such as a planning or zoning board, has the ability to adopt reasonable rules concerning its proceedings. The other involves whether the use of the equipment would be disruptive.

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

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

the use of unobtrusive tape recording devices would not be reasonable if the presence of such devices would not detract from the deliberative process.

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

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

Several years later, the Appellate Division unanimously affirmed a decision which annulled a resolution adopted by a board of education prohibiting the use of tape recorders at its meetings and directed the board to permit the public to tape record public meetings of the board [Mitchell v. Board of Education of Garden City School District, 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).

In sum, based on the judicial decisions cited in the preceding commentary, unless the use of a recording device at an open meeting of a public body is disruptive or obtrusive, the public body cannot validly prohibit a person present from recording the proceedings.

I hope that I have been of assistance.

RJF:jm

OML-AO-4397

From: Robert Freeman
To: Nancy Swietek
Date: 1/30/2007 9:15:29 AM
Subject: Re: Exec Session

I believe that both descriptions are inadequate. The provision that appears to be applicable as a basis for conducting an executive session, §105(1)(f) of the Open Meetings Law, 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."

Based on the foregoing, this office has advised and it has been confirmed by means of judicial precedent that a motion based on that provision should include two elements: inclusion of the term "particular", and reference to one or more of the qualifiers contained in its language. For instance, a proper motion might be: "I move to enter into executive session to discuss *the employment history of a particular person*." The name of the person being discussed would not have to be included. However, by indicating that the discussion will focus on a particular person in relation to one or more of the qualifying subjects appearing in §105(1)(f), the public and board members can know that the board is about to consider a topic that may properly be discussed during an executive session.

I hope that I have been of assistance.

Robert J. Freeman
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OML-AO- 4328

From: Camille JobinDavis
To: Jesep, Paul
Date: 1/31/2007 9:32:15 AM
Subject: RE: Open Meetings Law - committees

Paul,

I agree with your analysis in the first paragraph, that committees made up of board members and employees and perhaps others, with advisory responsibilities only, are likely not "public bodies" subject to the open meetings law.

And to clarify the discussions of the committee in your second paragraph -- a committee made up entirely of board members is a public body, is subject to the OML, and may enter into executive session only for the reasons enumerated in section 105(1).

I hope this helps clarify.

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
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OML-AO-4329

From: Robert Freeman
To: [redacted]
Date: 2/2/2007 8:30:04 AM
Subject: Dear Mr. Enright:

Dear Mr. Enright:

I have received your inquiry in which you asked whether a school district clerk may tape record meetings of a board of education without notifying members of the the public that their comments are being recorded.

In this regard, although the Open Meetings Law is silent with respect to the use of recording devices, several judicial decisions indicate that anyone may record an open meeting, so long as the use of the recording device is not obtrusive or disruptive. There is no requirement that the clerk or any person present inform those in attendance at a meeting that their comments are being recorded. Judicial precedent indicates there is a right to engage in "unsupervised" recording, and that: "...those 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 they should be protected from the use of their own comments, is therefore wholly specious" [Mitchell v. Board of Education, 113 AD2d 924,925 (1985)].

In short, it is reiterated that neither the clerk nor any other person is required to inform those who speak at open meetings that their comments are being recorded.

I hope that I have been of assistance.

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STATE OF NEW YORK
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February 8, 2007

John and Connie Lichtenberger
[redacted]

Marge and Ken Pimental
[redacted]

Robert and Arlene Smith
[redacted]

Gary T. Pollard
[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. and Ms. Lichtenberger *et al.*:

I have received your letter and hope that you will accept my apologies for the delay in response. You have raised a series of issues relating to the Town of Wawayanda and particularly its Zoning Board of Appeals.

In this regard, I point out that the advisory jurisdiction of the Committee on Open Government relates to the Open Meetings and Freedom of Information Laws. That being so, we have neither the expertise nor the authority to address or respond to certain of the matters that you raised. However, with respect to whether "citizens have to seek permission to record public meetings or hearings," I offer the following comments.

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

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

detract from the deliberative process. Therefore, it was held that a public body could adopt rules generally prohibiting the use of tape recorders at open meetings.

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

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

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

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

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

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

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

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

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

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

Based on the foregoing, I believe that you, or any person, would have the right to record open meetings of the Board. Moreover, I do not believe that a person may be required to inform the Chairman of the Zoning Board of Appeals of the intent to use a tape recorder at an open meeting, so long as the recording device is used in a manner that is not disruptive.

With specific respect to the use of video recorders, 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).

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: Town Board
Zoning Board of Appeals

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OMC-AO-4331

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February 9, 2007

Ms. J. Christine Murphy
[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. Murphy:

We are in receipt of your request for suggestions with respect to certain proceedings of two committees of the Town of Colton. Before addressing the factual situations you described, please note that 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 law. 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 your request, you described two committees, the Caterpillar Control Committee, which "originally was comprised of seven members of the community including two town [board] members", and the Town Board Caterpillar Committee consisting of the Caterpillar Control Committee and two additional Town Board members. Because, the Town Board consists of five members, a majority of the members of the Town Board are members of the Town Board Caterpillar Committee. For this reason and others, we believe the Town Board Caterpillar Committee is and that the Caterpillar Control Committee may be subject to the Open Meetings Law.

First, the Town Board is clearly required to comply with the Open Meetings Law. That statute pertains to meetings of public bodies, and a "meeting" is a convening of a quorum of a public body for the purpose of conducting public business [see §102(1)]. Absent a quorum, the Open Meetings Law does not apply [see e.g., Mobil Oil Corp. v. City of Syracuse Industrial Development Agency, 224 AD2d 15, motion for leave to appeal denied, 89 NY2d 811 (1997)]. Accordingly, we believe that when the membership of a committee includes a majority of the members of a public body, such as the Town Board, the committee constitutes a "public body."

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 whose membership includes a majority of the members of a public body, such as a committee or subcommittee consisting of, among others, four members of a five-member town 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)].

Second, 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" [GoodsonTodman 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, if the Caterpillar Control Committee has only advisory authority, it would not, in my opinion, be subject to the Open Meetings Law, even if two members of the Town Board, or the staff of an agency participates on the committee.

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

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

Based on the provision quoted above, a valid meeting may occur only when a majority of the total membership of a public body, a quorum, has "gathered together in the presence of each other or through the use of videoconferencing." Moreover, only when a quorum has convened in the manner described in §41 of the General Construction Law would a public body have the authority to carry out its powers and duties. If the committee has eleven members, for instance, a gathering of any six would constitute a quorum. Furthermore, in light of our previous analysis, a gathering of a majority of the members of the Town Board, when conducting the business of the Town Caterpillar Committee, would constitute a meeting of the Town Board.

Next, regardless of how a gathering is characterized, any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" subject to the Open Meetings Law. 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 Town Caterpillar Control Committee convenes to discuss Committee business, any such gathering, in our opinion, would constitute a "meeting" subject to the Open Meetings Law, regardless of how it is characterized. In the alternative, when two Town Board members meet with town employees "to discuss a work program", such a gathering in our opinion, would not constitute a "meeting."

With respect to minutes of meetings, again, when it applies, 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 of the workshops must be prepared.

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

OML-AO-4332

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February 12, 2007

E-MAIL

TO: Laura Wells

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. Wells:

As you are aware, I have received your memorandum and related material that you sent in your capacity as a member of the Board of Education of the Moravia Central School District. The matter concerns the propriety of entry into executive session to discuss a "Board Self Evaluation", and the District's attorney referred to two opinions rendered by this office and concluded that the self evaluation would not be subject to the Open Meetings Law. In addition, you wrote most recently about a "team review" that involves an evaluation of the performance of the Superintendent. It is your understanding that the review, based on the original evaluation document, would pertain only to the Board, and you expressed the opinion that if the review includes evaluation of the performance of the Superintendent, it should be "split into two forms", one pertaining to the Board and the other to the Superintendent.

Having reviewed the opinions rendered by this office that were cited by the attorney, as well as the original "team review" document, I believe that the difficulty is that the issues described in the document in some instances clearly involve the official duties of the Board and District business, while others appear to involve individuals' behavior and interpersonal relationships and communication. In this regard, I offer the following comments.

Both of the opinions dealt essentially with the same issue, and that issue is the focus of the matter that you have raised. One of the opinions (OML-AO 2294) referred to a board of education conducting a "self-assessment", and it was advised that "if 'self-assessment sessions are held to discuss interpersonal relations and similar matters, and if the business of the Board is not intended to arise and does not arise, I do not believe that those kinds of gatherings would be subject to the Open Meetings Law.'" The other pertained to a gathering of the governing body of a state agency (OML-AO-2733), and I was informed that the "session is not intended to deal in any way with the business of the Agency, but rather to build upon our team building and communication skills."

Further, the facilitator for the session provided assurances that "his program...would in no way be inclusive of any Agency matters."

The information offered in relation to those opinions was critical, for the primary issue involves whether or the extent to which the gathering as described in the evaluation document constitutes a "meeting" that falls within the coverage of the Open Meetings Law. As indicated in the opinions, §102(1) of that statute defines the term "meeting" to mean "the official convening of a public body for the purpose of conducting public business". 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, 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)].

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

Based on a review of the eleven items appearing in the evaluation document, it appears that all but two involve matters of District business that would fall within the scope of Board members' duties or authority. The two that may not, items 1 and 2, deal respectively with "Communication" ("listen and speak honestly; considerate of others") and "Trust" (willing to share concerns with the total group without fear; do not take disagreement personally"). The others, as I interpret them, all deal with the governmental functions of Board members and/or the Board as a whole.

From my perspective, assuming that the items of discussion are or can be segregable, the first two do not involve the governmental functions of the Board or its members and, therefore, could be discussed or carried out in private, for consideration of those items would not reflect a gathering of the Board for the purpose of conducting public business. In short, a session consisting of consideration of those two items, in my view, would not constitute a "meeting." The remainder, however, appears to involve consideration of matters that relate to the scope of the Board's duties. A session to consider those issues would, in my opinion, clearly constitute a "meeting" that must be held in accordance with the Open Meetings Law.

Lastly, if the Board evaluates the performance of the Superintendent, I believe that it could do so during an executive session. If, however, the Board discusses goals or functions of any person who might serve in the position of superintendent, I do not believe that there would be a basis for entry into executive session.

As you are likely aware, the Open Meetings Law is based on a presumption of openness and 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.

Perhaps the most frequently cited ground for entry into executive session is the so-called "personnel" exception. Although it is used often, the word "personnel" appears nowhere in the Open Meetings Law. While one of the grounds for entry into executive session relates to personnel matters, the language of that provision is precise. Section105(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..."

Due to the inclusion 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 of the topics listed in §105(1)(f) is considered.

Insofar as a discussion by the Board focuses on the Superintendent and his performance, I believe that an executive session could justifiably be held. However, if a discussion involves issues that would be applicable to any person who might serve in that position, i.e., consideration of the goals or duties inherent in the position, irrespective of the identity of the incumbent of that position, the matter would not relate to a "particular person", but rather to the position, and, in my view, there would be no basis for conducting an executive session.

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

I hope that I have been of assistance.

RJF:tt

cc: Board of Education

FOIL-AO-1645
OML-AO-4333

From: Robert Freeman
To: Deirdre Hoare
Date: 2/13/2007 10:49:39 AM
Subject: (Possible Spam: 10.1150) FW: RE: FOIL Requests of 11/17/06 and 11/18/06

Dear Ms. Hoare:

It is true that the opinions rendered by this office are advisory. Nevertheless, the Committee on Open Government is the sole agency designated by law to provide advice and opinions concerning the Freedom of Information and Open Meetings Laws, and we have been doing so since those laws become effective in the 1970's. Further, in cases in which the courts have cited the opinions rendered by this office, they have agreed in perhaps 90 percent of those cases. Finally and most importantly, the language of the law is clear. Section 106 of the Open Meetings Law clearly states that minutes of meetings of a public body must be prepared and made available within two weeks. Similarly, the Freedom of Information Law in §89(3) prescribes time limits within which agencies must respond to requests for records; it does not authorize agencies to respond by indicating that a request "is being handled" and that an applicant will receive a response "as soon as possible."

My advice may not be binding, but the law is.

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

>>> "Deirdre Hoare" [redacted] 2/13/2007 10:46:10 AM >>>

[redacted]

[redacted]

From: "Robert Freeman" <RFreeman@dos.state.ny.us>
To: [redacted]
Subject: RE: Dear Ms. Hoare:
Date: Mon, 05 Feb 2007 11:51:27 -0500
Dear Ms. Hoare:

I might have misunderstood your comments. I interpreted your question as involving the propriety of making a verbal appeal. Email, however, clearly involves a writing, and I believe that when an agency has the ability to accept a request or an appeal transmitted via email, it is required to do so, for it would be made in writing.

It is noted that the Freedom of Information Law was recently amended in relation to requests made by email, as well as agencies' responsibilities to transmit records requested vial email when they have the ability to do so. To learn more of the amendment, information is available on our website.

I hope that I have been of assistance.

****

[redacted]

From: "Robert Freeman" <RFreeman@dos.state.ny.us>
To: [redacted]
Subject: Dear Ms. Hoare:
Date: Fri, 02 Feb 2007 08:48:46 -0500
Dear Ms. Hoare:

I have received your correspondence in which you asked whether the City of Yonkers may require that an appeal made pursuant to the Freedom of Information Law must be made in writing. In short, based on §89(4)(a) of that law, the City may do so. That provision states in relevant part that "any person denied access to a record may within thirty days appeal in writing such denial..." (emphasis added).

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

Robert J. Freeman
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****

[redacted]

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4334

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February 13, 2007

E-MAIL

TO: Donna Suhor

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. Suhor:

I have received your inquiry concerning the obligation of the CDTA Board to permit members of the public in attendance at their meetings to speak.

In this regard, while the Open Meetings Law clearly provides the public with the right "to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy" (see Open Meetings Law, §100), the Law is silent with respect to public participation. Consequently, by means of example, if a public body, such as the CDTA 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., Education Law, §1709), the courts have found in a variety of contexts that such rules must be reasonable. For example, although a board of education may "adopt by laws and rules for its government and operations", in a case in which a board's rule prohibited the use of tape recorders at its meetings, the Appellate Division found that the rule was unreasonable, stating that the authority to adopt rules "is not unbridled" and that "unreasonable rules will not be sanctioned" [see Mitchell v. Garden City Union Free School District, 113 AD 2d 924, 925 (1985)]. Similarly, if by rule, a public body chose to permit certain citizens to address it for ten minutes while permitting others to address it for three, or not at all, such a rule, in my view, would be unreasonable.

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

RJF:tt

OML-AO-4335

From: Robert Freeman
To: kjfrank@cityof binghamton.com
Date: 2/21/2007 2:41:24 PM
Subject: Dear Mr. Frank:

Dear Mr. Frank:

I have received your letter in which you indicated that the Mayor of the City of Binghamton and two unions "have executed extensions of collective bargaining agreements" and that a member of the City Council "intends to make a motion to enter into executive session to discuss available funds in the budget to pay the proposed increases." You have asked whether an executive session could properly be held to do so.

In this regard, §105(1)(e) of the Open Meetings Law permits a public body, such as the City Council, to conduct an executive session to discuss "collective negotiations pursuant to article fourteen of the civil service law", which is commonly known as the Taylor Law. Based on your letter and our discussion, the agreements have been executed, and collective negotiations have ended. If that is so, I do not believe that either §105(1)(e) or any other ground for entry into executive session could validly be asserted to discuss the matter at issue.

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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February 21, 2007

Peter R. McGreevy, Esq.
McGreevy & Henle, LLP
131 Union 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 information presented in your correspondence.

Dear Mr. McGreevy:

I have received your letter and the materials attached to it. You have requested an advisory opinion concerning the Town of Southold Board of Ethics and "whether entering into executive session to discuss a potential ethics code violation by a town employee is proper, or is, as noted in the newspaper article and by former Town Justice Tedeschi, a 'stretch' of the Open Meetings Law."

The article to which you referred is an editorial published by the Suffolk Times. Mr. Todeschi, a longstanding member of the Board of Ethics and former Town Justice, according to the editorial, "said the subject of the investigation was not one of the eight subjects appropriate for executive session." The editorial also included a passage from an opinion that I prepared in 2003 relating to similar issues in which it was advised that:

> "'It is clear that public officers or employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that those persons are required to be more accountable than others'....'The courts have found that, as a general rule, records that are relevant to the performance of a public official's duties are available, for disclosure in such instances would result in permissible rather than unwarranted invasion of personal privacy.'"

With due respect to the former Town Justice, I believe that he is mistaken, for, in my view, there would clearly be a basis for entry into executive session. And with respect to the Times editorial, it is noted that there are many instances in which the grounds for entry into executive session are not equivalent to or consistent with the grounds for withholding records under the Freedom of Information Law. It appears that the editorial erroneously applied standards employed

in ascertaining rights of access to records under the Freedom of Information Law, rather than the standards appearing in the Open Meetings Law concerning the ability to enter into executive session.

For reasons expressed in the opinion prepared in 2003, it was advised based on judicial precedent that "final determinations indicating the imposition of some sort of disciplinary action pertaining to particular public officials [have been] found to be available." However, in the same paragraph in which that advice was offered, the following was also expressed:

> "...when allegations or charges of misconduct have not yet been determined or did not result in disciplinary action, the records relating to such allegations may, in my view, be withheld, for disclosure would result in an unwarranted invasion of personal privacy [see e.g., Herald Company v. School District of City of Syracuse, 430 NYS2d (1980)]. Further to the extent the charges are dismissed or allegations are found to be without merit, I believe that they may be withheld."

Preceding any determination would be consideration and discussion by a Board of Ethics of a complaint or allegation of misconduct. When the complaint or allegation focuses on a particular public officer or employee, I believe that the Board of Ethics clearly has the right to enter into an executive session.

Again, referring to the opinion rendered in 2003, it was written that:

> "Relevant to the duties of a board of ethics is §105(1)(f) of the Law, which permits a public body to enter into an executive session to discuss:
>
> > 'the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation...'
>
> "If the issue before a board of ethics involves a particular person in conjunction with one or more of the subjects listed in §105(1)(f), I believe that an executive session could appropriately be held. For instance, if the issue deals with the 'financial history' of a particular person or perhaps matters leading to the discipline of a particular person, §105(1)(f) could in my opinion be cited for the purpose of entering into an executive session."

Lastly, the 2003 opinion indicates that both the Open Meetings Law and the Freedom of Information Law are permissive. Stated differently, the Open Meetings Law permits public bodies to conduct executive sessions in certain circumstances but does not require that they do so. Similarly, the Freedom of Information Law permits an agency to withhold records in accordance

with the exceptions authorizing denials of access, but the agency is not required to do so. Nevertheless, the ability to discuss an issue in public or to disclose records does not create an obligation to do so when there is a justifiable basis for conducting an executive session or withholding records. In the context of the matter at issue, again, I believe that the Board of Ethics had the right to enter into executive session.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Suffolk Times

STATE OF NEW YORK
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February 21, 2007

Mr. Arthur Springer
[redacted]

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

Dear Mr. Springer:

I have received your letter and the materials attached to it. It is noted that you referred to a transcript of a meeting of the Commission on Health Care Facilities in the 21st Century, but that no such record was included among the materials.

Your primary area of complaint involves the inability of some persons present at the meeting to hear discussion or statements of Commission members. Although microphones were apparently available, you wrote that they were not used, despite comments by the public that Commission members could not be heard. In addition, you indicated that copies of a statement "read into the record" by the Chairman were "leaked to professional lobbyists in the audience and to the media", but that your request for the document following the meeting was rejected. You were informed that the statement would be posted on the Commission's website on November 28, eight days after the meeting.

Based on the foregoing, you asked that I "invalidate the actions taken by the commission at this meeting, and order the commission to take appropriate remedial action." You also referred to an advisory opinion prepared at your request several years ago that involved similar facts and wrote that it was advised that "actions taken at meetings where an installed sound system was not used could be invalidated."

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized to provide advice and opinions pertaining to the Freedom of Information and Open Meetings Laws. Neither the Committee nor its staff is empowered to enforce those statutes or invalidate action, even if a violation of law occurred.

Second, the only reference to the invalidation of action in relation to the Open Meetings Law concerns situations in which action is taken in private that should have been taken in public. Specifically, §107(1) states in relevant part that:

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

Third, I have reviewed the earlier opinion to which you referred, which was prepared in 2002 and pertained to a meeting of the Board of Directors of the New York city Health and Hospitals Corporation. You described a situation in which the members could have used a microphone but did not do so. Due to the similarity of the situation described then and that concerning the Commission, I am quoting verbatim the substance of that opinion, which I believe would be equally applicable to the more recent situation, as follows:

> "From my perspective, every law, including the Open Meetings Law, must be implemented in a manner that gives reasonable effect to its intent. With respect to the capacity to hear what is said at meetings, I direct your attention to §100 of the Open Meetings Law, its legislative declaration. That provision states that:
>
> > 'It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy. The people must be able to remain informed if they are to retain control over those who are their public servants. It is the only climate under which the commonweal will prosper and enable the governmental process to operate for the benefit of those who created it.'
>
> Based upon the foregoing, it is clear in my view that public bodies must conduct meetings in a manner that guarantees the public the ability to "be fully aware of" and "listen to" the deliberative process. While I do not believe that a public body could be compelled to purchase a sound system, when a system exists, in my view, it would be unreasonable to avoid using it if those in attendance cannot hear the public body's discussions and deliberations. In this instance, if the sound system is operational, I believe that the Board must use it or situate itself and conduct its meetings in a manner in which those in attendance can observe and hear the proceedings. To do

otherwise would in my opinion be unreasonable and fail to comply with a basic requirement of the Open Meetings Law."

Lastly, although the Commission or its employee could have disclosed the statement to which you referred immediately, I do not believe that there was an obligation to do so. Pursuant to §89(3) of the Freedom of Information Law an agency may require that a request be made in writing, and as you are likely aware, must respond in some manner to a request within five business days of its receipt.

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: Commission on Health Care Facilities in the 21st Century

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February 21, 2007

Mr. Steve Knapp
[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. Knapp:

I have received your letter and hope that you will accept my apologies for the delay in response. You have raised questions relating to the Town Board of the Town of Barrington.

First, you wrote that the Board received two letters in August requesting a moratorium on development, but that the public did not learn of the request until November. You asked whether it is "legal for town officials not to publicly acknowledge receipt of such correspondence, or not to place consideration of the request in the correspondence on the agenda, for 3 months..."

In this regard, neither the Open Meetings Law or the Freedom of Information Law requires that correspondence received by a town be publicly acknowledged. Similarly, there is no reference in the Open Meetings Law to agendas, nor is there any requirement that the subject matter of requests be placed on an agenda for consideration by a town board.

It is noted that §63 of the Town Law authorizes town boards to establish rules and procedures applicable to their own proceedings. It is suggested that you might attempt to ascertain whether the Board has adopted rules or procedures concerning the acknowledgment of receipt of correspondence or the placement of matters on its agenda. Absent the adoption of such provisions, again, there is no legal obligation to publicly acknowledge the receipt of correspondence or place topics on an agenda at the request of the public.

Your second area of inquiry concerns the absence of reference in minutes to comments made during meetings of the Town Board. Here I point out that 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 minutes are not expansive and there is a need or desire to have a verbatim account of everything expressed at an open meeting, judicial precedent indicates that open meetings may be audio or video recorded, so long as the use of the recording equipment is neither disruptive nor obtrusive [see Mitchell v. Board of Education of the Garden City Union Free School District, 113 AD2d 924 (1985); Csorny v. Shoreham-Wading River Central School District, 759 NYS2d 513, 305 AD2d 83 (2003)].

Lastly, you questioned the propriety of an executive session conducted by the Planning Board with its attorney, "claiming protection of 'attorney-client privilege' as a rationale, ostensibly because they felt that discussion of the Moratorium is an open session might place them in jeopardy with the developer..."

There are two vehicles that may authorize a public body, such as a town board or a planning board 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).

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

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

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

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

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

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

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

I note that the mere presence of an attorney does not signify the existence of an attorney-client relationship; in order to assert the attorney-client privilege, the attorney must in my view be

providing services in which the expertise of an attorney is needed and sought. Further, often at some point in a discussion, the attorney stops giving legal advice and a public body may begin discussing or deliberating independent of the attorney. When that point is reached, I believe that the attorney-client privilege has ended and that the body should return to an open meeting.

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

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

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February 22, 2007

E-Mail

TO: Mr. Thomas Callahan

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. Callahan:

I have received your letter in which you questioned the propriety of including an item on each Newfane Central School District Board of Education agenda pertaining to a "proposed executive session."

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

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

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

Second, it has been consistently advised that a public body, in a technical sense, cannot schedule or conduct an executive session in advance of a meeting, because a vote to enter into an executive session must be taken at an open meeting during which the executive session is held. In

a decision involving the propriety of scheduling executive sessions prior to meetings, it was held that:

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

For the reasons expressed in the preceding commentary, a public body cannot in my view schedule an executive session in advance of a meeting. In short, because a vote to enter into an executive session must be made and carried by a majority vote of the total membership during an open meeting, technically, it cannot be known in advance of that vote that the motion will indeed be approved. However, as an alternative method of achieving the desired result that would comply with the letter of the law, rather than scheduling an executive session, the Superintendent or the Board on its agenda or notice of a meeting could refer to or schedule a motion to enter into executive session to discuss certain subjects. Reference to a motion to conduct an executive session would not represent an assurance that an executive session would ensue, but rather that there is an intent to enter into an executive session by means of a vote to be taken during a meeting.

Similarly, the reference to "a proposed executive session" would not guarantee that such a session will be held, but rather that it might be held. From my perspective, that kind of reference would be appropriate.

I hope that I have been of assistance.

RJF:jm

cc: Board of Education

FOIL-AO-16477
OML-AO-2340

From: Robert Freeman
To: [redacted]
Date: 2/27/2007 12:44:04 PM
Subject: Dear Mr. Liebrand:

Dear Mr. Liebrand:

I have received your letter in which you referred to action taken by a board of education to approve "Terms and Conditions of Asst. Superintendents which is annexed to the minutes of the meeting." You asked whether those terms and conditions must be included within the minutes.

In my view, there is no such requirement. Section 106 of the Open Meetings Law requires that minutes consist of a record or summary of action taken; it does not require the inclusion of the entirety of an agreement or contract, for example, within the minutes.

Notwithstanding the foregoing, the entirety of the terms and conditions approved by the Board would, in my opinion, clearly be accessible under the Freedom of Information Law. That statute is based on a presumption of access, stating that all agency records of an agency, such as a school district, must be disclosed, unless an exception to rights of access may properly be asserted. In this instance, I do not believe that any of the grounds for denial of access could be cited to withhold the terms and conditions of your interest.

I hope that I have been of assistance.

Robert J. Freeman
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STATE OF NEW YORK
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March 5, 2007

E-Mail

TO: Ms. Maria Cudequest

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. Cudequest:

I have received your letter in which you asked whether a village board of trustees is permitted to vote during an executive session.

In this regard, §106 of the Open Meetings Law which provides that:

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

In view of the foregoing, as a general rule, a public body may take action during a properly convened executive session [see Open Meetings Law, §105(1)]. If action is taken during an executive session, minutes reflective of the action, the date and the vote must be recorded in minutes pursuant to §106(2) of the Law. If no action is taken, there is no requirement that minutes of the executive session be prepared.

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

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

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

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

To comply with the Freedom of Information Law, I believe that a record must be prepared and maintained indicating how each member cast his or her vote. In most instances, a record of votes of the members appear in minutes required to be prepared pursuant to §106 of the Open Meetings Law.

I hope that I have been of assistance.

RJF:jm

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March 6, 2007

E-Mail

TO: Mr. Eric Tedford

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. Tedford:

I have received your letter in which you asked whether a village board may conduct a meeting on a "federally recognized holiday."

With regard to the legality of a meeting held on a legal holiday, the Open Meetings Law is silent on the matter. Although §24 of the General Construction Law enumerates certain days as "public holidays", I an unaware of any statute or judicial decisions that deal specifically with the issue of a public body's authority to conduct a meeting on a holiday or a weekend day. I have found a summary of an opinion rendered by the State Comptroller in which it was advised that a town is not legally obligated to close its offices on the holidays designated in §24 of the General Construction Law, and that a town board has discretionary authority to close town offices in observation of those holidays (see 1985 Opinion of the State Comptroller, 85-33). In my view, due to the absence of specific statutory guidance, it appears that a public body may in its discretion conduct meetings on public holidays or weekends, so long as it complies with the applicable provisions of law, such as the Open Meetings Law. I point out, too, that many public bodies conduct organizational meetings on January 1, which is a public holiday.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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March 6, 2007

Mr. Thomas Occhiogrossi
[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. Occhiogrossi:

Your letter of February 26 addressed to Governor Spitzer has been forwarded to the Committee on Open Government. The Committee, a unit of the Department of State, is authorized to offer advice and opinions pertaining to the Open Meetings Law. You have complained that the Mayor and Trustees of the Village of Ossining have altered previous practices by limiting residents' participation at meetings of the Board of Trustees and videotaping only a portion of its meetings.

In this regard, there is no requirement that a public body, such as a village board of trustees, tape record or video record its meetings. Because that is so, I do not believe that the Board is required to record the entirety of its meetings. Nevertheless, I point out that it has been held by the courts that any person who attends an open meeting has the right to tape or video record the proceedings, unless the use of the recording device is disruptive or obtrusive [see e.g., Mitchell v. Board of Education of the Garden City Union Free School District, 113 AD2d 924 (1985); Csorny v. Shoreham-Wading River Central School District, 759 NYS2d 513, 305 AD2d 83 (2003)]. Therefore, even though the Board may not record the entirety of its open meetings, any member of the public may do so, again, unless the use of the recording device interferes with the proceedings.

Next, you wrote that the Board reduced the time that attendees may speak from five to three minutes and give attendees "a one time four (4) minutes to speak on all resolutions being brought up that evening before they are read and voted on."

From my perspective, first, while individuals may have the right to express themselves and to speak, they do not 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.

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

Although public bodies have the right to adopt rules to govern their own proceedings [see e.g., County Law, §153; Town Law, §63; Village Law, §4-412; Education Law, §1709(1)], the courts have found in a variety of contexts that such rules must be reasonable. For example, although a board of education may "adopt by laws and rules for its government and operations", in a case in which a board's rules prohibited the use of tape recorders at its meetings, the Appellate Division found that the rule was unreasonable, stating that the authority to adopt rules "is not unbridled" and that "unreasonable rules will not be sanctioned" [see Mitchell v. Garden City Union Free School District, 113 AD 2d 924, 925 (1985)]. Similarly, if by rule, a public body chose to permit certain citizens to address it for ten minutes while permitting others to address it for three, or not at all, such a rule, in my view, would be unreasonable. In short, I believe that the Board of Trustees has the ability to limit public participation in the manner that you described.

Lastly, you wrote that those who want to speak during meeting must "stand in line behind the microphone or they cannot speak." You added that often those who wish to speak "have some sort of disability or are seniors who cannot stand that long..." In my opinion, if indeed the Board by rule or policy requires those who wish to speak to stand in line, irrespective of the number of those who want to do so, such a rule or policy would be found by a court to be unreasonable and, therefore, invalid. Certainly an alternative to standing in line for extended periods of time can be devised that would provide those who wish to speak with the opportunity to so.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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March 7, 2007

Mr. William A. Witkopf
[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. Witkopf *et al.*:

I have received your letter and hope that you will accept my apologies for the delay in response. You have raised a variety of questions pertaining to the Rushford Lake Recreation District ("the District") and its Board of Commissioners ("the Board") relating to the Open Meetings and Freedom of Information Laws. In this regard, I offer the following comments.

First, in my view, the Board is a public body required to comply with the Open Meetings Law. That statute is applicable to public bodies, and §102(2) defines the phrase "public body" to mean:

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

Having reviewed Chapter 78 of the Laws of 1981, the Board is, according to §7, administered by a board consisting of five commissioners; paragraph (f) indicates that three members constitute a quorum, and §11 details the Board's powers and duties, which involve conducting public business and performing a governmental function.

Similarly, I believe that the District is subject to the Freedom of Information Law, which applies to agencies and defines "agency" in §86(3) to include:

> "...any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or

> proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

The District is a kind of public corporation (see General Construction Law, §66), and based on §2 of Chapter 78 and the ensuing provisions, it performs a governmental function for the towns of Rushford and Caneadea.

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 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.

Section102(1) of the Open Meetings Law defines the term "meeting" to mean "the official convening of a public body for the purpose of conducting public business, including the use of videoconferencing for attendance and participation by the members of the public body." Based upon an ordinary dictionary definition of "convene", that term means:

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

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

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

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

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

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

Conducting a vote or taking action via e-mail would, in my view, be equivalent to voting by means of a series of telephone calls, and in the only decision dealing with a vote taken by phone, the court found the vote to be a nullity. In Cheevers v. Town of Union (Supreme Court, Broome County, September 3, 1998), which cited and relied upon an opinion rendered by this office, the court stated that:

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

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

If a majority of the members of the 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).

Third, there is no reference in the Open Meetings Law to the ability to enter into executive session to discuss "legal matters." Here I note that the Open Meetings Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, §105(1) states in relevant part that:

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

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

The provision most analogous to "legal matters" is §105(1)(d), which permits a public body to enter into executive session to discuss "proposed, pending or current litigation." in construing the exception concerning litigation, it has been held that:

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

> would be to accept the view that any public body could bar the public from its meetings simply be expressing the fear that litigation may result from actions taken therein. Such a view would be contrary to both the letter and the spirit of the exception" [Weatherwax v. Town of Stony Point, 97 AD 2d 840, 841 (1983)].

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

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

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

The emphasis in the passage quoted above on the word "*the*" indicates that when the discussion relates to litigation that has been initiated, the motion must name the litigation. For example, a proper motion might be: "I move to enter into executive session to discuss our litigation strategy in the case of the XYZ Company v. the District." If the Board seeks to discuss its litigation strategy in relation to a person or entity that it intends to sue, and if premature identification of that person or entity could adversely affect the interests of the District and its residents, it has been suggested that the motion need not identify that person or entity, but that it should clearly indicate that the discussion will involve the litigation strategy. Only by means of that kind of description can the public know that the subject matter may justifiably be considered during an executive session.

Fourth, §106 106 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.

I point out that when a public body conducts an executive session and merely engages in a discussion but takes no action, there is no obligation of prepare minutes of that session. If, however, action is taken, as indicated in §106, minutes reflective of the nature of the action taken, the date and the vote must be prepared and made available in accordance with the Freedom of Information Law within one week.

You asked whether a motion must be made to authorize members of the public to join the Board in an executive session. Pertinent is §105(2) of the Open Meetings Law, which provides that: "Attendance at an executive session shall be permitted to any member of the public body and any other persons authorized by the public body." Therefore, the only people who have the right to attend executive sessions are the members of the public body. A public body may, however, authorize others to attend an executive session. While the Open Meetings Law does not describe the criteria that should be used to determine which persons other than members of a public body might properly attend an executive session, I believe that every law, including the Open Meetings Law, should be carried out in a manner that gives reasonable effect to its intent. Typically, those persons other than members of public bodies who are authorized to attend are the clerk, the public body's attorney, the superintendent in the case of a board of education, or a person who has some special knowledge, expertise or performs a function that relates to the subject of the executive session.

If there is a dispute among the members concerning the attendance of a person other than a member of the Board at an executive session, I believe that the Board could resolve the matter by adopting or rejecting a motion by a member to permit or reject the attendance by a non-member at an executive session.

I note that in Jae v. Board of Education of Pelham Union Free School District (Supreme Court, Westchester County, July 28, 2004), it was held that there is no requirement that a motion be made to authorize the presence of persons other than members of a public body at an executive session. The decision states that:

> "..the Petitioners' contention that the Board of Education must specifically identify any individuals invited to attend executive sessions of the Board, is not supported by law. The Public Officers Law specifically prescribes the manner and method by as well as the purposes for which a public body may enter executive session. The requirements include a motion on the public record; '...identifying the general area or areas of the subject or subjects to be considered,...' (Public Officers Law §105[1]). This section of the law specifically does not require that any individuals invited to attend the meeting be set forth in the motion to go into executive session. The language set forth above is also in sharp contrast to the language describing who may attend executive sessions which simply states: '[a]ttendance at an executive session shall be permitted to any member of the public body and any other persons authorized by the public body.' (Public Officers Law §105[2]). If the legislature had intended that the identities of those attending executive sessions be memorialized in the public records of the public body's meetings, the legislature wuld [sic] have included the necessary language in sub-section 1 of the statute or sub-section 2 of the statute would have included language similar to that contained in sub-section1. Therefore, the Court agrees with the Respondents that they are not obligated to include the identities of all individuals attending executive sessions of the Board of Education in the motion authorizing the executive session."

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

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

In addition, subdivision (2) authorizes a court to award attorney's fees to the successful party.

Lastly, as indicated earlier, the District in my view clearly constitutes an agency subject to the Freedom of Information Law. When a request for records is made, that statute 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, legislation became effective 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.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Rushford Lake Recreation District Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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March 9, 2007

Mr. John Kwasnicki
[redacted]

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

Dear Mr. Kwasnicki:

I have received your letter in which you questioned the propriety of an executive session held by the Tuxedo Town Board "for the purpose of receiving advice from counsel..."

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 and §102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. Section 105(1) of the Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. In brief, prior to conducting an executive session, a motion must be made that includes reference to the subject or subjects to be discussed, and it must be carried by majority vote of a public body's membership.

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

Relevant to your inquiry 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.

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

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

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

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

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

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

Lastly, although it is not my intent to be overly technical, as suggested earlier, the procedural methods of entering into an executive session and asserting the attorney-client privilege differ. In the case of the 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 I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4346

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

March 13, 2007

Hon. Anthony Massar
City of Binghamton
City Hall
38 Hawley Street
Binghamton, NY 13901-3776

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

Dear Councilman Massar:

I have received your letter in which you requested a "written decision" concerning the ability of a city council to enter into executive session "for the purposes of 'collective negotiations pursuant to article fourteen of the Civil Service law' absent the Council itself being actively involved in current at-the-table bargaining."

In this regard, it is noted at the outset that the Committee on Open Government is authorized to provide advice and opinions concerning the Open Meetings Law; it is not empowered to issue a decision that is binding. Nevertheless, I offer the following comments concerning your question.

The language that you quoted is found in §105(1)(e) of the Open Meetings Law and refers to the "Taylor Law", which deals with the relationship between public employers, such as the City of Binghamton, and public employee unions. There are few decisions concerning that provision, and I believe that a clear response to your question could only be offered by a court. In my view, however, there are two possible outcomes.

First, based on its literal terms, if the City Council is discussing collective bargaining negotiations, it appears that it may conduct an executive session even though it may not be involved directly in the negotiations. The provision at issue merely states that an executive session may be held to discuss collective negotiations; it does not refer to a standard based on the effect of public discussion, nor does it limit who may assert the exception.

Second, on the other hand, it has been held for many years that the Open Meetings Law is be given "a broad and liberal construction" in a manner that fosters the public's right to obtain information concerning the governmental process [see e.g., Holden v. Cornell University, 80 AD2d 378, 381 (1981)]. That being so, a court might consider the reasons for which the exception was enacted. From my perspective, the primary purpose of the exception is to enable a public body to discuss its collective bargaining strategy in private, so that it or its representatives may engage in fair negotiations, without providing the other party to the negotiations with an unfair advantage. By means of analogy, §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..." Despite the absence of a particular standard or condition that must be met to enter into executive session, it has been held that the purpose of the exception is to enable a public body to discuss its litigation strategy in private, so a not to divulge its strategy to its adversary [see e.g., Concerned Citizens to Review the Jefferson Mall v. Town Board of the Town of Yorktown, 84 AD2d 612, appeal dismissed, 54 NY2d, 957 (1981)].

In short, due to the absence of judicial direction, I regret that an unequivocal response cannot be offered. However, in my view, the grounds for excluding the public from meetings is based on the general notion that meetings must be held open to the public, except to the extent that public discussion would result in some sort of harm. In this instance, it is suggested that an executive session may properly be held only to the extent that public discussion would in some way adversely affect the negotiations or the financial interests of City taxpayers.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Kenneth J. Frank, Corporation Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16495
OML-AO-4347

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

March 14, 2007

Ms. Margaret Sobel
[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. Sobel:

We are in receipt of your request for an advisory opinion concerning application of the Open Meetings Law to the Meeting Hall Exploratory Committee of the Village of Old Field, as well as various related materials submitted by Ms. Donna Deedy. Specifically, you inquired whether the Open Meetings Law applies to meetings of the Exploratory Committee. Based on the materials provided, the Exploratory Committee was created by the Village Board of Trustees "to consider the advisability and feasibility of building a Village meeting house", and it will "presumably will make recommendations to the Board of Trustees". There are nine members of the Exploratory Committee, including the Mayor and one Village Trustee. In an effort to address all of the questions raised by you and Ms. Deedy, we offer the following comments.

First, in our view, the Meeting Hall Exploratory Committee is not subject to the Open Meetings Law. In this regard, and 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 our 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" [GoodsonTodman 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.). We 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 Village, we do not believe that it constitutes a public body or, therefore, is obliged to comply with the Open Meetings Law.

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

Further, we believe that the Village Board, the governing body, has the authority to direct that a committee that it has created must give effect to the Open Meetings Law. As you may be aware, §4-412 of the Village Law confers general powers on the board of trustees, "[t]he board of trustees may create or abolish by resolution offices, boards, agencies and commissions and delegate to said offices, boards, agencies and commissions so much of its powers, duties and functions as it shall deem necessary for effectuating or administering the board of trustees duties and functions."
In our view, since the Board has the power to create the committee, it is implicit that it has the power to require that the committee function in a certain way, in this instance, in accordance with the Open Meetings Law.

Section 110 of the Open Meetings Law entitled "Construction with other laws" provides in subdivision (1) that any local enactment that is "more restrictive with respect to public access...shall be deemed superseded" by the Open Meetings Law to the extent that it grants lesser access than that statute. However, subdivision (2) provides that any such enactment or "rule" that is "less restrictive with respect to public access...shall not be deemed superseded..." That being so, we believe that the Village Board could by local law or rule require the committee to grant public access to its meetings in a manner consistent with the Open Meetings Law.

Further, and with respect to records prepared by the Committee for the Village Board, the Freedom of Information Law is the governing provision of law. That statute is broad in its scope, for it pertains to all records of an agency, such as a village, and 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, records produced or acquired by the Committee constitute Village records subject to rights conferred by the Freedom of Information Law. Further, it is our view that such records would be accessible pursuant to the Freedom of Information Law.

Finally, please accept my apologies for initially providing a different opinion to Ms. Deedy. As I explained to her, since my discussion with her I have researched the matter more fully and confirmed my opinion with our executive director.

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: Donna Deedy

OML-AO-4348

From: Camille JobinDavis
To: [redacted]
Date: 3/16/2007 3:11:30 PM
Subject: Open Meetings Law - charter school

Scott,

Below is a link to an advisory opinion with respect to requiring meeting attendees to sign in and wear an identification tag in order to enter a building at which a public meeting is held. It talks about why the rule was adopted and how it applies to everyone entering the building.

http://www.dos.state.ny.us/coog/otext/3527.htm

Where the rule requires 24-hour advance identification of who will attend the meeting, and it is a rule adopted by the Charter School Board, I would suspect that the rule is not reasonable. The following is a link to an advisory opinion concerning the ability of an agency to adopt reasonable rules:

http://www.dos.state.ny.us/coog/otext/o3364.htm

Finally, and this is copied from one of our advisory opinions with respect to requiring people to identify themselves before speaking at a meeting:

Factual situations have been brought to the attention of this office that demonstrate that it may be inappropriate or even dangerous for a speaker to identify himself or herself. Battered women and victims of violence may want to express their views, but, if, for example, they are attempting to protect themselves from abusers or attackers, providing their names and especially their addresses could endanger their lives or safety. In a different context, parents of students may want to express their opinions before a board of education without identifying themselves, for doing so would identify their children, perhaps to their detriment. In short, I believe that there may be valid, justifiable reasons for speakers not identifying themselves or having their names and/or addresses included in minutes of meetings.

I hope these are helpful to you - and that you are enjoying the snow!

Camille

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
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Albany NY 12231
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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March 20, 2007

E-Mail

TO: Hon. Kathy Crance, Town Clerk

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. Crance:

I have received your letter and, in your capacity as Town Clerk, you have questioned the authority of a Board member to "edit" minutes that you prepared.

From my perspective, a member of a town board has no authority to compel the town clerk to alter minutes. In this regard, I offer the following comments.

I believe that four provisions of law are pertinent to the matter. First, §106 of the Open Meetings Law deals with minutes and under that statute, it is clear that minutes need not consist of a verbatim account of what is said. Rather, at a minimum, minutes must consist of a record or summary of motions, proposals, resolutions, action taken and the vote of each member. 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". As such, except in unusual circumstances, the town clerk has the "sole responsibility" to prepare the minutes. Third, subdivision (1) of §30 of the Town Law provides that the clerk "shall have such additional powers and perform such additional duties as are or hereafter may be conferred or imposed upon him by law, and such further duties as the town board may determine, not inconsistent with law". And fourth, §63 of the Town Law states in part that a town board "may determine the rules of its procedure".

In my opinion, inherent in each of the provisions cited is an intent that they be carried out reasonably, fairly, with consistency, and that minutes be accurate.

More specifically, §106 of the Open Meetings Law provides that:

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

Based on the foregoing, minutes need not consist of a verbatim account of everything that was said; on the contrary, so long as the minutes include the kinds of information described in §106, I believe that they would be appropriate and meet legal requirements. Most importantly, I believe that minutes must be accurate. Alteration of minutes in a manner that does not accurately reflect what occurred or what was said at a meeting, would, in my view, be inconsistent with law.

In good faith, I point out that in an opinion issued by the State Comptroller, it was advised that when a member of a board requests that his statement be entered into the minutes, the board must determine, under its rules of procedure, whether the clerk should record the statement in writing, which would then be entered as part of the minutes (1980 Op.St.Comp. File #82-181). Despite that opinion, it is unclear from my perspective whether a board has the authority to compel a clerk to include information in minutes beyond the requirements of the Open Meetings Law. It is unlikely in my view that a town board has the authority to require the exclusion of information from minutes of an open meeting that is accurate.

Additionally, I do not believe that a member of the board may unilaterally alter or direct that minutes be altered. That person is one among five members; in my view, minutes may be amended only pursuant to action taken by a majority of vote of the total membership of a town board. Moreover, as suggested earlier, any such alteration must accurately reflect what transpired at a meeting.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4350

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March 23, 2007

E-MAIL

TO: Dr. Howard S. Smith

FROM: Robert J. Freeman, Executive Director

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

Dear Dr. Smith:

I have received your letter and appreciate your interest in compliance with the Open Meetings Law. You described a situation in which a resident addressed the Board of Education and wrote, in your words, that "judicial intervention will be necessary to resolve a concern should the Board not grant his request." You have asked whether the matter may be discussed during an executive session.

In this regard, as you are likely aware, the Open Meetings Law is based on a presumption of openness. Stated differently, the Law requires that meetings of public bodies be conducted in public, except to the extent that a closed or executive session may properly be held. Paragraphs (a) through (h) of §105(1) of the Law specify and limit the subjects that may be considered in an executive session, and it is clear in my view that those provisions are generally intended to enable public bodies to exclude the public from their meetings only to the extent that public discussion would result in some sort of harm, perhaps to an individual in terms of the protection of his or her privacy, or to a government in terms of its ability to perform its duties in the best interests of the public.

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

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

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

In the instant situation, in my view, only to the extent that the Board discusses its litigation strategy would an executive session be properly held.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16511
OML-AO-4351

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

March 30, 2007

E-MAIL

TO: Diane Benczkowski

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. Benczkowski:

I have received your letter in which you raised issues relating to the Depew Board of Education, upon which you serve as a member. You referred to a situation in which "the Board met in Executive Session...to discuss legal issues and access to the legal bills [you] had in question." You added that:

> "At that time, the entire Board took a vote and agreed to keep an ongoing file in the District Clerk's office of legal bills that a board member could view at any time. At our next regular meeting, on February 6, in Executive Session, the Board President, Susan Wagner, presented all of the board members with the attached Confidentiality Agreement that she wanted us to sign before we could view the legal bills. Myself and 3 of the 7 member board refused to sign the agreement."

The proposed "Confidentiality Agreement for Review of Un-Redacted Legal Bills by Board of Education Members" states as follows:

> "1. Members in their individual capacities are entitled to review the bills for professional services rendered by the school attorney to the District under the New York State Freedom of Information Law in a redacted form; and
>
> 2. The District seeks to allow Members access to these bills in an un-redacted form and without having to file the required Freedom of Information Request with the District; and

3. These bills will be maintained in a binder with the District Clerk and the Member's signature seeking review of these bills will be required on a sign-in sheet prior to the Member's review of these bills; and

4. By signing below the Member agrees in exchange for reviewing said bills in the form described in this Agreement, that all information contained in these bills will remain strictly confidential and only be discussed by Members in an Executive Session of a Board of Education Meeting; and

5. If a Member fails to adhere to the sign-in procedure or the confidentiality requirements of this agreement, said access to the documents described in this agreement will be denied.

6. Any new Member of the Board of Education will be required to sign a copy of this Agreement prior to obtaining access to the bills described herein under the terms described herein.

7. By signing below you accept and agree to adhere to all the requirements set forth in this Agreement."

From my perspective, the proposed agreement is overbroad and, in some respects, inconsistent with law. In this regard, I offer the following comments.

First and perhaps most importantly, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency, such as a school district, 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. 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)].

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 government attorney to his or her clients, government 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 school district 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.

One of the difficulties with the proposed agreement is that some elements of the records at issue must, based on judicial precedent, be made available to any person pursuant to the Freedom of Information Law.

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 opinion, 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. Similarly, because the Family Educational Rights and Privacy Act (20 USC §1232g) prohibits the disclosure of information personally identifiable to students, I believe that references identifiable to students may properly be deleted. However, as suggested in both Knapp and Orange County Publications, "descriptive" material reflective of the "general nature of services rendered", as well as the dates, times and duration of services rendered ordinarily would be beyond the coverage of the privileged.

Section 4 of the proposed agreement states that, by signing, a member of the Board, in exchange for having the opportunity to inspect the bills in their entirety, promises to keep "all information contained in these bills...strictly confidential" and that they may only be discussed by Board members during an executive session. Similarly, section 5 states that a failure to abide by the "sign-in procedure" would eliminate any access to the records. For the reasons described above, I believe that those provisions are contrary to law. It has been held that accessible records should be made equally available to any person, without regard to status or interest [see e.g., Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976) and M. Farbman & Sons v. New York City, 62 NY 2d 75 (1984)]. The proposed agreement would eliminate the rights of Board members as members of the public. Some portions of the bills are accessible to anyone under the Freedom of Information Law, including Board members, irrespective of whether they sign the agreement. I do not believe the agreement could validly restrict or diminish rights of access conferred upon members of the public who happen to be members of a board of education. Further and equally important, while there may be a basis for entry into executive session to discuss some bills or certain aspects of them, there would likely be no basis for entry into executive session in consideration of others.

In my opinion, the agreement would be valid insofar as the bills include information that is indeed confidential by statute based on the proper assertion of the attorney-client privilege or perhaps a different statute that forbids disclosure, such as the Family Educational Rights and Privacy Act. Other aspects of the records likely would not be exempted from disclosure by statute or, therefore, be confidential. I note that if a member of the Board obtains information subject to the attorney-client privilege, that person, acting unilaterally, would not have the authority to waive the privilege on behalf of the Board; only a majority of the Board would have the authority to do so..

Lastly, there are issues relating to the Open Meetings Law that merit comment, and your description of the manner in which the proposed agreement was developed suggests a failure to comply with both that law and the Education Law. According to your letter, the Board conducted

an executive session to discuss access to the legal bills and "took a vote and agreed to keep ongoing file in the District Clerk's office of legal bills that a board member could review at any time." I do not believe that the Board could have properly discussed that procedure or policy during an executive session.

Like the Freedom of Information Law, the Open Meetings Law is based on a presumption of openness. Meetings must be conducted in public, except to the extent that an executive session may properly be convened in accordance with §105(1). Paragraphs (a) through (h) of that provision specify and limit the subjects that may properly be discussed in executive session. In my view, consideration of an adoption of policy concerning Board members' access to legal bills would not fall within any of the grounds for entry into executive session, and that issue should have been discussed in public.

Moreover, judicial decisions indicate that the Board could not have voted in private to adopt the policy. 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.

I hope that I have been of assistance.

RJF:tt

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4352

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April 2, 2007

E-MAIL

TO: Robert J. Newman

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. Newman:

We are in receipt of your request for an advisory opinion concerning application of the Open Meetings Law to recent gatherings of the Audit Committee of the Patchogue Medford School District. Specifically you questioned recent appointments to the Committee, whether action by the Committee requires a quorum, and the Committee's announcements to enter into executive sessions. In an effort to answer all the issues raised in your correspondence, 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 gatherings that you described, once a quorum of the Committee had convened, either three of the members of a Committee consisting of four, or four of the members of the Committee consisting of six, such gatherings in our view constitute meetings of the Committee and the Open Meetings Law would have applied.

Second, as recently delineated 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). We believe that the Legislature intended the Open Meetings Law to apply to 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. Although we do not know what was discussed at the gathering you described, a presentation by a vendor about a particular proposal for the Committee's consideration, such discussion, in our opinion, would not likely have been an appropriate topic for executive session. Very simply, it does not appear that the subject matter of a discussion of that nature would fall within any of the grounds under which an audit committee may enter into an executive session.

Further, 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."

The Committee is authorized to issue advisory opinions concerning application of the Freedom of Information and Open Meetings Laws. 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.

Finally, with respect to your opinion that "the board has stacked the committee with school board members knowing that certain appointed audit committee members will not show up", we refer again to §2116-c of the Education law. Subparagraph (2) pertaining to membership of the committee, permits that it "may include, or be composed entirely of persons other than trustees or members of the board if, in the opinion of the trustees or board, such membership is advisable to

provide accounting and auditing expertise." Accordingly, it is our opinion that subject to the discretion of the school board, membership of the committee may consist entirely of members of the public, entirely of members of the school board, or any combination thereof.

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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April 3, 2007

Ms. Donna Suhor
Chairperson
Capital District Coalition for
Accessible Transportation
P.O. Box 685
Troy, NY 12180

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

Dear Ms. Suhor:

I have received your letter in which you asked whether "there should be a public comment period at CDTA board meetings." In my view, although many public bodies authorize the public to speak at meetings, there is no requirement that they do so.

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

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

Although public bodies have the right to adopt rules to govern their own proceedings [see e.g., County Law, §153; Town Law, §63; Village Law, §4-412; Education Law, §1709(1)], the courts

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

To encourage the CDTA Board to authorize a public comment period, it is suggested that you indicate to the Board that many public bodies permit the public to speak at their meetings, but only in accordance with reasonable rules and procedures adopted by those bodies.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: CDTA Board

STATE OF NEW YORK
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April 4, 2007

Mr. Jerome Lefkowitz
State of New York
Public Employment Relations Board
80 Wolf Road
Albany, NY 12205-2670

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

Dear Mr. Lefkowitz:

I have received your letter in which you inquired "as to the extent, if any that the Public Employment Relations Board should be exempt from the New York State Open Meetings Law."

You wrote that:

> "[t]he Board holds monthly meetings at which a written copy of the minutes are distributed to the three members who read them, and vote whether or not to accept them as written or else to propose some changes in them. After completion of this, the Board goes into executive session at which it considers appeals from staff ALJ decisions, discusses those decisions and formulates its own decision that affirms, reverses or modifies the staff decisions. Upon concluding this business, the Board meeting is usually adjourned."

You added that:

> "[a]bout once a year, the Board holds oral argument on a particular case where exceptions have been filed with it. The decision to entertain oral argument may be made at a Board meeting. Also, approximately once every three or four years, the Board will review and discuss proposals for changes in its Rules of Procedures at a meeting. The Board will formulate proposed amendments to its existing Rules of Procedures at that meeting and determine that it will hear comments by the Board's clientele. [sic] or that the

> proposals be distributed among that clientele along with a request for comments."

Based on my understanding of the foregoing and our discussion of the matter, I believe that the majority of the Board's meetings are exempt from the coverage of the Open Meetings Law. In this regard, I offer the following comments.

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

Relevant to the duties of the Board is §108(1) of the Open Meetings Law, which exempts "judicial or quasi-judicial proceedings..." from the coverage of that statute.

In my view, 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."

Lastly, it is noted that although the deliberations of a public body 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)].

In consideration of the foregoing, it appears that the only portion of many of the Board's meetings that are subject to the Open Meetings Law would involve the review and adoption of minutes; the remainder in most instances would be quasi-judicial and, therefore, exempt from the coverage of the Open Meetings Law. The other aspects of the Board's functions that fall within the Open Meetings Law to which you referred involve decisions to conduct oral arguments and the arguments themselves that occur "about once a year", and the review and discussion of proposals for alterations in the Board's rules of procedure, which occur "approximately once every three or four years."

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
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April 4, 2007

E-MAIL

TO: Hon. Gale Grice

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. Grice:

I have received your letter in which you questioned the reasonableness of a requirement imposed by the Town Board directing you to prepare a verbatim record of its meetings.

From my perspective, the Board cannot require that you prepare verbatim minutes of its meetings. To reiterate points offered in other opinions dealing with similar or related matters, I believe that four provisions law are pertinent to the matter.

First, §106 of the Open Meetings Law deals directly with minutes of meetings and states that:

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

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

Based on the foregoing, it is clear that minutes need not consist of a verbatim account of what is said. Rather, at a minimum, minutes must consist of a record or summary of motions, proposals, resolutions, action taken and the vote of each member.

Second, in the Town Law, subdivision (1) of §30 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 provides that the clerk "shall have such additional powers and perform such additional duties as are or hereafter may be conferred or imposed upon him by law, and such further duties as the town board may determine, not inconsistent with law". And fourth, §63 of the Town Law states in part that a town board "may determine the rules of its procedure".

In my opinion, inherent in each of the provisions cited is an intent that they be carried out reasonably, fairly, with consistency, and that minutes be accurate.

While I know of no case law that focuses on this particular issue, the courts have offered guidance concerning the authority of governing bodies to adopt rules and the requirement that those rules must be reasonable. For example, as in the case of town boards having the authority to adopt rules and procedures pursuant to §63 of the Town Law, boards of education have essentially the same authority under §1709 of the Education Law. However, in a case in which a board's rule prohibited the use of tape recorders at its meetings, the Appellate Division found that the rule was unreasonable, stating that the authority to adopt rules "is not unbridled" and that "unreasonable rules will not be sanctioned" [see Mitchell v. Garden City Union Free School District, 113 AD 2d 924, 925 (1985)]. Similarly, if by rule, a town board chose to permit certain citizens to address it for ten minutes while permitting others to address it for three, or not at all, such a rule, in my view, would be unreasonable, despite the authority conferred upon a town board by §63 of the Town Law.

In my opinion, a rule requiring that a town clerk prepare a verbatim account of everything said at every town board meeting would be found by a court to be unreasonable and beyond the authority granted to town boards by both §§30(11) and 63 of the Town Law. In consideration of the numerous statutory obligations imposed upon town clerks by a variety of statutes, a clerk would be effectively precluded from carrying out those duties if he or she is required to prepare verbatim minutes of every meeting. Meetings may be held frequently, often they are lengthy, and the time needed to type verbatim minutes would force the clerk to put aside other duties and likely engage in failures to comply with law. Moreover, if the Board or others have a need years from now to determine the nature of action taken by the Board, the task of wading through lengthy documentation in an effort to find the crucial portions will be unnecessarily frustrating and time consuming.

In short, I believe that a requirement that you, as clerk, prepare verbatim minutes is not only unreasonable; a requirement of that nature also results in inefficiency and a lesser capacity to conduct town business in a manner that enables you to meet your statutory responsibilities.

It is suggested that reasonable alternative exists and is practiced by many municipalities. In order to have a verbatim account of statements made at meetings, the meetings can be audio tape recorded or perhaps video recorded. If there is a question concerning the accuracy of minutes or a need for detail not ordinarily included in typical minutes of a meeting, the tape can be reviewed to ensure accuracy, to resolve a dispute or to refresh one's memory. I note, too, that minutes of meetings must be retained permanently pursuant to the records retention schedule issued by the State Archives at the State Education Department, but that tapes are required to be maintained for a period of months. At the expiration of the retention period, the tapes could be preserved, or if they are no longer of value, they could be erased and reused.

I hope that I have been of assistance.

RJF:tt

OML-AO-4356

-----Original Message-----
From: sisrael@th-record.com [mailto:sisrael@th-record.com]
Sent: Friday, April 06, 2007 3:48 PM
To: Jobin-Davis, Camille
Subject: Re:

[redacted]

On Board President Ginny Esposito's request to discuss the issue at a meeting in the Superintendent's office or by telephone conference:

It is my view that if a quorum of the board gathered to discuss the effects of the roofing project and the odors, and/or to discuss how information was distributed to the board members and/or to set policy on how and when information of this nature should be distributed, such gathering would be a meeting, subject to provisions of the Open Meetings Law. Very simply, there would be no basis for entry into executive session.
These discussions are different from what is typically referred to as a "retreat". As we have advised, at a retreat, when a majority of a public body gathers for the purpose of gaining education or training, or to develop or improve team building or communication skills, or to consider interpersonal relations, I do not believe that the Open Meetings Law would be applicable. To go on a retreat to improve team building skills or to work on interpersonal relationships is different than criticizing another board member for allegedly not following board policy. To discuss the employment history of a particular person, which is a permitted topic for executive session, in my view, is different than expressing an opinion about how another board member answered a particular question and whether or not I liked that answer.
...the school board is required to hold its meetings in a manner which permits the public to observe the performance of the school board members, and to "attend and listen to the deliberations and decisions that go into the making of public policy." Although I have not been there, it appears likely that gatherings at the Superintendent's office would not meet this standard. Similarly, the Open Meetings Law does not permit meetings by telephone conference call.

Steve:
>
>

>
> To go on a retreat to improve team building skills or to work on
> interpersonal relationships is different than criticizing another
> board member for allegedly not following board policy.
>
>
>
> To discuss the employment history of a particular person, which is a
> permitted topic for executive session, in my view, is different than
> expressing an opinion about how another board member answered a
> particular question and whether or not I liked that answer.
>
>
>
> (Since my conversation with you I've been interrupted with two other
> telephone conversations - I hope this is what we talked about!)
>
>
>
> Camille
>
>
>
> PLEASE NOTE: Effective immediately, my email address has changed to:
>
> camille.jobin-davis@dos.state.ny.us
>
>
>
> Camille S. Jobin-Davis, Esq.
>
> Assistant Director
>
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>

OMLAO - 4357

From: Jobin-Davis, Camille
Sent: Friday, April 06, 2007 12:39 PM
To: 'sisrael@th-record.com'
Subject: Open Meetings Law

Steve,

In follow up to our conversation, and in response to the emails forwarded previously, I offer the following comments:

One of the emails you forwarded indicates the Superintendent's intention to have informed the school board of the status of the roofing project, including the presence of fumes in the building and measures taken to protect people from exposure to the odors, during executive session. She relates that she was unable to do so because "[t]he time in executive session was used up with other issues and I knew I would be emailing you the parent letter the next morning." Please note that in order to enter into executive session, a majority of the board must agree that one of the provisions of section 105(1) of the Open Meetings Law applies and is the basis for entry into executive session. In my opinion, none of the provisions would apply to permit the board to enter into executive session in order to receive an update on a construction project. Even in this case, where it became necessary to inform the board of odor abatement issues, it does not appear that any of the provisions would apply, and therefore, such discussion would not be appropriate for executive session.

In this email the Superintendent indicated the name of a teacher and described her medical condition. If it were necessary to identify a teacher or a student who was receiving medical treatment as a result of odors in the building, or to identify any persons who had received any medical attention at all during this construction period, the Board could enter into executive session pursuant to section 105(1)(f) to discuss "the medical ... history of a particular person." However, the discussion would have to be limited to anything that would identify the individual, and when the conversation returned to generalized reporting about how many people required medical attention, or matters regarding the status of efforts to abate the effect of the odors, in my opinion the board would be required to return to the public meeting.

A further email indicates the board President's request to discuss ongoing issues regarding this matter at a meeting in the Superintendent's office or by telephone conference if necessary. It is my view that if a quorum of the board gathered to discuss the effects of the roofing project and the odors, and/or to discuss how information was distributed to the board members and/or to set policy on how and when information of this nature should be distributed, such gathering would be a meeting, subject to provisions of the Open Meetings Law. Very simply, there would be no basis for entry into executive session. These discussions are different from what is typically referred to as a "retreat". As we have advised, at a retreat, when a majority of a public body gathers for the purpose of gaining education or training, or to develop or improve team building or communication skills, or to consider interpersonal relations, I do not believe that the Open Meetings Law would be applicable.

Further, section 103 of the Open Meetings Law requires that every meeting of a public body be open to the general public. In keeping with the statement of intent set forth in section 100, the school board is required to hold its meetings in a manner which permits the public to observe the performance of the school board members, and to "attend and listen to the deliberations and decisions that go into the making of public policy." Although I have not been there, it appears likely that gatherings at the Superintendent's office would not meet this standard. Similarly, the Open Meetings Law does not permit meetings by telephone conference call.

Finally, the last email you sent, which is apparently from a board member, indicates his desire to have an emergency executive session to receive a "synopsis" from the Superintendent on "the events" including any incident reports, "and what the plan is to ensure this does not happen in the future...." Again, it is my opinion that any gathering of a majority of the board for the purpose of receiving an update or a briefing on the roofing project, odor abatement efforts and/or any policies or procedures to be put into place, would be a meeting subject to the provisions of the Open Meetings Law, including providing the public an opportunity to attend, notice of the meeting, and minutes.

Camille

PLEASE NOTE: Effective immediately, my email address has changed to:
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April 9, 2007

Mr. John Watson
State of New York
Executive Department
Crime Victims Board
845 Central Avenue, Room 107
Albany, NY 12206

The staff of the Committee on 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. Watson:

We are in receipt of your request for an advisory opinion concerning application of the Open Meetings Law to attendance by the members of the Crime Victims Board at meetings of the Crime Victims Board Advisory Council. Specifically, you indicated that "Council meetings are held in the presence of the CVB Board...no public business or governmental functions for the State are conducted at these meetings...The Council advises the Board on matters relating to victim services and victim rights and alerts the Board to issues of concern to the victim community. However, the Board **does not act** on recommendations or resolve issues at the Advisory Council" (emphasis yours).

In an effort to clarify the issues of application of the Open Meetings Law to such gatherings, we offer the following comments.

First, as you are 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."

Established pursuant to §622 of the Executive Law, the Crime Victims Board consists of five members with distinct terms of office, each receiving an annual salary, and prohibited from engaging in any other occupation. Section 623 of the Executive Law authorizes the Board "[t]o hear and determine all claims for awards . . . [t]o coordinate state programs and activities relating to crime victims" and "[t]o establish an advisory council to assist in formulation of policies on the problems of crime victims." Since the powers and duties conferred upon the Board clearly indicate that it conducts public business and performs a governmental function, in our view the Board is a public body required to comply with the Open Meetings Law.

Second, 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 Board gathers, by design and in their capacities as Board members, to receive the advice and recommendations of the Advisory Council, any such gathering, in our opinion, would constitute a "meeting" subject to the Open Meetings Law. Whether a quorum of the Board holds its own meeting to receive the advice and recommendations of the Advisory Council or travels to a location convenient to the Advisory Council, we believe, would have no bearing on application of the law.

Third, as indicated earlier, the definition of the phrase "public body" refers to entities that are required to conduct public business by means of a quorum. The term "quorum" is defined in §41 of the General Construction Law, which has been in effect since 1909. The cited provision 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. It is our opinion, therefor, that if less than a quorum of the Board attends a meeting of the Advisory Council, such gathering would not constitute a meeting of the Board subject to the Open Meetings Law.

To be sure, not every instance in which a quorum of the 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, and as distinguished from the situation here, if members of a public body meet by chance or at a social gathering, for example, we do not believe t hat the Open Meetings Law would apply, for there would be no intent to conduct public business.

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

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

FOIL-AO-4359

-----Original Message-----
From: Freeman, Robert (DOS)
Sent: Monday, April 09, 2007 8:42 AM
To: 'Carrie Remis'
Subject: RE: public meeting question

Good morning - -

I hope that you and yours enjoyed the holiday.

With respect to the first issue, the Open Meetings Law contains what might be characterized as minimum requirements concerning the contents of minutes. At a minimum, according to §106(1), minutes of an open meeting must consist of a record or summary of motions, proposals, resolutions, action taken and the vote. The minutes may include reference to comments made by the public and board members, but there is no obligation to do so.

The second appears to involve the status of a public comment period. As you may be aware, the Open Meetings Law provides the public with the right to attend, listen and observe the performance of public bodies. The law, however, is silent with respect to the ability to speak. Therefore, a public body, such as a board of education, need not authorize the public to speak at meetings. Many do so, and it has consistently been advised when they choose to permit public participation, they should do so by means of reasonable rules that treat members of the public equally. Notwithstanding the privilege of speaking at meetings, there is nothing in the law that requires that any particular weight be given to public comments. They may be effective in some instances but essentially ignored in others.

I hope that this serves to clarify your understanding.

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April 12, 2007

Mr. Neil Marcus
[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. Marcus:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information and Open Meetings Laws to requests made to and actions taken by the Village of Wesley Hills. In your correspondence, you raised many issues, all of which we will attempt to address with the following comments.

First, by way of background, the Freedom of Information Law governs access to records maintained by an agency, such as a village. The Open Meetings Law applies to meetings of public bodies, public access to meetings, notice of meetings, and minutes. While the Committee on Open Government is authorized to issue advisory opinions concerning application of these laws, this office has no authority to enforce or compel an entity to comply with those statutes. It is our hope that these opinions are educational and persuasive, and that they serve to resolve village problems and promote understanding of and compliance with the law.

Second, as you are likely aware, the Freedom of Information Law pertains to existing records. Section 89(3) states in part that an agency is not required to create a record in response to a request. We 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." When you consider it worthwhile to do so, you could seek such a certification.

It is noted that the Freedom of Information Law includes within its scope not only records in the physical possession of an agency, but also those that may be kept or maintained for an agency elsewhere. That statute pertains to all agency records, and §86(4) defines the term "record" expansively to mean:

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

In consideration of the language quoted above, documents need not be in the physical possession of an agency to constitute agency records; so long as they are produced, kept or filed for an agency, the courts have held they constitute "agency records", even if they are maintained apart from an agency's premises.

It has been found, for example, that records maintained by an attorney retained by an industrial development agency were subject to the Freedom of Information Law, even though an agency did not possess the records and the attorney's fees were paid by applicants before the agency. The Court determined that the fees were generated in his capacity as counsel to the agency, that the agency was his client, that "he comes under the authority of the Industrial Development Agency" and that, therefore, records of payment in his possession were subject to rights of access conferred by the Freedom of Information Law (see C.B. Smith v. County of Rensselaer, Supreme Court, Rensselaer County, May 13, 1993).

Perhaps most significant is a decision rendered by the Court of Appeals in which it was found that materials maintained by a corporation providing services pursuant to a contract for a branch of the State University that were kept on behalf of the University constituted "records" falling with the coverage of the Freedom of Information Law. The Court rejected "SUNY's contention that disclosure turns on whether the requested information is in the physical possession of the agency", for such a view "ignores the plain language of the FOIL definition of 'records' as information kept or held 'by, with or for an agency'" [see Encore College Bookstores, Inc. v. Auxiliary Services Corporation of the State University of New York at Farmingdale, 87 NY 2d 410. 417 (1995)].

In short, insofar as records sought are maintained for the Village, we believe that the Village would be required to direct the person who possesses them to disclose them in accordance with the Freedom of Information Law, or obtain them in order to disclose them to you to the extent required by law.

Further, 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 our view, perhaps some of the grounds for denial could properly be asserted to withhold some of the records in question.

Third, the transmittal or possession of records by the Village's attorney would not alter the character of the records or necessarily bring them within the scope of the attorney-client privilege. The first ground for denial in the Freedom of Information Law, §87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute." 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, we believe that a municipal attorney may engage in a privileged relationship with his or her client and that records prepared in conjunction with an attorney-client relationship may be considered privileged under §4503 of the Civil Practice Law and Rules. Further, since the enactment of the Freedom of Information Law, it has been found that records may be withheld when the privilege can appropriately be asserted when the attorney-client privilege is read in conjunction with §87(2)(a) of the Law [see e.g., Mid-Boro Medical Group v. New York City Department of Finance, Sup. Ct., Bronx Cty., NYLJ, December 7, 1979; Steele v. NYS Department of Health, 464 NY 2d 925 (1983)]. Similarly, the work product of an attorney may be confidential under §3101 of the Civil Practice Law and Rules.

Nevertheless, correspondence between the Village Attorney and the applicant's attorney, if it exists, although in possession of the Village's attorney, does not consist of privileged communications. In a discussion of the parameters of the attorney-client relationship and the conditions precedent to its initiation, it has been held that:

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

The Village is the client of the Village attorney; the applicant's attorney is not. Consequently, communications in possession of the Village attorney transmitted to and from the applicant's attorney would not fall within the coverage of the attorney-client privilege. On the contrary, we believe that they would constitute agency records that must be disclosed, for none of the grounds for denial would appear to be pertinent or applicable.

Turning to the issues raised with respect to the Open Meetings Law, you referred to the Village's denial of your request for access to minutes of a particular executive session on the ground that no such minutes exist. As you may be aware the Open Meetings Law contains direction concerning minutes of meetings and provides what might be viewed as minimum requirements pertaining to their contents. Specifically, §106 states that:

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

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

In view of the foregoing, as a general rule, a public body may take action during a properly convened executive session except to appropriate public moneys [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.

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)].

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, 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).

If the Board reached a "consensus" that is reflective of its final determination of an issue during an executive session, 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, 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, we believe that the exception is intended to permit a public body to discuss its litigation strategy and related settlement 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 our view, therefore, only to the extent that the Board discusses its litigation strategy and related settlement strategy could an executive session be properly held under §105(1)(d).

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

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

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

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

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

relationship, the communications made pursuant to that relationship would in 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 of entering into an executive session and asserting the attorney-client privilege differ. In the case of the former, the Open Meetings Law applies. Since a motion to enter into executive session must be made during an open meeting, and since §106(1) requires that minutes include references to all motions, the minutes of an open meeting must always include an indication that an executive session

was held, as well as the reason for the executive session. 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.

Finally, in contrast to the comment you attribute to the records access officer, that her job is to protect the Village's interests, the Freedom of Information Law and ensuing regulations require that the records access officer coordinate the Village's response to requests for records.

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 with those promulgated by the Committee and with the Freedom of Information Law. Further, §1401.2 of the regulations provides in relevant part that:

> "(a) The governing body of a public corporation and the head of an executive agency or governing body of other agencies shall be responsible for insuring compliance with the regulations herein, and shall designate one or more persons as records access officer by name or by specific job title and business address, and when requests are accepted via email, an email address, who shall have the duty of coordinating agency response to public requests for access to records. The designation of one or more records access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public from continuing to do so."

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...
>
> (4) 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.
> (5) 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 officer in the great majority of towns, for he or she, by law, is also the records management officer and the custodian of town 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, 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." From my perspective, every law must be implemented in a manner that gives reasonable effect to itsIt is our, an that 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.

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. Julie Pagliaroli

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4360

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April 13, 2007

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:

I have received your letter and hope that you will accept my apologies for the delay in response. In brief, you referred to opinions prepared at your request, and at the request of the Superintendent of the Pine Bush Central School District. Specifically, in your capacity as a member of the Board of Education, you sought an advisory opinion in October concerning an "emergency special meeting" characterized as a "retreat." You wrote that the retreat was conducted in executive session "to berate [you] for speaking to the press on an issue concerning the health and well being of a portion of [y]our student body." In your most recent letter, you indicated that you "understood through [my] response that this means that [the] board cannot call an executive session to berate [you] for your actions." The Superintendent also wrote this office and referred to earlier opinions rendered by this office concerning retreats, and I advised that if a gathering is held "for the purpose of discussing or improving interpersonal relations, training and the like", that kind of gathering "would not in my view constitute a meeting of a public body subject to the Open Meetings Law."

You referred in your letter to a conversation in which we engaged following the distribution of my response to the Superintendent to Board members, and we agreed that the question raised by the Superintendent concerning retreats involved an outcome different from the situation leading to the Board "berating" you in terms of the application of the Open Meetings Law.

In this regard, I believe that there is a clear distinction between a gathering during which the sole purpose is to enable members of a public body, such as a board of education, and perhaps others, to discuss interpersonal relations and civility, and a gathering during which a member is the subject of criticism in relation to board policy or for speaking with respect to matter of public concern involving the school district. The former would not likely constitute a "meeting" for reasons described in previous correspondence. In short, a gathering of that nature would not be held for the purpose of conducting public business. The latter, on the other hand, would be held to discuss district policy and whether a member complied with that policy, and, in my view, would

clearly constitute a "meeting" falling with the scope of the Open Meetings Law.. Further, in that latter circumstance, I do not believe that there would be a basis for entry into executive session.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: RoseMarie Stark, Superintendent

OML-AO-4362

From: Freeman, Robert (DOS)
Sent: Friday, April 13, 2007 1:17 PM
To: 'rider.troy@charlottevalley.org'
Subject: Contents of minutes

Dear Mr. Rider:

I have received your letter in which you asked whether or the extent to which minutes of meetings must include comments offered by members of the public during a meeting.

In short, there is no obligation to include the comments or reference to them in the minutes. Section 106 of the Open Meetings Law contains what might be viewed 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. They may include additional information, but there is no requirement that they must.

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
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April 16, 2007

Ms. Diane Newlander
[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. Newlander:

We are in receipt of your request for an advisory opinion concerning application of the Open Meetings Law to certain actions of the New Windsor Town Board. In this regard, we offer the following comments.

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

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

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed and it must be carried by majority vote of a public body's membership before such a session may validly be held. The ensuing provisions of §105(1) specify and limit the subjects that may appropriately be considered during an executive session. Therefore, a public body may not conduct an executive session to discuss the subject of its choice, nor may it continue holding a discussion in executive session when the discussion concerns matters that are required to be considered during the public portion of the meeting.

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.

Third, it is emphasized 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 [see Freedom of Information Law, §87(2)(b)].

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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April 16, 2007

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 facts presented in your correspondence.

Dear Mr. Pavalow:

I have received your letter and hope that you will accept my apologies for the delay in response.

You indicated that you are a member of the Katonah-Lewisboro Board of Education and that the Westchester County Department of Civil Service last year ordered a "a study investigating the 'senior typist' civil service positions to confirm that these individuals' job responsibilities matched the Civil Service titles." The Department issued two reports indicating its findings, and a resident asked the President of the Board at a Board meeting when the District would receive the report. The President responded, stating that "we are discussing this in executive session and I can't say anything because of that." When the resident pressed the issue and asked: "Have we received a report?", the President reiterated that "this is an executive session, we cannot speak of it and these are personnel matters..."

You expressed an understanding that reports in the nature of those issued are confidential, but that you "don't understand how it is breaking confidentiality by telling the public that Westchester County Civil Service completed their investigation and issued a report on the subject."

In consideration of the foregoing, you have sought an advisory opinion involving the following:

> "1) Is it breaking confidentiality to tell the public that the Westchester County Civil Service department's study/investigation has been concluded and that two reports were provided to the Superintendent and Board of Education members,

2) Is the Civil Service report a FOIL'able document?"

From my perspective, the statements offered by the Board President, as well as your understanding of confidentiality, are erroneous and based on misconceptions. In this regard, I offer the following comments.

Misconception # 1 - Confidentiality

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 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 "confidential" or "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 are likely aware, the federal Family Educational Rights and Privacy Act, "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.

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.

In the context of the situation that you described, neither the reports prepared by the County Department of Civil Service nor their consideration or discussion by the Board of Education would be "confidential", for there is no statute specifying that the records must be withheld or that a discussion relating to them must be held in private. It is possible that portions of the report *may* be withheld under the Freedom of Information Law, or that certain elements of the Board's discussions *may* be discussed in executive session. However, there is no obligation to withhold those reports or to conduct an executive session to discuss their contents.

Misconception # 2 - - Personnel

It is emphasized 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 considering the kinds of records to which you alluded, I believe that two of the grounds for denial are pertinent. Section 87(2)(b) permits an agency to deny access to records insofar as disclosure would constitute "an unwarranted invasion of personal privacy."

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

A possible issue in relation to the matter described involves whether incumbents of certain positions were qualified to hold their positions. In this regard, judicial precedent indicates that several aspects of a resume or application for employment are accessible, including those portions pertaining to a person's qualifications for a position.

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

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

> "If, for example, an individual must have certain types of experience, educational accomplishments or certifications as a condition precedent to serving in [a] particular position, those aspects of a

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

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

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

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

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

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

In short, again, the characterization of documents as personnel records is meaningless. Rather, according to judicial decisions, the details within those records that are irrelevant to the performance of one's duties may generally be withheld. However, those portions of such records detailing one's prior public employment and other items that are matters of public record, general

educational background, licenses and certifications, and items that indicate that an individual has met the requisite criteria to serve in the position, must be disclosed.

Also of possible significance may be an "eligible list" that identifies those who passed a civil service examination. Section 71.3 of the regulations promulgated by the State Department of Civil Service, which is entitled "Publication of eligible lists", states in relevant part that:

> "Eligible lists may be published with the standing of the persons named in them, but under no circumstances shall the names of persons who failed examinations be published nor shall their examination papers be exhibited or any information given about them..."

Based upon the foregoing, an eligible list identifies those who passed an exam and, therefore, are "eligible" for placement in a position, and such list is clearly public.

With respect to the report prepared by the County Civil Service Department, most pertinent is §87(2)(g) concerning "inter-agency or intra-agency materials." While that provision potentially permits a denial of access to those materials, due to its structure it may require that portions be disclosed. The cited provision authorizes an agency, such as a school district or a county, 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.

Insofar as a report consists of opinions or recommendations, I believe that it may be withheld. However, to the extent that it consists of factual information or is reflective of a final determination or statement of policy, it must be disclosed pursuant, respectively to subparagraphs (i) and (iii) of §87(2)(g). If, for example, the report contains a determination that certain employees hold "improper titles", I believe that the determination would be accessible to the public. Even though it may name

certain employees, a disclosure of that nature would be relevant to the duties of those employees and, therefore, would, in my view, result in a permissible invasion of privacy.

Similarly, 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 functions, creation or elimination of positions, I do not believe that §105(1)(f) could be asserted, even though the discussion may relate to "personnel". 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).

In sum, while there may be instances in which portions of personnel records may be withheld or in which discussions focusing on "particular persons" may be discussed in executive session, there are many others in which those records must be disclosed and in which discussions relating to personnel matters must be discussed in public. To characterize those records or issues as "confidential" in blanket fashion is, in my opinion, contrary to law.

I hope that I have been of assistance.

RJF:tt

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4365

41 State Street, Albany, New York 12231
(518) 474-2518
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April 17, 2007

Mr. Dennis deLeon
Latino Commission on AIDS
24 W. 25th Street, 9th Floor
New York, NY 10010-2704

The staff of the Committee on 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. deLeon:

We are in receipt of your request for an advisory opinion concerning application of the Open Meetings Law to certain actions taken by the Civilian Complaint Review Board, of which you are a member. You indicated that frequently the public portions of the Board's monthly meetings are followed by executive sessions to "discuss personnel matters and adjudicate cases", and that increasingly, executive sessions have been held to discuss policy or other agency business unrelated to cases or personnel matters. Specifically, you indicated that at the meeting in January, there was a lengthy policy discussion conducted in private. In this regard, we offer the following comments.

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

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

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

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

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

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

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

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

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

When a discussion concerns matters of policy, i.e., whether the Board should defer commencing investigations upon request by a district attorney, we do not believe that §105(1)(f) could be asserted, for the discussion would not focus on a particular person. Similarly, if a discussion involves positions or budgeting matters, the issues in our view would involve matters of policy even though the discussion may relate to "personnel". On the other hand, insofar as a discussion focuses upon a "particular person" in conjunction with that person's performance, i.e., how well or poorly he or she has performed his or her duties, an executive session could in our view be appropriately held.

Further, due to the insertion of the term "particular" in §105(1)(f), it has been advised that a motion describing the subject to be discussed as "personnel" is inadequate, and that the motion should be based upon the specific language of §105(1)(f). For instance, a proper motion might be: "I move to enter into an executive session to discuss the employment history of a particular person (or persons)". Such a motion would not in our opinion have to identify the person or persons who may be the subject of a discussion. By means of the kind of motion suggested above, members of

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

Another ground for entry into executive session that is often cited involves "litigation" or "legal matters". In our opinion, those minimal descriptions of the subject matter to be discussed would be insufficient to comply with the Law. The provision that deals with litigation is §105(1)(d) of the Open Meetings Law, which permits a public body to enter into an executive session to discuss "proposed, pending or current litigation". In construing the language quoted above, it has been held that:

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

Based upon the foregoing, we believe that the exception is intended to permit a public body to discuss its litigation strategy behind closed doors, rather than issues that might eventually result in litigation. Since "legal matters" or possible litigation could be the subject or result of nearly any topic discussed by a public body, an executive session could not in our view be held to discuss an issue merely because there is a possibility of litigation, or because it involves a legal matter.

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

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

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-4366

From: Freeman, Robert (DOS)

Sent: Friday, April 20, 2007 8:43 AM

To: MULLEN, VICTORIA

Subject: RE:

The only possible ground for entry into executive session would be §105(1)(f). That provision authorizes the Board to conduct an executive session to discuss: "the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular corporation..." Although I am unaware of the specific nature of the negotiations, insofar as the Board considers, for example, the financial, credit or employment history of the ambulance service or is considering appointing or employing the service, I believe that there would be a basis for entry into executive session. Insofar as those topics would not be discussed, the Board, in my opinion, would be required to hold the meeting in public.

Enjoy the weekend.

Robert J. Freeman

Executive Director

NYS Committee on Open Government

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Albany, NY 12231

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OML-AO- 4307

From: Freeman, Robert (DOS)
Sent: Friday, April 20, 2007 9:02 AM
To: Pine Plains Planning Board
Subject: RE: Dear Ms. Proper:

The town clerk is the legal custodian of all town records, but I know of no law that indicates that minutes of planning board meetings must be filed with the town clerk in order to be "legal." In fact, there is no law that requires that minutes be approved. The direction concerning minutes appears in §106 of the Open Meetings Law, which contains minimum requirements regarding their content and specifies that they must be prepared and available to the public within two weeks. In short, unless the attorney can cite a provision of law to justify his opinion, I believe that he/she is mistaken.

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-4368

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April 24, 2007

Hon. Nicole Pilcher
Town of Vienna Board 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 information presented in your correspondence.

Dear Ms. Pilcher:

I have received your letter and hope that you will accept my apologies for the delay in response.

You wrote that you serve as a member of the Vienna Town Board and referred to a situation in which the Supervisor contacted you to indicate that the Board would meet the following day to conduct an executive session to discuss "personnel." You objected and have sought my views on the matter.

In this regard, 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."

Both statutes require that notice of the time and place of a meeting be given.

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

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

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

> "The respondent Board prepared an agenda for each of the five designated regularly scheduled meetings in advance of the time that those meetings were to be held. Each agenda listed 'executive session' as an item of business to be undertaken at the meeting. The petitioner claims that this procedure violates the Open Meetings Law because under the provisions of Public Officers Law section 100[1] provides that a public body cannot schedule an executive session in advance of the open meeting. Section 100[1] provides that a public body may conduct an executive session only for certain enumerated purposes after a majority vote of the total membership taken at an open meeting has approved a motion to enter into such a session.

> Based upon this, it is apparent that petitioner is technically correct in asserting that the respondent cannot decide to enter into an executive session or schedule such a session in advance of a proper vote for the same at an open meeting" [Doolittle, Matter of v. Board of Education, Sup. Ct., Chemung Cty., July 21, 1981; note: the Open Meetings Law has been renumbered and §100 is now §105].

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

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

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

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

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

Even when §105(1)(f) may be validly asserted, it has been advised that a motion describing the subject to be discussed as "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 matter" is inadequate, for it fails to enable the public or even members of the Board to know whether subject at hand may properly be considered during an executive session.

Lastly, in another letter, you referred to a private gathering held by three Town Board members with the Town Assessor and a representative of a state agency. In my opinion, based on the information that you provided, the gathering fell within the coverage of the Open Meetings Law.

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

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

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

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

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

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4369

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April 24, 2007

Hon. Austin A. Markey
Town Board Member
Town of Warrensburg
Warrensburg, NY 12885

Dear Mr. Markey:

I have received your letter and hope that you will accept my apologies for the delay in response. You wrote that your serve as a member of the Warrensburg Town Board and that three members of the Board frequently gather prior to or after the regular Board meetings.

In this regard, when a majority of the Board is present either before or after its regular meeting for the purpose of discussing Town business, such a gathering would be subject to the Open Meetings Law.

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

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

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

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

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

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

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

Further, because a gathering held prior to a regular meeting is itself a "meeting", it must be preceded by notice of the time and place given to the news media and by means of posting pursuant to §104 of the Open Meetings Law.

It is also noted that 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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4370

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April 24, 2007

E-Mail

TO: Ms. Brenda Ross

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. Ross:

I have received your letter and hope that you will accept my apologies for the delay in response.

As I understand the matter, the primary issue involves the propriety of executive sessions held by the Board of Trustees of the Village of Hudson Falls to discuss issues that might result in litigation.

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.

Therefore, in my view, only to the extent that the Board discusses its litigation strategy would an executive session be properly held.

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

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

I hope that I have been of assistance.

RJF:jm

cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4321.

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April 24, 2007

E-Mail

TO: Mr. Scott Wymyczak

FROM: Robert J. Freeman, Executive Director

Dear Mr. Wymyczak:

I have received your letter and hope that you will accept my apologies for the delay in response.

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

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

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

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

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

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

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

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

The remaining issue relates to a vacancy occurring on the town board. Since that issue involves a matter beyond the expertise or jurisdiction of this office, I regret that I cannot offer guidance.

I hope, nonetheless, that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4372

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

April 24, 2007

Mr. Azem Albra
[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. Albra:

I have received your letter and hope that you will accept my apologies for the delay in response.

You wrote as follows:

> "The Town of Fishkill is not properly updating its web site, when it pertains to Planning, Zoning and Regular Town Board Meetings. It is my understanding that minutes should be posted within two weeks of the meeting. Also they are not posting the content of those meetings, prior to those meetings being held."

In this regard, §104 of the Open Meetings Law requires that every meeting of a public body must be preceded by notice of the time and place given to the news media and by means of posting in one or more designated, conspicuous public locations. Section 106 pertains to minutes of meetings and specifies that they must be prepared and made available to the public on request within two weeks.

In neither instance is there a requirement that notice or minutes of a meeting be posted on a website. While a unit of government may choose to do so, it is not required by law to do so. Further, when an entity chooses to post notice or its minutes on a website, there is no particular time that it must do so.

Lastly, I point out that the Committee on Open Government in its most recent report to the Governor and the State Legislature has recommended that the Open Meetings Law be amended to require that notice of meetings be placed on an agency's website when the agency maintains a website.

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
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16542
OML-AO-4323

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April 25, 2007

E-MAIL

TO: Diane Cirillo

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. Cirillo:

I have received your letter and hope that you will accept my apologies for the delay in response.

You referred to a "long standing practice" of the Seaford Board of Education to permit public comments during its meetings, and that the Board recently "announced that public comments will be restricted to three minutes." You also referred to §1709 of the Education Law, which authorizes boards of education "to adopt by-laws and rules for its government."

In order to do so, you asked whether a board of education must "conduct a formal vote and memorialize same in the form of minutes" and whether "changing the public comments time from no time limit to three minutes require[s] a Board vote."

In this regard, from my perspective, a board of education may adopt rules or by-laws only during a meeting by means of an affirmative vote of a majority of its total membership (see §41, General Construction Law concerning "Quorum and majority"). In any instance in which action of that nature is taken, I believe that minutes must be prepared in accordance with §106(1) of the Open Meetings Law. That provision states that :

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

Since only a board of education may adopt rules and by-laws, I believe that only the board may alter or amend rules or by-laws that it initially approved. Accomplishing any such change or

amendment would in my opinion represent an action taken by the board. Again, when a board takes such action, it may do so in my opinion only at a meeting held open to the public by means of an affirmative vote of a majority of its total membership. Further, any such action must be memorialized in minutes prepared pursuant to §106(1) of the Open Meetings Law.

Lastly, it is also noted that the Freedom of Information Law requires that a record be maintained whenever a final action is taken that indicates the manner in which each member cast his or her vote. Specifically, §87(3) states in relevant 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."

I hope that I have been of assistance.

RJF:tt

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16543
OML-AO-4374

41 State Street, Albany, New York 12231
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April 25, 2007

Mr. James P. Langton
[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. Langton:

I have received your letter and hope that you will accept my apologies for the delay in response.

You referred to a situation in which a member of the Newfane Board of Education resigned and asked that those interested in filling the vacancy to submit their names. Your request for the names of those seeking to become a member of the Board was denied on the ground that disclosure would result in "an unwarranted invasion of personal privacy." You have sought a "ruling" on the matter.

In this regard, the Committee on Open Government is authorized to offer advice and opinions concerning the Freedom of Information Law. Neither the Committee nor its staff is empowered to issue a binding determination. That being so, the following remarks should be viewed as an advisory opinion.

In short, it has consistently been advised that the names of those who seek to fill a vacancy in what would normally be an elective office must be disclosed to comply with 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.

In typical circumstances, a person seeking to fill an elective position attempts to make his or her name known in order to attract the interest and support of voters. To suggest that names of those seeking to fill the same position that has become vacant and which may be filled by means of an appointment made by an elective body would in my view be an anomaly. I am not suggesting that personal details of individuals' lives must be disclosed. Nevertheless, in my opinion, disclosure of

the names of candidates for a vacant elective position could not be characterized as "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §87(2)(b)].

Further, although §89(7) of the Freedom of Information Law states in part that nothing in that statute requires the disclosure of the name "of an applicant for appointment to public employment", an applicant for a position on a board of education would not be a prospective employee seeking employment.

In a judicial decision dealt in part with a discussion in executive session concerning those under consideration to fill a vacant elective position on a public body, it was held 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).

Based on the foregoing, it is clear in my view the names of candidates who seek to fill vacant elective positions must be disclosed.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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

April 25, 2007

Mr. James W. Fowler
[redacted]

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

Dear Mr. Fowler:

I have received your letter and apologize for the delay in response. You have asked whether a town may "hold two public hearings on two different projects at the same time."

In this regard, it is noted that the Committee on Open Government is authorized to provide advice and opinions concerning the Open Meetings Law. That statute pertains to meetings of public bodies, and a "meeting" is a gathering of a majority of the members of a public body for the purpose of conducting public business. Typically, a meeting is held by a public body in order to discuss, deliberate and potentially take action.

A hearing, on the other hand, is typically held to enable members of the public to express their views concerning a particular subject. In some instances, a hearing may also be a meeting. In others, for example, those in which less than a majority of the members of a public body is present, a hearing may be conducted, but the Open Meetings Law would not apply.

Unlike the Open Meetings Law, which generally applies to all public bodies in state and local government, there is no single or general law that pertains to hearings. For instance, although public hearings must be held prior to the adoption of a budget by a town, a village or school district, separate laws govern the conduct of each of those hearings.

With respect to your specific questions, I know of no law that precludes the holding of two hearings regarding separate matters at the same time. I believe, however, that the governing body of a municipality, such as a town board, could establish a rule specifying that public hearings conducted by two or more entities within town government could not be held at the same time.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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May 14, 2007

Ms. Linda Mangano
[redacted]

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

Dear Ms. Mangano:

We are in receipt of your request for an advisory opinion concerning application of the Open Meetings Law to a work session of the Ossining Village Board. Specifically, you questioned the Board's decision not to take minutes of a work session based on advice from the Committee on Open Government. In this regard, we 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 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 ability to enter into executive sessions.

With respect to minutes of "workshops", "work sessions" and similar gatherings, 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 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.

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

OML-AO-4377

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May 15, 2007

E-MAIL

TO: Linda Marrero

FROM: Camille S. Jobin-Davis, Assistant Director

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

Dear Ms. Marrero:

We are in receipt of your request for an advisory opinion concerning application of the Open Meetings Law to certain proceedings of the Ossining Village Board. Soon after receiving your request, we received requests from Ms. Anne Perron, Mr. Stephen Dewey and Ms. Linda Mangano pertaining to the same issue and the same meetings. The following comments are offered in an effort to address all concerns raised by the four separate requests.

You have complained that the Mayor and the Trustees of the Village of Ossining have altered previous practices by limiting public participation at meetings of the Board of Trustees and videotaping only a portion of its meetings.

In this regard, there is no requirement that a public body, such as a village board of trustees, tape record or video record its meetings. Because that is so, we do not believe that the Board is required to record or broadcast the entirety of its meetings. Nevertheless, we point out that it has been held by the courts that any person who attends an open meeting has the right to tape or video record the proceedings, unless the use of the recording device is disruptive or obtrusive [see e.g., Mitchell v. Board of Education of the Garden City Union Free School District, 113 AD2d 924 (1985); Csorny v. Shoreham-Wading River Central School District, 759 NYS2d 513, 305 AD2d 83 (2003)]. Therefore, even though the Board may not record the entirety of its open meetings, any member of the public may do so, again, unless the use of the recording device interferes with the proceedings.

Mr. Dewey pointed out that the Village Code requires the Board to "'provide the widest possible diversity of information sources and services to the public.' Oss. Village Code, Art II, §103-5(C)(4)." Because there is no corresponding generalized requirement in the Open Meetings Law, and because this office has no authority to interpret Village Code, we cannot comment or advise with

respect to interpretation of whether this provision might arguably require the Village to broadcast entire meetings on cable TV.

Next, and based on the submissions we received, the Village Board reduced the time that attendees may speak from seven to three minutes, and now gives attendees a single four-minute comment period prior to the reading of a resolution.

From our perspective, first, while individuals may have the right to express themselves and to speak, they do not 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.

Second, the Open Meetings Law clearly provides the public with the right "to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy" (see Open Meetings Law, §100). However, that statute is silent with respect to the issue of public participation. Consequently, if a public body does not want to answer questions or permit the public to speak or otherwise participate at its meetings, 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 my view, would be unreasonable.

Reducing the number of minutes a member of the public has to speak at a public meeting from seven to three, in our opinion, would not be found by a court to be unreasonable. It is also not unreasonable, in our opinion, to deviate, under certain circumstances, from restrictions on the number of minutes a person is permitted to speak, for instance, if an individual has special knowledge or expertise regarding a matter before the Board.

However, if a person arrives late to a meeting, and the public comment portion of the meeting has already passed, a public body, in our view, would not be required to permit a latecomer to speak during the business portion of the meeting. On the other hand, when a latecomer arrives within the public comment portion of a meeting, or prior to that portion of the meeting at which others are invited to speak, in our opinion, we see no reason for prohibiting that person from speaking, subject, of course, to applicable time limitations.

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

In sum, based on the foregoing, we believe that the Board may establish rules concerning the conduct of those who attend its meetings, including the privilege of those in attendance to speak or participate at certain times, with respect to particular topics and for a limited duration. However, we do not believe it is reasonable to condition a person's ability to speak on whether s/he provides a name and address.

In small communities, it is likely that most persons wishing to speak at public meetings are already known to many of those in attendance. In larger settings, perhaps only a portion of those attending are familiar to those present. In any event, if the use of a sign-in sheet creates contention or reluctance to identify oneself, perhaps the municipality could offer consecutively numbered cards at the door. When a person who wishes to speak enters the meeting s/he could pick-up a card and be called on in the order in which s/he arrived at the meeting, by number or name, if known.

In response to your request that we appeal to the Governor to change the law, and require local municipal boards to permit public comments at certain times during public meetings, and for certain lengths of time, we decline to do so at this time. It has long been our opinion that the reasonableness of a policy or practice must be determined on a case by case basis, and that the flexibility of the law as it exists with respect to this issue is important to preserve. Setting out rigid parameters regarding public participation, in our opinion, may serve to create more conflict.

In response to Mr. Dewey's request, we confirm opinions previously rendered by this office, namely advisory opinion numbers 4002 and 3295, by incorporating portions of those opinions herein, where appropriate.

And finally, 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. 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. For that reason, a copy of this opinion will be forwarded to the Mayor and the Trustees of the Village Board.

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

CSJ:jm

cc: Hon. William R. Hanauer
Board of Trustees
Ann Perron
Stephen Dewey
Linda Mangano

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4378

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May 15, 2007

Jack Campisi, Ph.D.
[redacted]

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

Dear Mr. Campisi:

We are in receipt of your request for an advisory opinion concerning application of the Open Meetings Law to certain proceedings of the Milan Town Board. Specifically, you indicated that the Board entered into executive session in order to have an attorney-client privileged discussion regarding a trust fund set up by a resident to help defray the upkeep and maintenance expenses of the town hall and grounds, known as the Wilcox Fund. You raised questions involving the Town's authority to hold an attorney-client privileged discussion during a meeting of the Town Board.

It is our opinion that a public body may hold an attorney-client privileged discussion at any time, we offer the following comments.

As you may know, 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 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 our 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, we believe that the exception is intended to permit a public body to discuss its litigation strategy behind closed doors, rather than issues that might eventually result in litigation. 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 our view, only to the extent that the Board discusses its litigation strategy could an executive session be properly held under §105(1)(d).

We note, too, that the courts have provided direction with respect to the sufficiency of a motion to discuss litigation, and 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 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 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 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.

In sum, and in direct response to your questions, when or if a public body chooses to gather in private and exempt from the Open Meetings Law, such gathering is not prescribed by the Open Meetings Law; in our opinion, an attorney-client privileged discussion may be held at any time.

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: Town Board

There is
not an
OMI-AO-4379

OML-AO-4380

From: Jobin-Davis, Camille
Sent: Thursday, May 17, 2007 5:00 PM
To: [redacted]
Subject: Open Meetings Law

Dr. Marc Tack:

My apologies for cutting our discussion short.

Although I can give you legal advice regarding application of the Freedom of Information Law and the Open Meetings Law, I have no expertise with respect to procedures a school board must follow to approve individual buy-out contracts... You really need to talk to your school board attorney, or a public sector labor law attorney for an answer to that question.

The best I can do is reiterate that pursuant to the Open Meetings Law, all decisions and actions taken by a school board must be memorialized in the meeting minutes. I believe you will find the following advisory opinion helpful: http://www.dos.state.ny.us/coog/otext/3472.htm

Also, a decision to appropriate money, if that's what this is, must be made during the public portion of the meeting: see section 105 of the Open Meetings Law at the following link: http://www.dos.state.ny.us/coog/openmeetlaw.htm

Please let me know if you have further questions.

Camille S. Jobin-Davis, Esq.
Assistant Director
NYS Committee on Open Government
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(518) 474-2518
(518) 474-1927 fax
http://www.dos.state.ny.us/coog/coogwww.html

FOIL-AO-16575
OML-AO-4381

From: Freeman, Robert (DOS)
Sent: Friday, May 18, 2007 10:27 AM
To: [redacted]
Subject: Open Meetings/FOIL Question
Attachments: f14815.wpd

Dear Mr. Duncan:

I am unaware of any opinion focusing on the issue that you raised. However, I believe that requesting records pursuant to FOIL on the basis of information acquired during an executive session is valid and reflects an intelligent use of the law.

I would conjecture that members of the public have used FOIL in a manner that is somewhat analogous. By means of example, the courts have held that a motion for entry into executive to discuss litigation strategy must identify the case being discussed by name [see Daily Gazette v. Town Board, 444 NYS2d 44 (1981)]. Although a board could discuss its strategy relating to the litigation during a valid executive session, knowledge of the motion would enable any person to request records concerning the litigation pursuant to the FOIL. Further, once records are made available under FOIL, the recipient may do with the records as he/she sees fit (see attached opinion).

I hope that I have been of assistance.

Robert J. Freeman
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4382

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

May 21, 2007

Hon. Nancy Calhoun
Member of Assembly
1002 World Tradeway
Stewart International Airport
New Windsor, NY 12553

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

Dear Assemblymember Calhoun:

We have received your letter in which you request an advisory opinion concerning the propriety of an executive session held by the Cornwall Town Board.

According to your letter, two members of the Town Board informed you that an executive session was initiated to discuss a certain subject, but that the Supervisor discussed his written response to an article that you prepared for publication in a local newspaper, rather than the subject identified in the motion for entry into executive session. You added that, during the executive session, which lasted for more than an hour, the Supervisor sought approval "to sign it as from the entire Town Board."

In this regard, we offer the following comments.

As you are aware, the Open Meetings Law requires that a procedure be accomplished, during an open meeting, before a public body, such as a town board, 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.

From our perspective, insofar as a public body discusses a subject during an executive session that is not referenced in its motion to conduct an executive session, it would have exceeded its authority and failed to comply with law.

Further, and in our opinion, more importantly, 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. Having reviewed the eight grounds for entry into executive session, we do not believe that a discussion concerning the response by either the Supervisor or the Board to your article would have constituted a proper subject for consideration in executive session. In short, none of the eight grounds in our view could properly have been asserted to conduct an executive session.

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

Sincerely,

Camille S. Jobin-Davis
Assistant Director

RJF:tt

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4383

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May 22, 2007

E-MAIL

TO: Linda Cleary

FROM: Camille S. Jobin-Davis, Assistant Director

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

Dear Ms. Cleary

We are in receipt of your request for an advisory opinion concerning application of the Open Meetings Law to the Board of Directors of the New York Black Car Operators' Injury Compensation Fund for purposes of determining compliance with Executive Order No. 3 concerning webcasting. Statutorily created, the Fund is a not-for-profit corporation with a Board of Directors, the majority of which is selected by the Fund. In our opinion, meetings of the Board of Directors are not subject to the Open Meetings Law, and in this regard we offer the following comments.

As are 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."

Article 6-F of the Executive Law, New York Black Car Operators' Injury Compensation Fund, Inc., sets forth the purpose and authority of the Fund, which primarily involves securing the payment of workers' compensation for all black car operators entitled thereto either by self-insuring or purchasing workers' compensation insurance coverage. Membership on the Board of Directors is as follows:

> "...there shall be appointed a board of directors of the fund, consisting of nine directors, five of whom shall be selected by the black car

> assistance corporation; three of whom shall be chosen by the governor, including one chosen upon the recommendation of the temporary president of the senate and one chosen upon the recommendation of the speaker of the assembly; and one of whom shall be the secretary, who shall serve ex officio" [§160-ff (1)].
>
> "A vacancy occurring in a director position for which the governor was the original appointing authority shall be filled by the governor, upon the recommendation of the legislative official, if any, that was authorized to recommend the original appointee pursuant to subdivision one of this section. A vacancy occurring in a director position for which the black car assistance corporation was the original appointing authority shall be filled by the black car assistance corporation" [§160-ff(5)(c)].

Section 160-ff further requires that all directors shall have equal voting rights, that five or more directors shall constitute a quorum, and that the affirmative vote of five directors shall be necessary for the transaction of any business or the exercise of any power or function of the Fund.

From our perspective, based on the above description of the Board of Directors, it does not meet the conditions necessary to constitute a public body. There are nine members, only four of whom are appointed by the Governor. That being so, the government does not exercise substantial control over the Board or, therefore, the Fund. Further, in our view, providing workers' compensation insurance to employees of a particular industry, alone, does not reflect the performance of a governmental function for the state.

Assuming the accuracy of the foregoing, we believe that the Board of Directors is not a public body subject to the Open Meetings Law, and would not therefore, be required to webcast its meetings pursuant to Executive Order No. 3.

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

CSJ:tt

cc: William Sharp
Vince Sculco

FOIL-AO- 16584
OML-AO- 4384

From: Freeman, Robert (DOS)
Sent: Friday, May 25, 2007 12:08 PM
To: Kelly Vadney
Subject: RE: question
Attachments: O2565.wpd

Hi Kelly - -

Although the language of the Open Meetings Law indicates that an executive session may be held to discuss "matters leading to the appointment...of a particular person...", in the only judicial decision of which I am aware that dealt with filling a vacancy in an elective office, the court found that there is no basis for conducting an executive session. Attached is an expansive opinion that focuses on the issue and includes the passage from the decision indicating that an executive session was improperly held. Further, while the Freedom of Information Law states that an agency is not required to disclose name of an applicant for appointment to public employment, the position of town board member is not that of an employee. Again, because the names involve those who seek to fill a vacancy in an elective office, I believe that FOIL requires that their names be disclosed. When considering names of those who might fill the unexpired term of what otherwise would be an elective office, it is our view that disclosure would result in a permissible, not an unwarranted invasion of personal privacy.

I hope that this will be of use to you.

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

OML-AO-4385

From: Freeman, Robert (DOS)
Sent: Friday, May 25, 2007 10:17 AM
To: [redacted]
Subject: Open Meeting Decorum
Attachments: o3845.wpd

Dear Mr. Berger:

There is nothing in the Open Meetings Law that focuses on the conduct of individuals who attend meetings. However, public bodies have the ability to adopt reasonable rules to govern their own proceedings, and it has been advised that such rules may be adopted regarding decorum. Attached is an opinion that deals with the issue that may be useful to you.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4386

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

May 29, 2007

E-MAIL

TO: Mr. Kurt Willwerth

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. Willwerth:

We are in receipt of your request for an advisory opinion concerning application of the Open Meetings Law to meetings of a "Town-Village Youth Commission", including whether "there [is] ever a time that posting, in the newspaper, of a planned meeting [is] not necessary?" In this regard, we offer the following comments.

First, the Open Meetings Law applies to meeting 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."

Second, in our view, the nature of the membership of the Commission is one of the factors to consider when determining if an entity is a public body required to comply with the Open Meetings Law. If a commission, a committee or a subcommittee consists of two or more members of a public body, such as a town board or a village board of trustees, it too would constitute a public body subject to the Open Meetings Law.

However, judicial decisions indicate generally that advisory bodies having no authority to take binding action and which typically include persons other than members of a governing body fall outside the scope of the Open Meetings Law. As stated in those decisions: "it has long been held

that the mere giving of advice, even about governmental matters is not itself a governmental function" [Goodson Todman Enterprises, Ltd. v. Town Board of Milan, 542 NYS 2d 373, 374, 151 AD 2d 642 (1989); Poughkeepsie Newspapers v. Mayor's Intergovernmental Task Force, 145 AD 2d 65, 67 (1989); see also New York Public Interest Research Group v. Governor's Advisory Commission, 507 NYS 2d 798, aff'd with no opinion, 135 AD 2d 1149, motion for leave to appeal denied, 71 NY 2d 964 (1988)]. Therefore, an advisory body, such as a citizens' advisory committee, would not in our opinion be subject to the Open Meetings Law, even if a member of a governing body or the staff of an agency participates.

If the Commission is authorized or empowered to carry out certain duties on behalf of a town and a village, it would likely constitute a public body subject to the Open Meetings Law. Review of the town or village resolution that created the Commission would help to understand its authority and membership and enable us to render more specific advice. Similarly, if the Commission has authority derived from law, we could provide more comprehensive advice. On the other hand, if its authority is advisory, it likely falls beyond the coverage of the Open Meetings Law.

With respect to your question about publishing notice in the newspaper, we direct you to the notice requirements imposed by the Open Meetings Law. Section 104 of that statute pertains to notice of meetings and states that:

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

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

Although §104 does not specify where notices of meetings must be posted, it requires that notice be "conspicuously posted in one or more designated public locations." Consequently, we

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 our 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 our 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 to place a legal notice in a newspaper prior to every meeting. In terms of the news media, in many instances, there may be hundreds of public bodies within the coverage area of a newspaper, and requiring a newspaper to print notices of meetings relating to perhaps dozens of meetings on a particular day would be financially burdensome.

In short, we do not believe that the Legislature intended to force public bodies to publish notice of their meetings or to require newspapers to publish notices of meetings.

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

CSJ:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4387

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

May 31, 2007

E-MAIL

TO: Jennifer Levesque

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. Levesque:

I have received your letter, and the primary issue as it relates to the functions of this office involves your belief that the President of the Troy City School District Board of Education took action, unilaterally, without the consent or approval of the Board.

In this regard, from my perspective, voting and action by a public body, such as a board of education, 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 that §102(2) defines the phrase "public body" to mean:

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

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

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

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

The provisions in the Open Meetings Law concerning videoconferencing reflect amendments enacted (Chapter 289 of the Laws of 2000), and in my view, they 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 by gathering "in the hallway", 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 and action may be taken 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.

Assuming that the action to which you referred could properly have been taken only by the Board, it would appear that the President could not have validly taken that action unilaterally.

I hope that I have been of assistance.

RJF:tt

cc: Board of Education
Michael Pollack

FOIL-AO-16595
OML-AO-4388

From: Freeman, Robert (DOS)
Sent: Friday, June 01, 2007 9:39 AM
To: Tedra L. Cobb
Subject: Your recommendations

Hi - -

Since it seems unlikely that we'll have the opportunity any time soon, I'd like to offer brief comments regarding your recommendations.

First, in the recommendations regarding motions for entry into executive session, we have suggested that the term "personnel" not be used because it can have numerous meanings, some of which would justify holding an executive session, while others would not. The language of the so-called "personnel" exception, §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."

This office has advised and the courts have agreed that a motion under that provision should include two elements: reference to the term "particular" and to one of the qualifiers. Therefore, a proper motion might be: "I move to enter into executive session to discuss the employment history of a particular person." That person need not be named.

Second, also in the recommendations involving motions for executive session, the last refers in part to "contract negotiations." The only reference in the Open Meetings Law to contract negotiations pertains to collective bargaining negotiations involving a public employee union, §105(1)(e). Therefore, not all contract negotiations fall within that provision. I note that often when considering whether to employ or terminate a contractor or firm, the language within §105(1)(f) may apply, for it encompasses certain matters as they relate to a particular person or corporation.

Lastly, the final recommendation involves the designation of a "Records Access Coordinator" who would respond to FOIL requests. I would conjecture that such a person has already been designated. The regulations promulgated by the Committee on Open Government, which are available on our website, have long required that the governing body of public corporation, such as a county legislature, adopt procedure that include the designation of one or more persons as "records access officer." The records access officer has the duty of coordinating the agency's response to requests. It is suggested that you contact the clerk of Legislature to ascertain whether a records access officer has indeed been designated.

I hope that the foregoing serves to clarify. If I can be of further assistance, please feel free to get in touch.

Hope to speak with you soon.
Bob

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

FOIL-AO-16601
OML-AO-4389

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

June 5, 2007

E-MAIL

TO: [redacted]

FROM: Robert J. Freeman, Executive Director

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

I have received your letter in which you asked whether a person who attends a meeting of a village board of trustees may tape record the meeting. Similarly, if a board meeting "is taped and transcribed into minutes", you questioned whether a person may "foil both the transcript and a copy of the tape."

In this regard, first, the Open Meetings Law does not deal with the use of audio or video recording devices at open meetings of public bodies. There are, however, several judicial decisions concerning the use of those devices at open meetings. In my view, the decisions consistently apply certain principles. One is that a public body, such as a municipal board, has the ability to adopt reasonable rules concerning its proceedings. The other involves whether the use of the equipment would be disruptive.

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

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

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

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

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

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

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

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

> "[t]hose who attend such meetings, who decide to freely speak out and voice their opinions, fully realize that their comments and

> remarks are being made in a public forum. The argument that members of the public should be protected from the use of their words, and that they have some sort of privacy interest in their own comments, is therefore wholly specious" (id.).

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

Second, it is clear that minutes and tape recordings of open meetings must be disclosed. The Freedom of Information Law pertains to agency records, such as those of a unit of local government, 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 (j) 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].

Lastly, I point out that §106 of the Open Meetings Law specifies that minutes of open meetings must be prepared and made available within two weeks.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4390

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June 5, 2007

Ms. Suzanne McCrory
[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. McCrory:

I have received your letter in which you requested an advisory opinion pertaining to the Open Meetings Law. You wrote that four members of the Village of Mamaroneck Zoning Board of Appeals "signed a letter about ZBA business" and did so "outside of a public meeting." Specifically, you indicated that "[t]hese four members of the ZBA crafted a joint letter to the Board of Trustees expressing their dissatisfaction" concerning funds for a consulting contract and "made evident that a subset of the ZBA constituting a quorum had somehow taken action on business before them without convening a meeting, without noticing a meeting, and without informing the Chairman of the ZBA of their actions."

You have asked whether the foregoing is "consistent with the Open Meetings Law." From my perspective, a public body, such as a zoning board of appeals, may take action only during a meeting conducted in accordance with the Open Meetings Law. In this regard, I offer the following comments.

It is noted at the outset that there is nothing in the Open Meetings Law that would preclude members of a public body from conferring individually, by telephone, via mail or e-mail. However, a series of communications between individual members or telephone calls among the members which results in a collective decision, or a meeting or vote held by means of a telephone conference, by mail or e-mail would in my opinion be inconsistent with law. In my view, voting and action by a public body may be carried out only at a meeting during which a quorum has physically convened, or during a meeting held by videoconference.

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

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

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

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

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

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

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

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

> words 'whole number' shall be construed to mean the total number which the board, commission, body or other group of persons or officers would have were there no vacancies and were none of the persons or officers disqualified from acting."

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

There is no authority to take action outside of a meeting, and in a 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..."

In sum, based on the facts that you provided, a majority of the ZBA acted collectively without having held a meeting in accordance with the Open Meetings Law. If that is so, I believe that it would have failed to comply with law and that any action taken would be found to be a nullity.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Zoning Board of Appeals
Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4391

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June 6, 2007

Mr. Thomas J. Klotzbach
[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. Klotzbach:

We are in receipt of your request for an advisory opinion concerning application of the Open Meetings Law to a new policy adopted by the Le Roy Town Board in January of this year. You indicated that the Board adopted a policy to permit the use of audio conferencing for those members who are unable to be physically present at a meeting. We are in agreement with your opinion that the policy is inconsistent with the Open Meetings Law and offer the following comments.

In this regard, from our perspective, a public body, such as a town board, may validly conduct a meeting or carry out its authority only at a meeting during which a majority of its members has physically convened or during which a majority has convened by means of videoconferencing, and even then, only when reasonable notice is given to all of the members. In this regard, we 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)].

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 our opinion be inconsistent with law.

Based on relatively recent legislation and as suggested earlier, we 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, 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 Planning 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 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 our 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, we do not believe that a valid meeting could be held or that action could validly be taken.

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..."

Recently, the Appellate Division confirmed that to be so in Eastchester v. New York State Board of Real Property Services, 23 AD2d 484, 808 NYS2d 90 (2005) in light of the amendment to the above-cited provision of the General Construction Law.

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.

Again, in response to your situation, as described in the newspaper article you attached, it is our opinion that an absent member cannot cast a vote by phone or be counted for quorum purposes.

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-4392

From: Freeman, Robert (DOS)
Sent: Wednesday, June 06, 2007 9:09 AM
To: gheidcamp1@hvc.rr.com

Dear Mr. Heidcamp:

If the school board to which you were elected consists of nine members, a gathering of less than five would not be subject to the Open Meetings Law. Further, as a member-elect who has not yet been sworn into office, you would not be counted as a member during any such gathering. Therefore, if you were to meet with "two or three other members about school issues", I do not believe that the Open Meetings Law would apply. The only exception to that general advice would involve a gathering of a majority of a committee consisting solely of board members. If, for example, the board has designated a committee consisting of three of its members, a gathering of two of the three, in their capacities as members of the committee, would constitute a meeting subject to the Open Meetings Law, irrespective of your participation.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
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Albany, NY 12231
(518) 474-2518
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4393

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June 12, 2007

Hon. Richard Randazzo
Town Supervisor
Town of Cornwall
183 Main Street
Cornwall, NY 12518

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

Dear Supervisor Randazzo:

We are in receipt of your letter and the materials attached to it. You referenced an advisory opinion issued to Assemblymember Nancy Calhoun concerning application of the Open Meetings Law to a recent meeting of the Cornwall Town Board and asked that we withdraw or amend it. Because the opinion issued is accurate according to the facts presented at the time, we have opted not to withdraw it and offer the following comments with respect to the additional information you provided.

At the meeting as you described it, the Town Board determined to enter into executive session "to discuss personnel matters in the Town's Police Department and Highway Department and also that the Board would be meeting with its counsel to seek confidential legal advice" (emphasis yours). Because the Assemblymember's letter in the newspaper "called for a class action lawsuit to be brought against the Town of Cornwall and made various representations regarding the law applicable to assessments and real property taxes", you and the other board members "conferred privately in closed session with [y]our counsel regarding Ms. Calhoun's assertions and how, if at all, to respond." You added that "A confidential memo from the Town's special counsel for Article 7 proceedings and taxation was also discussed. No vote or official action was taken during the closed session."

Initially, we 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, to determine whether there has been a "violation", or to compel an entity to comply with 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.

As you know, there are two vehicles that may authorize a public body to discuss public business in private. One 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.

Since one of the issues appears to relate to 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.

As indicated in the above-referenced advisory opinion, Assemblymember Calhoun expressed the understanding that the Board discussed, in private, the written response to her article, and your request that the Board give you approval to sign on behalf of the entire Town Board. As set forth in our opinion to the Assemblymember, from our perspective, that portion of the discussion is distinct from that during which the Board received legal advice. Accordingly, we do not believe that the entirety of a discussion concerning the response by either the Supervisor or the entire Town Board would have constituted a proper subject for consideration in a closed, private session.

The other vehicle for excluding the public from a meeting 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.

Although it is used frequently, the term "personnel" appears nowhere in the Open Meetings Law. One of the grounds for entry into executive session often relates to personnel matters, however, 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 advises that the provision was intended largely to protect privacy and not to shield matters of policy under the guise of privacy.

Even when §105(1)(f) may be validly asserted, it has been advised that a motion describing the subject to be discussed as "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 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; 209 AD 2d 55, 58 (1994)].

In short, the characterization of a topic 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.

While it is not our intent to be overly technical, as suggested earlier, the procedural methods of asserting the attorney-client privilege and entering into executive session differ. In the case of the latter, the Open Meetings Law applies. In the case of the former, because the matter is exempted from the Open Meetings Law, the procedural steps associated with conducting executive sessions do not apply. As you indicated, your motion mirrored our suggestion that when a meeting is closed for multiple reasons, including the attorney-client exemption, a public body should inform the public that, in part, it is seeking the legal advice of its attorney, which is a matter made confidential by law.

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: Hon. Nancy Calhoun

Tefft, Teshanna (DOS) OML-AO-4394

From: Freeman, Robert (DOS)
Sent: Friday, June 15, 2007 9:43 AM
To: KBaldas@schools.nyc.gov
Subject: Right of person subject to executive session

Dear Ms. Baldasano:

I have received your letter in which you asked whether "there are any rights under NYS law for a person who is the subject being discussed in an Executive Session of a public body" and whether that person has the right to attend or speak during the executive session or to be represented by counsel during the executive session.

In short, there are no such rights. The only persons who have the right to attend an executive session are the members of the public body. Specifically, §105(2) of the Open Meetings Law states that: "Attendance at an executive session shall be permitted to any member of the public body and any other persons authorized by the public body." Based on that provision, a public body could "authorize" the subject of the discussion or that person's representative to attend or speak during the executive session, but there would be no obligation to do so.

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
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML AO-4395

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June 18, 2007

E-MAIL

TO: Richard Tortorici

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. Tortorici:

I have received your letter in which you asked whether there is "a requirement to allow public participation at a regularly scheduled School Board meeting."

In short, there is no such requirement. While individuals may have the right to express themselves and to speak, I do not believe that they necessarily have the right to do so at meetings of public bodies, such as boards of education. It is noted that there is no constitutional right to attend meetings of public bodies. 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, that right is limited, for public bodies in appropriate circumstances may enter into closed or executive sessions.

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. A public body may in my view permit the public to speak, and if it does so, it has been suggested that rules and procedures be developed that regarding the privilege to speak that are reasonable and that treat members of the public equally.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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OML-AO-4396

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June 18, 2007

Ms. Lynda B. LaMountain
P.O. Box 436
Peru, NY 12972-0436

Dear Ms. LaMountain:

I have received your letter and, based on your remarks, must reiterate the initial point offered in the opinion addressed to you on May 11. Very simply, there is nothing in the Freedom of Information Law or the Open Meetings Law that requires that government officers or employees respond to questions, supply information in response to questions or offer explanations for their governmental activities. Again, the Freedom of Information Law pertains to existing records and specifies that government agencies need not create new records to comply with that law. Also as noted in that opinion, the Open Meetings Law provides the public with the right to attend meetings of government bodies. It does not, however, give the public the right to speak or require that questions be answered during meetings held in accordance with that law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Peru Town Board
Hon. Kathleen Flynn

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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June 19, 2007

Mr. Charles Ferry
[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. Ferry:

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

You questioned the propriety of a closed meeting held by the Board of Trustees of the Village of Wappingers Falls to discuss "the ongoing negotiations between the Wappingers Falls Water Board and the City of Poughkeepsie Water Board. You indicated that the Village "is considering permanently closing our wells and purchasing all our water from the Poughkeepsie Joint Water Board" and that the Village engineer made a presentation during the meeting, explaining "why or why not the Village should move forward with the contract." When you asked why the meeting was closed, you were informed that the discussion involved "contract negotiations" and "the lease of real property (the water lines)."

As you have described the situation, it does not appear that there would have been a basis for conducting an executive session. In this regard, I offer the following comments.

The Open Meetings Law is based on a presumption of openness. Stated differently, meetings of public bodies, such as boards of trustees in villages, must be conducted open to the public, unless there is a basis for entry into a closed or "executive" session. Paragraphs (a) through (h) of §105(1) of the law specify and limit the grounds for entry into executive session. Although reference appears to have been made to two of the grounds, one clearly would not have applied in my opinion, and it is questionable whether the other could properly have been asserted.

The only ground for conducting an executive session that refers to negotiations, §105(1)(e), pertains to "collective negotiations pursuant to article fourteen of the civil service law." Article 14 of the Civil Service Law deals with the relationship between public employers and public employee unions. Consequently, the ability to enter into executive session under paragraph (e) relates to discussions involving collective bargaining negotiations with a public employee union. It is clear

that §105(1)(e) would not have served as a basis for entering into an executive session in the context of the facts that you presented.

The other ground to which reference was made, §105(1)(h), authorizes a public body to enter into executive session to discuss the proposed acquisition, sale or lease of real property, "but only when publicity would substantially affect the value" of the property. Based on language quoted in the preceding sentence, not all discussions involving potential real estate transactions may be discussed in executive session; the ability to do so is limited to those instances in which publicity would "substantially affect the value" of real property. Assuming that the location of the parcels at issue is known to the public and that they are owned by governmental entities, it appears unlikely that public discussion would affect the value of the parcels, and less likely that publicity would "substantially affect" their value. If my assumptions are accurate, paragraph (h) would not have constituted a proper basis for conducting an executive session.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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June 21, 2007

E-MAIL

TO: Ginny Kent

FROM: Camille S. Jobin-Davis, Assistant Director CJD

Dear Ms. Kent:

We are in receipt of your request for an advisory opinion concerning application of the Open Meetings Law to a breakfast gathering of three members of the Board of the Auburn Enlarged City School District. Because you asked that we issue an opinion based on all relevant records in our possession, we note that fellow Board member Joseph Leogrande also submitted a request for an advisory opinion, but later withdrew it, and we received a written explanation about the gathering from Board member Michael Stearns. The following comments pertain to information submitted by all three Board members, and my recollection of our telephone conversation.

By way of background, you and two other members of the Board, consisting of the entire membership of the Audit Committee, gathered at a restaurant. Mr. Stearns, one of the members present, described the discussion as follows:

> "We caught up with [redacted] who had been on vacation, discussed [redacted] son being home and his travels out of state, discussed my daughters and school, the football team, how much has changed and continues to change, and several other items. One very brief thing that came up at that breakfast was whether or when to meet to answer questions Joe Leogrande raised which appear to be far outside the scope of the internal auditor."

He added that:

> "...there were no discussions of public business, just comments that were reminders that we should bring things up at our Audit Committee meeting which was to take place in 3 weeks."

Mr. Stearns indicated that he later "drafted an outline from my own perspective at my house" and "sent it to the Internal Auditor and members of the audit committee to be placed on the agenda at the next meeting."

Although you did not include any detail in your email, in our telephone conversation, I believe you indicated that you did not discuss any business of the audit committee, but that you shared observations about how Mr. Leogrande's questions needed to be addressed at the next meeting.

From our perspective, the gathering, as described, did not constitute a meeting of the Audit Committee, and the Open Meetings Law would not have been applicable. In this regard, we offer the following comments.

First, an audit committee is required to be created pursuant to §2116-c of the Education Law, which states in part that "Every school district, except those employing fewer than eight teachers, shall establish by a resolution of the trustees or board of education an audit committee to oversee and report to the trustees or board on the annual audit of the district records..." and that the audit committee "shall consist of at least three members." Although subdivision (4) of §2116-c states that the "role of an audit committee shall be advisory", subdivisions (5) and (6) describe a series of responsibilities imposed on the committee that are integral to the audit process.

The Open Meetings Law applies to public bodies, and in our view, an audit committee is clearly a public body required to comply with the Open Meetings Law. Section 102(2) of that statute defines the phrase "public body" to mean:

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

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

In this instance, however, an audit committee performs critical and necessary functions in the implementation of §2116-c of the Education Law.

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

Again, according to §2116-c, since an audit committee carries out necessary functions in the implementation of legislation, we believe that it performs a governmental function and, therefore, is a public body subject to the Open Meetings Law.

We note, too, that subdivision (7) of §2116-c refers to the ability of an audit committee to conduct executive session to discuss certain matters. That reference in our view indicates a recognition by the State Legislature that such a committee is subject to the Open Meetings Law.

Second, the Open Meetings Law pertains to meetings of public bodies, and the courts have construed the term "meeting" [§102(1)] expansively. In a landmark decision rendered in 1978, the state's highest court, the Court of Appeals, held that any gathering of a quorum of a public body for the purpose of conducting public business constitutes a "meeting" subject to the Open Meetings Law, whether or not there is an intent to take action, and regardless of the manner in which a gathering may be characterized [see Orange County Publications, Division of Ottoway Newspapers, Inc. v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. In our 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, we 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, we do not believe that the Open Meetings Law would apply, for there would be no intent to conduct public business, collectively, as a body. However, if, by design, the members of a public body seek to meet to socialize and to discuss public business, formally or otherwise, we 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 our 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, we 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 the situation in which public business is discussed, we believe that a court would determine that the public body would have acted in a manner inconsistent with law.

In sum, while a social or similar gathering is not governed by the Open Meetings Law, Board members should be cognizant when the nature of a discussion turns to the business of the public body, and thereby subjecting the gathering to the Open Meetings Law. In this instance, however, it appears that the only issue relating to public business that was discussed involved brief reminders of topics to be considered at an upcoming meeting, not the topics themselves.

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

CSJ:tt

cc: Joseph Leogrande
Michael Stearns

STATE OF NEW YORK
DEPARTMENT OF STATE
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June 22, 2007

E-Mail

TO: Mr. Steven Fornal

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. Fornal:

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

You expressed dissatisfaction with a statement that I made that was apparently published in the Kingston *Freeman* in which I indicated that: "There's nothing in the Open Meetings Law or any other law that forbids them (Town Board) from discussing it...." The subject involved consideration of potential appointees to serve on a town commission.

In this regard, I believe that there clearly would have been a basis for discussion of the matter during a closed or "executive" session. However, the point was that there was no requirement that it be discussed in private. 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, such as a town board, 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.

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

RJF:jm

cc: Rochester Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4400

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June 25, 2007

E-MAIL

TO: Clark Richters

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. Richters:

As you are aware, I have received your letter in which you asked whether the Kingston Public Access Commission is subject to the Open Meetings Law.

From my perspective, because it was created pursuant to regulations promulgated by the New York State Commission on Cable Television, the Commission is required to comply with the Open Meetings Law. I note that the New York State Commission on Cable Television was abolished, but that its functions were preserved and merged into the Department of Public Service. In this regard, I offer the following comments.

First, the regulations, 16 NYCRR §895.4, entitled "Minimum standards for public, educational and governmental (PEG) access", state in subdivision (c) as follows:

> "*Administration and use.* The use of the channel capacity for PEG access shall be administered as follows:
>
> (1) The public access channel shall be operated and administered by the entity designated by the municipality or, until such designation is made, by the cable television franchisee; provided, however, that the municipality may designate such entity at any time throughout the term of a franchise.
>
> (2) The educational and governmental access channel shall be operated and administered by a committee or a commission appointed by local government and shall include appropriate representation of local school districts within the service area of the cable television

> system and may include for purposes of coordination an employee or representative of the cable television franchisee.
>
> (3) The entity responsible for administering and operating the public access channel shall provide notice to the general public of the opportunity to use such channel which notice shall include: (i) periodic messages transmitted on such channel; and (ii) written notice to subscribers at least annually. Notices shall include the name, address and telephone number of the entity to be contacted for use of the channel. All PEG access programming shall be identified as such.
>
> (4) Channel time shall be scheduled on the public access channel by the entity responsible for the administration thereof on a first-come, first-served, nondiscriminatory basis..."

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

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

By viewing the definition of "public body" in terms of its components, the Commission is, in my view, a "public body". It is an entity consisting of nine members; it is required in my opinion to conduct its business subject to quorum requirements (see General Construction Law, §41); and, pursuant to the regulations cited earlier, it conducts public business and performs a governmental function for the City of Kingston, which is a public corporation.

As a public body, meetings of the Commission must be held in accordance with the Open Meetings Law's presumption of openness. Stated differently, meetings of the Commission must be conducted open to the public, except to the extent that an executive session may properly be held in accordance with §105(1).

With respect to notice, §104 of the Open Meetings Law 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.

I hope that I have been of assistance.

RJF:tt

cc: Kingston Public Access Commission.

FOIL-AO-16635
OML-AO-4401

From: Freeman, Robert (DOS)
Sent: Monday, June 25, 2007 5:10 PM
To: Sarah Ryley
Subject: RE: Brooklyn Bridge Park
Attachments: o3654.wpd

Hi Sarah - -

For reasons described in the attached advisory opinion, it does not appear that there was a valid basis for entry into executive session. In short, there is no exception for "legal matters", and the exception pertaining to litigation has been interpreted to enable a public body enter into executive session to discuss its litigation strategy in private so as not to divulge its strategy to its adversary, who might be present at the meeting. As I understand the matter, the discussion did not involve litigation strategy.

If the issue had been discussed in public, the information contained in the passage that you sent presumably would have been disclosed. Even if there was no meeting, the passage would constitute "intra-agency material" falling within §87(2)(g) of the Freedom of Information Law, and I believe that portions of the passage would be accessible. In brief, that provision authorizes and agency to withhold internal governmental communications consisting of advice, opinion, recommendation and the like. Therefore, the last sentence in the passage in my view could be withheld in that circumstance. However, the same provision also states that other portions of those communications consisting of statistical or factual information must be disclosed. The remainder of the passage in my opinion consists of factual information that would be accessible.

I hope the foregoing will be useful to you.

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STATE OF NEW YORK
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June 26, 2007

E-Mail

TO: Ms. Margaret Bartley

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. Bartley:

I have received your letter in which you referred to minutes of a meeting that "were significantly different than [what] was actually said" and asked whether "changing entire sentences so as to alter significantly meaning and in some cases removing statements made" is consistent with law. You also asked whether a tape recording may be destroyed after minutes are prepared.

In this regard, the Open Meetings Law prescribes what might be characterized as minimum requirements concerning the contents of minutes. Specifically, §106 of that statute 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 my opinion, the provisions quoted above must be carried out reasonably, fairly and with consistency. Most importantly, whether minutes consist of the minimum required information or a summary, I believe that they must accurately reflect what occurred at a meeting.

Next, a tape recording of a meeting falls within the requirements of the Freedom of Information Law, as well as provisions concerning the retention and disposal of records.

The Freedom of Information Law is applicable to all agency records, and §86(4) of the Law defines the term "record" to include:

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

Therefore, a tape recording produced by or for a municipal clerk would constitute an agency record subject to the Freedom of Information Law.

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

Lastly, pursuant to §57.25 of the Arts and Cultural Affairs Law, the Commissioner of Education is authorized to adopt regulations that include reference to minimum periods of time that records must be retained by local governments. That provision also specifies that a local government cannot "destroy, sell or otherwise dispose of" records, except in conjunction with a retention scheduled adopted by the Commissioner, or the Commissioner's consent. Having contacted the Education Department, I have been informed that tape recordings of meetings must be retained for a period of four months after transcription and/or approval of minutes.

I hope that I have been of assistance.

RJF:jm

cc: Essex County Board of Supervisors

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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June 27, 2007

E-MAIL

TO: Barbara Meeks

FROM: Camille S. Jobin-Davis CSJ

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

Dear Mrs. Meeks:

We are in receipt of your descriptions of various proceedings of the Newark Village Board of Trustees, and your suggestion that the Open Meetings Law be amended to require that a public body conspicuously post notice of every meeting at least 72 hours prior to such meeting. In this regard, we offer the following comments concerning application of the Open Meetings Law to the various scenarios you relate.

By way of background, you described various special meetings for which notice may have been posted subsequent to a start of the meeting, in one case, and in another, only a few hours prior to the start of the meeting. In the third scenario, you indicated that perhaps notice was posted during the Saturday prior to a Monday morning meeting. Notices typically indicated that the Board may elect to enter into executive session and "[i]f it so chooses, it may discuss matters that have come to its attention since its last regular meeting by moving to an open session."

In this regard, we note that while it is not necessarily inappropriate to do so, conducting unscheduled meetings may diminish the effectiveness of the Open Meetings Law. When unscheduled meetings are held, members of the public who might otherwise have an interest in attending may be unable to do so.

As you know, the Open Meetings Law requires that notice be given to the news media and posted prior to every meeting. Specifically, 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 "unscheduled", "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.

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)].

From our perspective, unless there is a true emergency or need that would justify convening a meeting within a brief period and providing notice a short time before the meeting, members of the public may be effectively precluded from asserting their statutory right to attend a meeting of a public body. Based on the explanation provided in the notices of the meetings, it is apparent that while the Board intended to conduct a substantial portion of the meeting in executive session, it clearly intended to leave open the option to discuss "matters that have come to its attention since its last regular meeting." This appears to reference less than urgent matters that typically arise between regularly scheduled meetings, which, in our opinion, would not constitute an emergency or necessity. We do not have enough information, however, to offer advice regarding the immediacy of issues pertaining to ongoing collective bargaining negotiations or other issues mentioned in the notices, or whether they require the Board's expedited consideration.

With respect to similar notice issues for a "special workshop meeting", we believe the same provisions described above would apply. Based on judicial precedent, there is no distinction between a "workshop" and a "meeting".

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

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" or a "work session" held by a majority of a public body is a "meeting", it would have the same responsibilities in relation to notice and access by the public as in the case of a formal meeting, as well as the same ability to enter into executive sessions.

With respect to your question concerning the ability of the Mayor to direct entrance into an executive session and the basis for entry into executive session, 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), we believe that a discussion of "personnel" may be considered in an executive session only when the subject involves a particular person or persons, and only when at least one of the topics listed in §105(1)(f) is considered.

It has been advised that a motion describing the subject to be discussed as "personnel" or "specific personnel matters" is inadequate, and that the motion should be based upon the specific language of §105(1)(f). For instance, a proper motion might be: "I move to enter into an executive session to discuss the employment history of a particular person (or persons)". Such a motion would not in 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)].

Finally, although 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. While we cannot provide information in response to your questions concerning any changes in personnel, or reasons for organizing an agenda in a particular sequence, 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 Open Meetings Law.

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

CSJ:tt

cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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June 27, 2007

E-Mail

TO: Mr. Robert Waxman

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. Waxman:

I have received your inquiry concerning the status of the Temporary Task Force on Preschool Special Education under the Open Meetings Law. In my view, because it is a statutory creation and is required to carry out certain functions, it constitutes a "public body" subject to that statute.

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."

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

In the decisions cited earlier, none of the entities was designated by law to carry out a particular duty and all had purely advisory functions. More analogous to the matter in my view is the decision rendered in MFY Legal Services v. Toia [402 NYS 2d 510 (1977)]. That case involved an advisory body created by statute to advise the Commissioner of the State Department of Social Services.

In this instance, the Task Force has a variety of statutory functions, including the duty to "evaluate the relationship between preschool special education and other early childhood programs", to "conduct a comparative study of the systems of delivery of preschool special education and services in New York and other states...", and to report on its "conclusions" to the Governor, the leaders of the State Legislature, the Director of the Budget and the Board of Regents. In consideration of those functions, it is advised that the Task Force conducts public business, performs a governmental function for the state and, therefore, constitutes a "public body"subject to the Open Meetings Law.

I believe that the same conclusion can be reached by viewing the definition of "public body" in terms of its components. The Task Force is an entity consisting of more than two members; it is required in my view to conduct its business subject to quorum requirements (see General Construction Law, §41); and, based upon the preceding commentary, it conducts public business and performs a governmental function.

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

RJF:jm

cc: Michael Plotzker

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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June 27, 2007

Larry Amster, Commissioner
Medford Ambulance District
1890 Route 112
Medford, NY 11763

The staff of the Committee on 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. Amster:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to the Medford Volunteer Ambulance Company. Specifically, you inquired whether the Company is an "agency" subject to the Freedom of Information Law in light of Ryan v. Mastic Volunteer Ambulance Company, 212 AD2d 716, 622 NYS2d 795 (2d Dept, 1995). You noted that the Town's attorney indicated that the Company "is not an agency of the Town", yet has indicated that the records of the Company are subject to the Freedom of Information Law. We write to confirm our previously rendered verbal opinion that the Company is an "agency" within the meaning of the Freedom of Information Law.

First, the Committee on Open Government is the only entity with statutory authority to issue legal advice concerning application of the Freedom of Information and Open Meetings Laws. Pursuant to §89(1)(b) of the Freedom of Information Law, this office is authorized to issue legal advice to any agency or person, and, promulgate rules and regulations to implement the Freedom of Information Law. Similarly, §109 of the Open Meetings Law authorizes this office to provide advice and opinions regarding that statute. While the Committee 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.

Second, the Freedom of Information Law is applicable to agency records, and §86(3) of the Law 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 governments.

However, in Westchester-Rockland Newspapers v. Kimball [50 NYS 2d 575 (1980)], a case involving access to records relating to a lottery conducted by a volunteer fire company, the Court of Appeals, found that volunteer fire companies, despite their status as not-for-profit corporations, are "agencies" subject to the Freedom of Information Law. In so holding, the Court stated that:

> "We begin by rejecting respondent's contention that, in applying the Freedom of Information Law, a distinction is to be made between a volunteer organization on which a local government relies for performance of an essential public service, as is true of the fire department here, and on the other hand, an organic arm of government, when that is the channel through which such services are delivered. Key is the Legislature's own unmistakably broad declaration that, '[a]s state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (emphasis added; Public Officers Law, §84).
>
> "True, the Legislature, in separately delineating the powers and duties of volunteer fire departments, for example, has nowhere included an obligation comparable to that spelled out in the Freedom of Information statute (see Village Law, art 10; see, also, 39 NY Jur, Municipal Corporations, §§560-588). But, absent a provision exempting volunteer fire departments from the reach of article 6-and there is none-we attach no significance to the fact that these or other particular agencies, regular or volunteer, are not expressly included. For the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objections cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" (id. at 579].

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

Based upon the foregoing, it is clear that volunteer fire companies are subject to the Freedom of Information Law, despite their status as private, not-for-profit corporations.

With specific respect to your situation, the Appellate Division, Second Department, which includes Suffolk County within its jurisdiction, has held that a volunteer ambulance corporation is subject to the Freedom of Information Law. In so holding, the decision states that:

> "The Court of Appeals has rejected any distinction between a volunteer organization on which a local government relies for the performance of an essential public service and an organic arm of government (*see, Matter of Westchester Rockland Newspapers v. Kimball,* 50 N.Y.2d 575, 579, 430 N.Y.S.2d 574, 408 N.E.2d 904).
>
> "The appellant performs a governmental function, and it performs that function solely for the Mastic Ambulance District, a municipal entity and a municipal subdivision of the Town of Brookhaven (hereinafter the Town). The appellant submits a budget to and receives all of its funding from the Town, and the allocation of its funds is scrutinized by the Town. Thus, the appellant clearly falls within the definition of an agency and is subject to the requirements of FOIL" [Ryan v. Mastic Volunteer Ambulance Company, 212 AD 2d 716, 622 NYS 2d 795, 796 (1995)].

Based on your description of the Medford Volunteer Ambulance Company, and its similarity to the Mastic Volunteer Ambulance Company, we believe that it is an "agency" within the meaning of the Freedom of Information Law and subject to the law's requirements.

Although you did not question application of the Open Meetings Law, we note that in his February 27, 2007 correspondence, counsel for the Town indicated based on the Company's by-laws, that the Board of Directors' meetings "are indeed open to the public, but become closed meetings from which the public is excluded when the Board goes into executive session to discuss personnel or the budget."

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

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

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

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

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

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

Under the language quoted above, public bodies often convened executive sessions to discuss matters that dealt with "personnel" generally, tangentially, or in relation to policy concerns. 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, we do not believe that there would have been a basis for conducting an executive session.

Even when §105(1)(f) may be validly asserted, it has been advised that a motion describing the subject to be discussed as "personnel" or "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 the subject at hand may properly be considered during an executive session. Again, a public body may enter into executive session only for one or more of the purposes enumerated in §105(1).

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-4406

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

June 29, 2007

E-MAIL

TO: Keith Eddings

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. Eddings:

I have received your letter in which you asked whether "'pending litigation' [is a] sufficient description of the purpose of the executive session."

Based on judicial precedent, it is not. In this regard, I offer the following comments.

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

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

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

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 County." If a public body 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 municipality and its residents, it has been suggested that the motion need not identify that person or entity, but that it should clearly indicate that the discussion will involve the litigation strategy. Only by means of that kind of description can the public know that the subject matter may justifiably be considered during an executive session.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
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June 29, 2007

Mr. Alan Hillsberg
[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. Hillsberg:

Your letter addressed to Eamon Moynihan, Deputy Secretary of State, has been forwarded to the Committee on Open Government. The Committee, a unit of the Department of State, is authorized to provide advice and opinions concerning the Freedom of Information and Open Meetings Laws.

I have received numerous other communications from residents of the District, and in response to them offered the following remarks.

First, there is nothing in the Open Meetings Law that deals with situations in which meetings of public bodies, such as boards of education, are cancelled. However, I believe that every governmental entity is obliged to carry out its duties in a manner that gives reasonable effect to the intent of the laws with which they must comply.

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

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

Based on the statement of legislative intent cited above, the Open Meetings Law confers a right upon the public to attend and listen to the deliberations of public bodies and to observe the performance of public officials who serve on such bodies.

As suggested earlier, every provision of law, including the Open Meetings Law, should be implemented in a manner that gives reasonable effect to its intent. In a decision that dealt in part with meetings of a board of education held at 7:30 a.m., it was stated that:

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

If there is an intent discuss items of critical interest and import at a time when those most affected or interested in attending cannot reasonably do so, as in Goetschius, I believe that a court would find that a public body acted unreasonably and must engage in those discussions at a time during which those persons have a reasonable opportunity to attend.

Similarly, in the case of meetings that are unscheduled or held on short notice, there is judicial guidance dealing with the reasonableness of a public body's actions. By way of background, the Open Meetings Law requires that notice be given prior to all meetings of a public body. Specifically, §104 provides that:

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

Nevertheless, 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... [524 NYS2d 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, it is suggested that you and others with similar views concerning the operation of the District might confer with an attorney with expertise regarding the Education Law and the duties and fiduciary responsibilities imposed upon members of boards of education.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
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June 29, 2007

Ms. Rosemary Cifuentes
[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. Cifuentes:

I have received your letter, as well as essentially the same from many others, in which you sought assistance in relation to the Lawrence School District and its Board of Education.

You referred initially to the cancellation of a meeting "on less than eight hours notice" during which "two crucial, time sensitive items" were to be discussed and that:

> "This School Board has made a practice all year of canceling meetings, holding unscheduled meetings, and acting on crucial matters at midnight because the agendas become so bloated. The result is that the public is discouraged from attending these meetings and the Board acts outside the public eye. In this case, the Board has rescheduled tonight's lengthy agenda to May 1, 2007, when it is already scheduled to conduct a work session agenda *following* the annual Budget Hearing at 8 p.m."

You added that a majority of the Board is controlled by members with no children attending District schools who "consistently advocate for the benefit of private school interests", and that by failing to take action in a timely manner, the Board "shirked its responsibility to [y]our community." You wrote further that, as a consequence, you "have no means of assuring that this Board will ever meet its obligation to protect [y]our funds and [y]our children..."

In this regard, I offer the following comments.

First, there is nothing in the Open Meetings Law that deals with situations in which meetings of public bodies, such as boards of education, are cancelled. However, I believe that every governmental entity is obliged to carry out its duties in a manner that gives reasonable effect to the intent of the laws with which they must comply.

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

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

Based on the statement of legislative intent cited above, the Open Meetings Law confers a right upon the public to attend and listen to the deliberations of public bodies and to observe the performance of public officials who serve on such bodies.

As suggested earlier, every provision of law, including the Open Meetings Law, should be implemented in a manner that gives reasonable effect to its intent. In a decision that dealt in part with meetings of a board of education held at 7:30 a.m., it was stated that:

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

If there is an intent discuss items of critical interest and import at a time when those most affected or interested in attending cannot reasonably do so, as in Goetschius, I believe that a court would find that a public body acted unreasonably and must engage in those discussions at a time during which those persons have a reasonable opportunity to attend.

Similarly, in the case of meetings that are unscheduled or held on short notice, there is judicial guidance dealing with the reasonableness of a public body's actions. By way of background, the Open Meetings Law requires that notice be given prior to all meetings of a public body. Specifically, §104 provides that:

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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.

Nevertheless, 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... [524 NYS2d 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, it is suggested that you and others with similar views concerning the operation of the District might confer with an attorney with expertise regarding the Education Law and the duties and fiduciary responsibilities imposed upon members of boards of education.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4409

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June 29, 2007

Ms. Jodi Messer
[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. Messer:

I have received your letter, as well as essentially the same from many others, in which you sought assistance in relation to the Lawrence School District and its Board of Education.

You referred initially to the cancellation of a meeting "on less than eight hours notice" during which "two crucial, time sensitive items" were to be discussed and that:

> "This School Board has made a practice all year of canceling meetings, holding unscheduled meetings, and acting on crucial matters at midnight because the agendas become so bloated. The result is that the public is discouraged from attending these meetings and the Board acts outside the public eye. In this case, the Board has rescheduled tonight's lengthy agenda to May 1, 2007, when it is already scheduled to conduct a work session agenda *following* the annual Budget Hearing at 8 p.m."

You added that a majority of the Board is controlled by members with no children attending District schools who "consistently advocate for the benefit of private school interests", and that by failing to take action in a timely manner, the Board "shirked its responsibility to [y]our community." You wrote further that, as a consequence, you "have no means of assuring that this Board will ever meet its obligation to protect [y]our funds and [y]our children..."

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Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4410

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June 29, 2007

Mr. Wayne Messer
[redacted]

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Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

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June 29, 2007

Mr. Harold Steinbrock
[redacted]

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You added that a majority of the Board is controlled by members with no children attending District schools who "consistently advocate for the benefit of private school interests", and that by failing to take action in a timely manner, the Board "shirked its responsibility to [y]our community." You wrote further that, as a consequence, you "have no means of assuring that this Board will ever meet its obligation to protect [y]our funds and [y]our children..."

In this regard, I offer the following comments.

First, there is nothing in the Open Meetings Law that deals with situations in which meetings of public bodies, such as boards of education, are cancelled. However, I believe that every governmental entity is obliged to carry out its duties in a manner that gives reasonable effect to the intent of the laws with which they must comply.

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

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

Based on the statement of legislative intent cited above, the Open Meetings Law confers a right upon the public to attend and listen to the deliberations of public bodies and to observe the performance of public officials who serve on such bodies.

As suggested earlier, every provision of law, including the Open Meetings Law, should be implemented in a manner that gives reasonable effect to its intent. In a decision that dealt in part with meetings of a board of education held at 7:30 a.m., it was stated that:

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

If there is an intent discuss items of critical interest and import at a time when those most affected or interested in attending cannot reasonably do so, as in Goetschius, I believe that a court would find that a public body acted unreasonably and must engage in those discussions at a time during which those persons have a reasonable opportunity to attend.

Similarly, in the case of meetings that are unscheduled or held on short notice, there is judicial guidance dealing with the reasonableness of a public body's actions. By way of background, the Open Meetings Law requires that notice be given prior to all meetings of a public body. Specifically, §104 provides that:

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

Nevertheless, 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... [524 NYS2d 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, it is suggested that you and others with similar views concerning the operation of the District might confer with an attorney with expertise regarding the Education Law and the duties and fiduciary responsibilities imposed upon members of boards of education.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4412

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

June 29, 2007

Ms. Heidi Beyer
[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. Beyer:

I have received your letter, as well as essentially the same from many others, in which you sought assistance in relation to the Lawrence School District and its Board of Education.

You referred initially to the cancellation of a meeting "on less than eight hours notice" during which "two crucial, time sensitive items" were to be discussed and that:

> "This School Board has made a practice all year of canceling meetings, holding unscheduled meetings, and acting on crucial matters at midnight because the agendas become so bloated. The result is that the public is discouraged from attending these meetings and the Board acts outside the public eye. In this case, the Board has rescheduled tonight's lengthy agenda to May 1, 2007, when it is already scheduled to conduct a work session agenda *following* the annual Budget Hearing at 8 p.m."

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I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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June 29, 2007

Mr. Fu-Yun Tang
[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. Tang:

I have received your letter, as well as essentially the same from many others, in which you sought assistance in relation to the Lawrence School District and its Board of Education.

You referred initially to the cancellation of a meeting "on less than eight hours notice" during which "two crucial, time sensitive items" were to be discussed and that:

> "This School Board has made a practice all year of canceling meetings, holding unscheduled meetings, and acting on crucial matters at midnight because the agendas become so bloated. The result is that the public is discouraged from attending these meetings and the Board acts outside the public eye. In this case, the Board has rescheduled tonight's lengthy agenda to May 1, 2007, when it is already scheduled to conduct a work session agenda *following* the annual Budget Hearing at 8 p.m."

You added that a majority of the Board is controlled by members with no children attending District schools who "consistently advocate for the benefit of private school interests", and that by failing to take action in a timely manner, the Board "shirked its responsibility to [y]our community." You wrote further that, as a consequence, you "have no means of assuring that this Board will ever meet its obligation to protect [y]our funds and [y]our children..."

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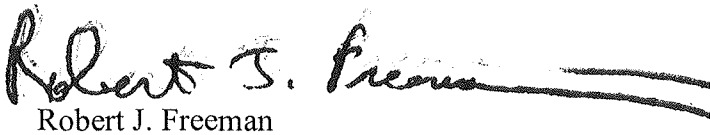

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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June 29, 2007

Ms. Nancy Fragner
[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. Fragner:

I have received your letter, as well as essentially the same from many others, in which you sought assistance in relation to the Lawrence School District and its Board of Education.

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Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4415

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

June 29, 2007

Mr. Richard Libbey
[redacted]

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Dear Mr. Libbey:

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> 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.

Nevertheless, 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... [524 NYS2d 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, it is suggested that you and others with similar views concerning the operation of the District might confer with an attorney with expertise regarding the Education Law and the duties and fiduciary responsibilities imposed upon members of boards of education.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4416

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

June 29, 2007

Ms. Claudia Thaler
[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. Thaler:

I have received your letter, as well as essentially the same from many others, in which you sought assistance in relation to the Lawrence School District and its Board of Education.

You referred initially to the cancellation of a meeting "on less than eight hours notice" during which "two crucial, time sensitive items" were to be discussed and that:

> "This School Board has made a practice all year of canceling meetings, holding unscheduled meetings, and acting on crucial matters at midnight because the agendas become so bloated. The result is that the public is discouraged from attending these meetings and the Board acts outside the public eye. In this case, the Board has rescheduled tonight's lengthy agenda to May 1, 2007, when it is already scheduled to conduct a work session agenda *following* the annual Budget Hearing at 8 p.m."

You added that a majority of the Board is controlled by members with no children attending District schools who "consistently advocate for the benefit of private school interests", and that by failing to take action in a timely manner, the Board "shirked its responsibility to [y]our community." You wrote further that, as a consequence, you "have no means of assuring that this Board will ever meet its obligation to protect [y]our funds and [y]our children..."

In this regard, I offer the following comments.

First, there is nothing in the Open Meetings Law that deals with situations in which meetings of public bodies, such as boards of education, are cancelled. However, I believe that every governmental entity is obliged to carry out its duties in a manner that gives reasonable effect to the intent of the laws with which they must comply.

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

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

Based on the statement of legislative intent cited above, the Open Meetings Law confers a right upon the public to attend and listen to the deliberations of public bodies and to observe the performance of public officials who serve on such bodies.

As suggested earlier, every provision of law, including the Open Meetings Law, should be implemented in a manner that gives reasonable effect to its intent. In a decision that dealt in part with meetings of a board of education held at 7:30 a.m., it was stated that:

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

If there is an intent discuss items of critical interest and import at a time when those most affected or interested in attending cannot reasonably do so, as in Goetschius, I believe that a court would find that a public body acted unreasonably and must engage in those discussions at a time during which those persons have a reasonable opportunity to attend.

Similarly, in the case of meetings that are unscheduled or held on short notice, there is judicial guidance dealing with the reasonableness of a public body's actions. By way of background, the Open Meetings Law requires that notice be given prior to all meetings of a public body. Specifically, §104 provides that:

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I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4417

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June 29, 2007

Ms. Maria Vollmer
[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. Vollmer:

I have received your letter, as well as essentially the same from many others, in which you sought assistance in relation to the Lawrence School District and its Board of Education.

You referred initially to the cancellation of a meeting "on less than eight hours notice" during which "two crucial, time sensitive items" were to be discussed and that:

> "This School Board has made a practice all year of canceling meetings, holding unscheduled meetings, and acting on crucial matters at midnight because the agendas become so bloated. The result is that the public is discouraged from attending these meetings and the Board acts outside the public eye. In this case, the Board has rescheduled tonight's lengthy agenda to May 1, 2007, when it is already scheduled to conduct a work session agenda *following* the annual Budget Hearing at 8 p.m."

You added that a majority of the Board is controlled by members with no children attending District schools who "consistently advocate for the benefit of private school interests", and that by failing to take action in a timely manner, the Board "shirked its responsibility to [y]our community." You wrote further that, as a consequence, you "have no means of assuring that this Board will ever meet its obligation to protect [y]our funds and [y]our children..."

In this regard, I offer the following comments.

First, there is nothing in the Open Meetings Law that deals with situations in which meetings of public bodies, such as boards of education, are cancelled. However, I believe that every governmental entity is obliged to carry out its duties in a manner that gives reasonable effect to the intent of the laws with which they must comply.

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Based on the statement of legislative intent cited above, the Open Meetings Law confers a right upon the public to attend and listen to the deliberations of public bodies and to observe the performance of public officials who serve on such bodies.

As suggested earlier, every provision of law, including the Open Meetings Law, should be implemented in a manner that gives reasonable effect to its intent. In a decision that dealt in part with meetings of a board of education held at 7:30 a.m., it was stated that:

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

If there is an intent discuss items of critical interest and import at a time when those most affected or interested in attending cannot reasonably do so, as in Goetschius, I believe that a court would find that a public body acted unreasonably and must engage in those discussions at a time during which those persons have a reasonable opportunity to attend.

Similarly, in the case of meetings that are unscheduled or held on short notice, there is judicial guidance dealing with the reasonableness of a public body's actions. By way of background, the Open Meetings Law requires that notice be given prior to all meetings of a public body. Specifically, §104 provides that:

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> "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... [524 NYS2d 643, 645 (1988)]."

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I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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Fax (518) 474-1927
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June 29, 2007

Ms. Giselle L. Eras
[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. Eras:

I have received your letter, as well as essentially the same from many others, in which you sought assistance in relation to the Lawrence School District and its Board of Education.

You referred initially to the cancellation of a meeting "on less than eight hours notice" during which "two crucial, time sensitive items" were to be discussed and that:

> "This School Board has made a practice all year of canceling meetings, holding unscheduled meetings, and acting on crucial matters at midnight because the agendas become so bloated. The result is that the public is discouraged from attending these meetings and the Board acts outside the public eye. In this case, the Board has rescheduled tonight's lengthy agenda to May 1, 2007, when it is already scheduled to conduct a work session agenda *following* the annual Budget Hearing at 8 p.m."

You added that a majority of the Board is controlled by members with no children attending District schools who "consistently advocate for the benefit of private school interests", and that by failing to take action in a timely manner, the Board "shirked its responsibility to [y]our community." You wrote further that, as a consequence, you "have no means of assuring that this Board will ever meet its obligation to protect [y]our funds and [y]our children..."

In this regard, I offer the following comments.

First, there is nothing in the Open Meetings Law that deals with situations in which meetings of public bodies, such as boards of education, are cancelled. However, I believe that every governmental entity is obliged to carry out its duties in a manner that gives reasonable effect to the intent of the laws with which they must comply.

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

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Lastly, it is suggested that you and others with similar views concerning the operation of the District might confer with an attorney with expertise regarding the Education Law and the duties and fiduciary responsibilities imposed upon members of boards of education.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4419

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

June 29, 2007

Ms. Deokie Rampersaud
[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. Rampersaud:

I have received your letter, as well as essentially the same from many others, in which you sought assistance in relation to the Lawrence School District and its Board of Education.

You referred initially to the cancellation of a meeting "on less than eight hours notice" during which "two crucial, time sensitive items" were to be discussed and that:

> "This School Board has made a practice all year of canceling meetings, holding unscheduled meetings, and acting on crucial matters at midnight because the agendas become so bloated. The result is that the public is discouraged from attending these meetings and the Board acts outside the public eye. In this case, the Board has rescheduled tonight's lengthy agenda to May 1, 2007, when it is already scheduled to conduct a work session agenda *following* the annual Budget Hearing at 8 p.m."

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I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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June 29, 2007

Mr. and Mrs. Michael Adams
[redacted]

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

Dear Mr. and Mrs. Adams:

I have received your letter, as well as essentially the same from many others, in which you sought assistance in relation to the Lawrence School District and its Board of Education.

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In this regard, I offer the following comments.

First, there is nothing in the Open Meetings Law that deals with situations in which meetings of public bodies, such as boards of education, are cancelled. However, I believe that every governmental entity is obliged to carry out its duties in a manner that gives reasonable effect to the intent of the laws with which they must comply.

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

Based on the statement of legislative intent cited above, the Open Meetings Law confers a right upon the public to attend and listen to the deliberations of public bodies and to observe the performance of public officials who serve on such bodies.

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Similarly, in the case of meetings that are unscheduled or held on short notice, there is judicial guidance dealing with the reasonableness of a public body's actions. By way of background, the Open Meetings Law requires that notice be given prior to all meetings of a public body. Specifically, §104 provides that:

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

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> "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.

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Lastly, it is suggested that you and others with similar views concerning the operation of the District might confer with an attorney with expertise regarding the Education Law and the duties and fiduciary responsibilities imposed upon members of boards of education.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4421

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

June 29, 2007

Mr. Joseph Turco
Ms. Susan Turco
[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. and Ms. Turco:

I have received your letter, as well as essentially the same from many others, in which you sought assistance in relation to the Lawrence School District and its Board of Education.

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I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4422

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

June 29, 2007

Mr. Peter and Mrs. Ruth Basta
[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. and Mrs. Basta:

I have received your letter, as well as essentially the same from many others, in which you sought assistance in relation to the Lawrence School District and its Board of Education.

You referred initially to the cancellation of a meeting "on less than eight hours notice" during which "two crucial, time sensitive items" were to be discussed and that:

> "This School Board has made a practice all year of canceling meetings, holding unscheduled meetings, and acting on crucial matters at midnight because the agendas become so bloated. The result is that the public is discouraged from attending these meetings and the Board acts outside the public eye. In this case, the Board has rescheduled tonight's lengthy agenda to May 1, 2007, when it is already scheduled to conduct a work session agenda *following* the annual Budget Hearing at 8 p.m."

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Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4423

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

June 29, 2007

Mr. Ron and Mrs. Rebeca Aghassi
[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. and Mrs. Aghassi:

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Executive Director

RJF:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4424

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

June 29, 2007

Mr. Ronald Sorrentino
Ms. Marge Sorrentino
[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. and Ms. Sorrentino:

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>
> 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.

Nevertheless, 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... [524 NYS2d 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, it is suggested that you and others with similar views concerning the operation of the District might confer with an attorney with expertise regarding the Education Law and the duties and fiduciary responsibilities imposed upon members of boards of education.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4425

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July 9, 2007

E-MAIL

TO: Jeffrey K. Branch

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. Branch:

I have received your letter in which you referred to public business conducted via email and asked whether that is "allowable" under the Open Meetings Law.

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

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

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

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

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

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

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

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

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

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

Conducting a vote or taking action via e-mail would, in my view, be equivalent to voting by means of a series of telephone calls, and in the only decision dealing with a vote taken by phone, the court found the vote to be a nullity. In Cheevers v. Town of Union (Supreme Court, Broome County, September 3, 1998), which cited and relied upon an opinion rendered by this office, the court stated that:

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

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

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

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

I hope that I have been of assistance.

cc: Board of Trustees

OML-AO-4426

From: Freeman, Robert (DOS)
Sent: Monday, July 09, 2007 12:11 PM
To: mzwerger
Subject: private press briefing

Dear Mr. Zwerger:

I have received your inquiry concerning the right of the public to attend a "private press briefing." In this regard, the issue, as it relates to the functions of this office, pertains to the Open Meetings Law. That statute provides any member of the public with the right to attend a meeting of a public body. A "meeting" is a gathering of a majority of a public body, such as a county legislature, a city council, a town board, a village board, a school board, etc. for the purpose of conducting public business collectively as a body. If less than a majority of a public body is present and participating in a press briefing, the Open Meetings Law would not apply. In that kind of situation, I do not believe that the public would have the right to attend.

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
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16656
OML-AO-4142?

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July 10, 2007

E-MAIL

TO: Laura Wells

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. Wells:

I have received your letter in which you asked whether a board of education may vote "by paper ballot" to elect its president.

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 [such as a board of education; 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."

In an Appellate Division decision that was affirmed by the Court of Appeals, the state's highest court, 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)]. Further, in a case dealing directly with election of officers, it was found that secret ballot voting violated both the Freedom of Information Law and the Open Meetings Law (Wallace v. City University of New York, Supreme Court, New York County, Julu7, 2000).

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.

Lastly, while the record of votes by members ordinarily is included in minutes, there is no requirement that it be included in minutes. Although such a record must be prepared and made available, the Court of Appeals 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
DEPARTMENT OF STATE
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July 18, 2007

E-Mail

TO: Hon. Pat Irving, Trustee, Village of Asharoken

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Trustee Irving:

I have received your communication in which you asked that I confirm the advice offered during a recent telephone conversation.

By way of background, you indicated that you serve as a member of the Village of Asharoken Board of Trustees. The Board consists of five members, four of whom are associated with a political party that exists only in the Village, and you indicated that a majority of Board members have met in closed political caucuses to discuss Village business. You have questioned the legality of those closed caucuses.

From my perspective, which is based on judicial precedent and statutory language, the gatherings that you described fall within the coverage of the Open Meetings Law. In this regard, I offer the following comments.

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

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

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

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

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

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

Second, the Open Meetings Law provides two vehicles under which members of 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. Section 108(2)(a) of the Law states that exempted from its provisions are: "deliberations of political committees, conferences and caucuses." Further, §108(2)(b) states that:

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

Based on the foregoing, 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.

Third, and perhaps most significantly, the political entity that is unique to the Village of Asharoken, according to the Election Law, is not a "party." Section 1-104(3) of the Election Law states that:

> "The term 'party' means any political organization which at the last preceding election for governor polled at least fifty thousand votes for its candidate for governor."

It is my understanding that the Village has less than a thousand inhabitants. That being so, a political entity whose membership is limited to Village residents is not a "party", and the Board members who are adherents of that entity, therefore, cannot, in my opinion, conduct closed political caucuses to discuss public business. On the contrary, as suggested earlier, any gathering of a majority of the Board for the purpose of conducting public business would constitute a "meeting" subject to the Open Meetings Law that must be preceded by notice given in accordance with §104 of that statute.

I hope that I have been of assistance.

RJF:jm

cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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July 18, 2007

E-Mail

TO: Hon. Kathleen Smith, Assessor, Town of Deerpark

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Ms. Smith:

I have received your letter in which you referred to a board of assessment review and asked whether minutes are required to be prepared in relation to its deliberations, which are quasi-judicial and, therefore, exempt from the requirements of the Open Meetings Law.

In this regard, a board of assessment review is in my view clearly a "public body" required to comply with the Open Meetings Law [see Open Meetings Law, §102(2)]. While meetings of public bodies generally must be conducted in public unless there is a basis for entry into executive session, following public proceedings conducted by boards of assessment review, I believe that their deliberations could be characterized as "quasi-judicial proceedings" that would be exempt from the Open Meetings Law pursuant to §108(1) of that statute. It is emphasized, however, that even when the deliberations of such a board may be outside the coverage of the Open Meetings Law, its vote and other matters would not be exempt. As stated in Orange County Publications v. City of Newburgh:

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

Therefore, although an assessment board of review may deliberate in private, based upon the decision cited above, the act of voting or taking action must in my view occur during a meeting.

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

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

The minutes are not required to indicate how a board member reached its conclusion; however, I believe that the conclusion itself, i.e., a motion or resolution, must be included in minutes.

Lastly, since its enactment, the Freedom of Information Law has contained a related requirement in §87(3). The provision states in part that:

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

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

I hope that I have been of assistance.

RJF:jm

OML-AO-4430

From: Mercer, Janet (DOS)
Sent: Monday, July 23, 2007 10:47 AM
To: 'George Heidcamp'
Subject: RE: Question regarding greivnces school District

Dear Mr. Heidcamp:

Boards of education are subject to the Open Meetings Law in the same manner as all other public bodies.

Robert J. Freeman
Executive Director
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STATE OF NEW YORK
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July 23, 2007

Mr. Peter A. Reese
[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. Reese:

I have received a variety of correspondence from you involving the Open Meetings Law as it relates to the Erie County Fiscal Stability Authority ("the Authority").

By way of background, §3951(2) of the Public Authorities Law states that the Authority is a public benefit corporation, and §3952 describes the authority as a "corporate governmental agency" and an "instrumentality of the state." Section 3953(1) provides that the Authority is headed by a board of directors consisting of seven members appointed by the Governor, and subdivision (5) of that section states that a quorum is four.

The first area of inquiry concerns a gathering that involved the members of the Authority's Finance Committee. Although the gathering was not preceded by notice, it included the three members of the Committee, the Authority's Executive Director, and a staff person.

From my perspective, if the gathering involved the members of the Finance Committee in their capacities as members of that Committee, it would have been subject to the requirements of 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 Board of Directors of the Authority, I believe that the Open Meetings Law is applicable.

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

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

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

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

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

In view of the amendments to the definition of "public body", I believe that any entity consisting of two or more members of a public body, such as a committee, a subcommittee or "similar body" consisting of members of the Board of the Authority, would fall within the requirements of the Open Meetings Law when such an entity discusses or conducts public business collectively as a body [see Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984 (1981)]. A quorum of a public body is a majority of its total membership (see General Construction Law,

§41). Therefore, in a body consisting of seven, a quorum would be four. If that body designates a committee of three, a quorum of the committee would be two.

Again, if the members who attended the gathering in question did so in their capacities as members of the Finance Committee, I believe that the gathering would have constituted a meeting of the Committee that should have been preceded by notice given in accordance with §104 of the Open Meetings Law, convened open to the public, and conducted open to the public, except to the extent that an executive session could properly have been held.

In your second area of inquiry, you asked whether it is "acceptable for a public body to convene an executive session 'for the purpose of meeting with the auditor.'" As you are likely aware, the Open Meetings Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, §105(1) states in relevant part that:

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

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.

"Meeting with the auditor", without more, does not in my opinion adequately describe the subject to be considered. More importantly, it does not indicate in any way whether the subject matter would fall within any of the eight grounds for entry into executive session. If it did not, the public body conducting the meeting would in my opinion have failed to comply with the Open Meetings Law.

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

From my perspective, voting and action by a public body may be carried out only at a meeting during which a quorum has physically convened, or during a meeting held by videoconference.

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

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

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

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

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

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

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

Conducting a vote or taking action via e-mail would, in my view, be equivalent to voting by means of a series of telephone calls, and in the only decision dealing with a vote taken by phone, the court found the vote to be a nullity. In Cheevers v. Town of Union (Supreme Court, Broome County, September 3, 1998), which cited and relied upon an opinion rendered by this office, the court stated that:

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

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

In contrast, if e-mail communications are made via a listserve or other means through which the members receive them at different times, and there is no instantaneous or simultaneous

communication, that circumstance would be equivalent to the transmission of inter-office memoranda. In that kind of situation, the recipients open their mail at different times and, in my view, the Open Meetings Law would not be implicated.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Erie County Fiscal Stability Authority

OML-AO-4432

From: Freeman, Robert (DOS)
Sent: Tuesday, July 24, 2007 9:21 AM
To: kmclaughlin@putnamvalleylibrary.org
Subject: RE: Election of an Officer of an Association Library

Dear Ms. McLaughlin:

I have received your letter in which you referred to a statement made by a member of the board of trustees of an association library "with regard to holding a 'trustee meeting'" that would not be open to the public for the purpose of filling a vacancy on the board.

From my perspective, the gathering clearly would constitute a "meeting" that falls within the scope of the Open Meetings Law. That being so, it must be preceded by notice, convened open to the public and conducted open to the public, except to the extent that an executive session may be held.

I believe that there is a distinction between the election of officers and the appointment of a person to fill a vacancy. Based on the language of §105(1)(f), the former, in my view, must be conducted in public, while the latter would qualify for discussion during an executive session. The cited provision permits an executive session to be held 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 Board seeks to discuss a particular person who may be appointed to fill the vacancy, I believe that an executive session could properly be held within a meeting.

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

OML-AO-4433

From: Freeman, Robert (DOS)
Sent: Tuesday, July 24, 2007 1:10 PM
To: Jacknis, Norman
Subject: RE: Westchester Library System Board Meeting Participation Via Videoconference

Hi - -

Your memory is accurate.

The Open Meetings Law includes provisions authorizing public bodies to conduct meetings by means of videoconferencing. In addition to the members of a board being able to observe one another, §103(c) requires that members of the public have the same capacity to do so, stating 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." Further, §104 concerning notice of meetings states in subdivision (4) that: "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."

I hope that this is what you need and that all is well.

Bob

Robert J. Freeman
Executive Director
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4434

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July 25, 2007

Mr. Gary T. Margiotta
[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. Margiotta:

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

You wrote that you served as City Clerk of the City of Gloversville, and that your position was appointed by the City Council. Several days prior to the Council's organizational meeting during which appointments would be made or renewed, the Mayor informed you that "Council had decided not to reappoint [you] for 2007." That decision was later confirmed during the organizational meeting. You asked "when had the decision to dismiss been made" and whether the Council failed to comply with the Open Meetings Law.

In this regard, I note that there is nothing in the Open Meetings Law that would preclude members of a public body, such as the Common Council, 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 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. 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, 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 Common 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, by mail, or by e-mail, would be inconsistent with law.

Further, 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 and action taken 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..."

Based on the foregoing, I do not believe that action could validly have been taken as described by the Mayor when he informed you that the Council "had decided" not to reappoint you without having first convened a meeting as required by the Open Meetings Law. Stated differently, the Council in my view could not have taken action outside the confines of a meeting held in accordance with the Open Meetings Law.

Lastly, §107(1) of the Open Meetings Law indicates that a court may invalidate action taken in private in contravention of that statute. However, the initiation of a lawsuit would not likely achieve that result because, as I understand the matter, the Council took action validly at its organizational meeting.

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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OML-AO-4435

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July 25, 2007

E-MAIL

TO: Thomas Brennan

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. Brennan:

We are in receipt of your request for an advisory opinion concerning application of the Open Meetings Law to certain proceedings of the Rochester School Board, of which you are a member. Specifically, you are concerned with the propriety of entering into executive session to discuss "proposed changes in the structure of the school district central office" and whether written evidence of the proposal under consideration is "confidential" and must be returned, upon demand, to the superintendent. It is our opinion that a discussion concerning the structure of an office, or how a particular department is organized should be held during the public portion of a meeting to comply with law. In this regard, we offer the following.

First, 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 so-called 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), we 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 discussion involves structural changes to the central office, and "not the specific hiring and firing for the hypothetical consolidated positions", we do not believe that §105(1)(f) may be asserted to justify holding an executive session. Further, based on your description of the flow chart that "dealt only with these structural changes," and the interim superintendent's effort to seek "only board approval of the structure", we believe the discussion concerning the proposed chart must occur in public to comply with law.

We 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 essentially 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 AD2d 840, 841 (1983)].

In sum, only to the extent that the matters considered by the Board 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 NY2d 573, 575; 207 AD2d 55 (1994)].

Next, with respect to access to the proposed flow chart, and whether, upon request, it must be maintained "confidentially," we note that in general, the Freedom of Information Law is based upon a presumption of access. 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 first ground for denial, §87(2)(a), pertains to records that are specifically exempted from disclosure by state or federal statute." 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). 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 NY2d 341 (1979); Washington Post v. Insurance Department, 61 NY2d 557 (1984); Gannett News Service, Inc. v. State Office of Alcoholism and Substance Abuse, 415 NYS2d 780 (1979)]. As such, an assertion or promise of confidentiality, without more, would not in our view serve to enable an agency, such as a school district to withhold a record.

In this instance, we know of no statute that would require or prohibit release of this record.

This does not necessarily mean that the proposed flow chart must be disclosed upon request. More specifically, §87(2)(g) states that an agency such as a school district may withhold records that,

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

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in our view be withheld. Accordingly, as long as the proposed flow chart remains an inter-agency recommendation, in our opinion, it would not be required to be disclosed to the public.

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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July 27, 2007

E-MAIL

TO: Donna Suhor

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. Suhor:

I have received your letter and offer the following comments.

First, I do not believe that meetings of public bodies must be held in locations "complete with accessible elevator and restrooms." However, subdivision (a) of §103 of the Open Meetings Law states in relevant part that "Every meeting of a public body shall be open to the general public..." Subdivision (b) provides that:

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

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

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

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

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

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

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

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

More recently, the Appellate Division, Second Department, unanimously affirmed a decision 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).

The same outcome has been reached concerning use of video recording devices [Csorny v. Shorham-Wading River Central School District, 305 AD2d 83 (2003)].

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

I hope that I have been of assistance.

RJF:tt

OML-AO-4437

From: Freeman, Robert (DOS)
Sent: Friday, July 27, 2007 1:09 PM
To: councilmanwilliams@nycap.rr.com
Subject: taping of meetings
Attachments: o3749.wpd

Dear Mr. Williams:

I have received your letter, which is not entirely clear. However, in brief, judicial decisions indicate that any person may audio record or video record an open meeting of a public body, such as a town board or a village board of trustees, so long as the use of the recording device is neither disruptive nor obtrusive. If your reference involves a gathering other than an open meeting of a public body, there may be no right to record, depending on circumstances.

Attached is a detailed opinion dealing with the right to use recording equipment at open meetings of public bodies.

I hope that I have been of assistance.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
Department of State
41 State Street
Albany, NY 12231
(518) 474-2518
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4438

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

July 27, 2007

E-MAIL

TO: Gary Cranker

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. Cranker:

I have received your letter and apologize for the delay in response. You have questioned the status under the Open Meetings Law of an "Open Space Implementation Committee" created by the Town Board of the Town of Ogden. The Committee consists of nine members, three of whom are members of the Town Board, and four of whom are also Town officials.

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

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

Based on the foregoing, the Open Meetings Law includes within its coverage governing bodies of governmental entities, such as town boards, as well as committees of such bodies.

A"meeting" is a gathering of a majority of the members of a public body for the purpose of conducting public business [see Open Meetings Law, §102(1)].

It is noted that 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.

In this instance, however, because the Committee was created by the Town Board and includes a majority of the members of the Town Board, I believe that it constitutes a public body required to comply with the Open Meetings Law. If that is so, the Committee has the same responsibilities concerning notice of its meetings, the preparation of minutes, and requirements of openness, as well as the same authority to conduct executive sessions as appropriate, as the Town Board itself.

Lastly, you referred to an obligation to post minutes on the Town's website. Here I point out that there is no law that requires that records be made available on a website. Agencies may choose to do so, and many do; nevertheless, there is no obligation to do so.

I hope that I have been of assistance.

RJF:tt

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-16698
OML-AO-4439

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July 30, 2007

E-MAIL

TO: Joseph Eisner

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. Eisner:

As you are aware, I have received your letter, and I hope that you will accept my apologies for the delay in response.

You referred to an advisory opinion citing Westchester-Rockland Newspapers v. Kimball [50 NY2d 575 (1980)], in which the Court of Appeals determined that volunteer fire companies are "agencies" subject to the Freedom of Information Law, despite being not-for-profit corporations. The Court found that those entities perform what historically has been considered an essential governmental function, and that such function is carried out pursuant a contract with one or more municipalities. You asked whether the reasoning in that decision might be applicable in determining the status of association libraries and cooperative library systems under the Freedom of Information Law.

While I believe that all public libraries are essential to the communities that they serve, due to judicial precedent, I cannot advise that they fall within the coverage of the Freedom of Information Law, absent the issuance of a new judicial decision specifying that they are subject to that statute.

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

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

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

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

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

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

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

In view of the precedent in French, albeit involving a different context, it cannot be advised that an association library constitutes an "agency" subject to the Freedom of Information Law.

With regard to library systems, I believe that there are distinctions among them. Some, like association libraries, are not-for-profit entities that would likely be found by a court to be outside the

coverage of the Freedom of Information Law. Others are creations and under the control of governmental entities, such as counties, and in those instances, they would be subject to that statute.

Lastly, you referred to a newspaper article indicating that I advised that a task force was subject to the Open Meetings Law because its membership consisted of members of two boards of trustees. I know of no case law that deals with that particular factual situation. However, the Open Meetings Law pertains to meetings of public bodies, and based on the definition of the phrase "public body" [§102(2)], it is clear in my opinion that a "committee or subcommittee or similar body" consisting solely of the members of a governing body would itself constitute a public body falling within the scope of the Open Meetings Law. From my perspective, when a "similar body", such as the task force described in the article, consists solely of members of two governing bodies, I believe that a court would determine that, due to its membership, it is a public body subject to the requirements of the Open Meetings Law. Analogous are conference committees consisting of members of the Senate and Assembly, which in my view, clearly constitute public bodies falling within the coverage of that law.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
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OML-AO-4440

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July 31, 2007

Jehed Diamond, Esq.
[redacted]

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

Dear Ms. Diamond:

I have reviewed your letter addressed to Ms. Jobin-Davis and apologize for the delay in response. You have asked whether a member of a public body may "bring and use a tape recorder [during an] executive session."

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

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

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

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

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

In short, I am suggesting that tape recording an executive session could potentially defeat the purpose of holding an executive session, and that, in my opinion, a public body, based on its authority to adopt rules to govern its own proceedings could, by rule, prohibit a member from using a tape recorder at an executive session absent the consent of a majority of the board.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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OML-AO-4441

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July 31, 2007

Hon. Judy Koehler
Councilperson
Town of Albion
[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 Councilperson Koehler:

I have received your letter and hope that you will accept my apologies for the delay in response. You referred to a passage from a summary of a Town Board meeting that you "suspect" represents "an attempt to keep [you] from putting items on our agenda for discussion in open session." You also referred to "the necessity of FOILs by board members, copies of items foiled" and the like.

In this regard, there is nothing in the Open Meetings Law that refers or pertains to agendas. A public body, such as a town board, may choose to prepare or abide by an agenda, but there is no obligation to do so. Most important in my view is §63 of the Town Law, which states in part that "The board may determine the rules of its procedure" and that "Every act, motion or resolution shall require for its adoption the affirmative vote of a majority of all the members of the town board." In consideration of those provisions, the means by which items may be placed on an agency should in my view be adopted by a majority of the board and included as part of its rules of procedure.

With respect to access to records, from my perspective, the Freedom of Information Law is intended to enable the public to request and obtain accessible records. Further, it has been held that accessible records should be made equally available to any person, without regard to status or interest [see e.g., Burke v. Yudelson, 368 NYS2d 779, aff'd 51 AD2d 673, 378 NYS2d 165 (1976) and M. Farbman & Sons v. New York City, 62 NY2d 75 (1984)]. Nevertheless, if it is clear that records are requested in the performance of one's official duties, the request might not be viewed as having been made under the Freedom of Information Law. In such a situation, if a request is reasonable, and in the absence of a rule or policy to the contrary, I believe that a member of a board should not generally be required to resort to the Freedom of Information Law in order to seek or obtain records.

However, viewing the matter from a more technical perspective, one of the functions of a public body involves acting collectively, as an entity. A town board, as the governing body of a public corporation, generally acts by means of motions carried by an affirmative vote of a majority of its total membership (see General Construction Law, §41; also Town Law, §63). In my view, in most instances, a board, member acting unilaterally, without the consent or approval of a majority of the total membership of the board, has the same rights as those accorded to a member of the public, unless there is some right conferred upon a board member by means of law or rule. In the absence of any such rule, a member seeking records could presumably be treated in the same manner as the public generally.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4442

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August 1, 2007

Hon. Shirley W. Seney
Supervisor
Town of North Elba
[redacted]

Dear Supervisor Seney:

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

You described a meeting conducted by the Ways & Means Committee of the Essex County Board of Supervisors during which a heated discussion occurred. Relative to that meeting, you asked the following question: "Am I not correct in that a 'motion and second to adjourn' takes precedence over all other matters and there is no discussion nor vote - the meeting is adjourned?"

In this regard, there is nothing in the Open Meetings Law or any other statute of which I am aware that provides an answer to your question. I point out that subdivision (8) of §153 of the County Law, entitled "Rules of procedure", states that:

> "Except as otherwise expressly provided, the board of supervisors of each county shall determine the rules of its own proceedings. Unless the rules of the board otherwise provide, no rule may be suspended except by the unanimous vote of the members present and voting at any regular or special meeting of the board."

Based on the foregoing, it is suggested that you review the rules of procedure of the Essex County Board of Supervisors to ascertain whether the issue that you raised is addressed.

I regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML AO-4443

41 State Street, Albany, New York 12231
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August 1, 2007

Hon. Joanne Gray
Councilwoman
Town of Smithtown
P.O. Box 575
Smithtown, NY 11787

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

Dear Councilwoman Gray:

We are in receipt of your request for an advisory opinion concerning application of the Open Meetings Law to certain actions of the Smithtown Town Board. In conjunction with the installation of video recording equipment in Town Hall, 4 of the 5 Town Board members sent a letter to Mr. Ira Cernitz, a member of the public, requesting that he "discontinue [his] use of the tripod and extensive electrical cords, as they are obtrusive and pose a hazard to the public." Mr. Cernitz has recorded meetings of the Town Board on a number of occasions. In this regard, we offer the following comments.

First, although there is nothing in the Open Meetings Law with respect to the ability to audio or visually record open meetings, there is a series of judicial decisions pertaining to the use of recording equipment at meetings that consistently apply certain principles. One is that a public body, such as the Town Board, has the ability to adopt reasonable rules concerning its proceedings. The other involves whether the use of the equipment would be disruptive.

By way of background, until 1978, there had been but one judicial determination regarding the use of the recording devices at meetings of public bodies. The only case on the subject was Davidson v. Common Council of the City of White Plains, 244 NYS2d 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 to 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 NYS2d 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).

Several years later, the Appellate Division unanimously affirmed a decision which annulled a resolution adopted by a board of education prohibiting the use of tape recorders at its meetings and directed the board to permit the public to tape record public meetings of the board [Mitchell v. Board of Education of Garden City School District, 113 AD2d 924 (1985)]. In so holding, the Court stated that:

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

> recording goal of a fully informed citizenry, we accordingly affirm the judgement annulling the resolution of the respondent board of education" (id. at 925).

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

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

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

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

In Peloquin v. Arsenault [616 NYS2d 716 (1994)], the court focused primarily on the manner in which camera equipment is physically used and found that the unobtrusive use of cameras at open meetings could not be prohibited by means of a "blanket ban." The Court expansively discussed the notion of what may be "obtrusive" and referred to the Mitchell holding and quoted from an opinion rendered by this office as follows:

> "On August 26, 1986 the Executive Director of the Committee on Open Government opined (OML-AO-1317, p.3) with respect to *video* recording as follows:
>
> > 'If the equipment is large, if special *lighting* is needed, and if it is obtrusive and distracting, I believe that a rule prohibiting its use under those circumstances would be reasonable. However, if advances in technology permit video equipment to be used without special lighting, in a stationary location and in an unobtrusive manner, it is questionable in my view whether a prohibition under those circumstances would be reasonable.'

"On April 1, 1994, Mr. Freeman further opined (OML-AO-2324) that a county legislature's resolution limiting hand held camcorders to the spectator area in the rear of the legislative chamber was not per se unreasonable but rather, as challenged, it depended for its legitimacy on whether or not the camcorders could actually record the proceedings from that location.

"Blanket prohibition of audio recording is not permissible, and it is likely that the appellate courts would find that also to be the case with blanket prohibitions of video recording. However, what might be reasonable in one physical setting - a village board restricting camcording to the rear area of *its* meeting room - might not be in another - the larger chambers of a county legislature (OML-AO-1317, supra). It might well be reasonable in a village or other space-restricted setting to restrict the number of camcorders to one, as the court system may with its pooling requirement for video coverage of trials (22 NYCRR Parts 22 and 131). Such a requirement might be viewed as unreasonable in a large county legislative chamber or where a local board of education is conducting a meeting in a school auditorium.

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

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

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

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

From our perspective, when the basis for the policy denying use of visual recording devices, as in Peloquin, involves a "distaste for appearing on public access television", such 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 NYS2d 513, 305 AD2d 83 (2003)].

A factual determination of whether use of recording equipment might detract from the deliberative process or create a hazard can only be made by a court; however, it is our opinion that when the same recording device has been used unobtrusively and without endangering those in attendance at many meetings, and perhaps over a period of years, it would not suddenly become disruptive. As in Csorny, *supra*, "This is not to say that the Board lacks any authority to regulate the use of cameras at its meetings. It certainly has the authority to impose reasonable regulations upon the public's use of video cameras at its public meetings so as to ensure that cameras do not genuinely interfere with the work at hand." Csorny at 92, 519. In our opinion, a camera mounted on a stationary tripod, located in an area that does not prevent the public from observing the members of the public body is neither obtrusive nor disruptive to the deliberative process, and should be permitted to continue.

Further, although you did not question it, we note that the letter that was sent to Mr. Cernitz, that you refused to sign, was circulated to the Town Board members, rather than being discussed and approved at a public meeting. From our perspective, 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.

In this regard, §102(1) of the Open Meetings Law defines the term "meeting" to mean "the official convening of a public body for the purpose of conducting public business, 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 or a convening that occurs through videoconferencing.

The provisions in the Open Meetings Law concerning videoconferencing are relatively recent (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, by e-mail, or, as in this instance, by signing a letter in serial fashion at different times, would be inconsistent with law.

We 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 our 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..."

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 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.

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

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:jm

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August 1, 2007

Mr. Mark M. Rider
Saratoga County Attorney
Saratoga County Municipal Center
40 McMaster Street
Ballston Spa, NY 12020

The staff of the Committee on 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. Rider:

We are in receipt of your request for an advisory opinion concerning application of the Open Meetings Law to an executive session held by the Saratoga County Board of Supervisors. While I recall speaking with one of the Board members concerning an executive session, I do not recall the exact details we discussed. Accordingly, the opinions indicated below are based only on the facts provided in your correspondence.

First, 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 to compel an entity to comply with the statutory provisions. Only a court can determine whether an executive session is held in violation of the Open Meetings Law. 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.

Second, the Open Meetings Law is based on a presumption of openness and requires that meetings of public bodies be conducted open to the public, except to the extent that there is a basis for entry into an executive session. Paragraphs (a) through (h) of §105(1) specify and limit the grounds for entry into executive session.

Pertinent in the context of your inquiry is paragraph (f), which states that a public body may conduct an executive session to discuss:

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

A separate question arises concerning the authority of the Board of Supervisors. Since we are not experts concerning the powers and duties of such boards, we cannot offer unequivocal guidance. The question involves whether a board of supervisors has the authority to seek to discipline, suspend, dismiss or remove its chairman. As you indicate, §450 of the County Law sets forth the responsibilities and authority of the chairman of the board of supervisors. Sections 151 and 450 indicate that the chairman is selected by the board of supervisors and that s/he serves for a specific term, and also the absence of any statutory authority enabling the board to remove or discipline the chairman. If, as you indicated, "the Board could have resolved to take action against the Chair, such as to remove him, to ask for his resignation as Chair of the Board, to censor [sic] him or to vote 'no confidence in him'", it would appear that a discussion concerning the possibility of doing so could be conducted during an executive session under §105(1)(f). Such a discussion would apparently involve a matter leading to the discipline or removal of a particular person. However, if no such authority exists, it does not appear than an executive session could properly have been held to discuss the issues you described.

Further, we note the motion was made for entry into executive session "to discuss a personnel matter." Although it is used frequently, the term "personnel" appears nowhere in the Open Meetings Law. Although §105(1)(f) 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.

If the discussion of how well or how poorly a particular person was carrying out his/her duties expanded to include issues of policy or procedure, for example, we believe that the Board has an obligation to return to the public portion of the meeting to comply with law.

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 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.

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 NY2d 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 NY2d 573, 575; 209 AD2d 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.

Again, on behalf of the Committee on Open Government we reiterate that 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.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:jm

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August 1, 2007

Ms. Terry Dolfini
[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. Dolfini:

I have received your letter and hope that you will accept my apologies for the delay in response. Your referred to "the use of concealed high tech listening devices" and asked that I "prepare a ruling on prohibiting the use of said devices at an open Board of Education meeting."

In this regard, it is emphasized at the outset that the Committee on Open Government is authorized to provide advice and opinions pertaining to open government laws; the Committee is not empowered to issue a ruling that is binding. That being so, the following comments should be considered advisory.

First, the Open Meetings Law pertains to meetings of public bodies, such as boards of education, and its statement of intent provides in part that the public must have the ability "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 that statement, the intent of the Open Meetings Law is clear, that the public should have the capacity observe and hear the activities of public bodies during meetings.

Second, although the Open Meetings Law is silent with respect to the right of members of the public present at meetings to speak or otherwise participate, many public bodies permit public participation, and in those instances, what is expressed publicly during an open meeting can and should be heard by anyone present. I do not believe, however, that the Open Meetings Law is intended to authorize or permit persons with "concealed high tech listening devices" to eavesdrop or overhear the remarks or conversations that are made privately. The leading case involving the use of tape recorders focused on remarks made publicly, for the decision states that:

> "Those who attend such meetings, *and who decide to freely speak out* and voice their opinions, fully realize that their comments and remarks are being made *in a public forum*" [Mitchell v. Board of Education, 113 AD2d 924, 925 (1985); emphasis added]. When persons who attend open meetings "freely speak out" during a "public forum", as the court suggested, they recognize that there is no expectation of privacy. That being so, it was determined that open meetings could be recorded, and that recording could be prohibited only if the use of a recording device is obtrusive or disruptive.

A key element of the decision involved the ability of a public body to adopt rules to govern its own proceedings, specifying that such rules must be reasonable. A general prohibition concerning the use of recording devices was found to be unreasonable. However, it was also indicated that a prohibition would be proper when the use of a recording device is obtrusive or disruptive.

In consideration of judicial precedent, I believe that a public body could adopt a rule permitting listening or recording devices to be used for the purpose of capturing what is expressed freely, openly and in a public forum. Such a rule could, in my opinion, also prohibit the use of such devices to eavesdrop or overhear private conversations or remarks not intended to be expressed openly and in a public forum.

Lastly, I note that §250.05 of the Penal Law, entitled "Eavesdropping", states that:

> "A person is guilty of eavesdropping when he unlawfully engages in wiretapping , mechanical overhearing of a conversation, or intercepting or accessing of an electronic communication.
>
> Eavesdropping is a class E felony."

Section 250.00(2) of the Penal Law defines "mechanical overhearing of a conversation" to mean:

> "...the intentional overhearing or recording of a conversation or discussion, without the consent of at least one party thereto, by a person not present thereat, by means of any instrument, device or equipment."

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

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August 1, 2007

Hon. Paul E. Haney
Legislator
Monroe County Legislature
424 Broadway, Suite B
Rochester, NY 14607

The staff of the Committee on 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. Haney:

I have received your letter and apologize for the delay in response. You have sought an advisory opinion concerning the status of the Monroe County Audit Committee ("the Committee") under the Open Meetings Law.

According to the documentation accompanying your letter, the Committee was created by law, and its composition, powers and duties are delineated in the Monroe County Charter, Article VI(4). In brief, in paragraph (a), the Charter requires that the Committee consist of seven members, including two from the County Legislature, two from the County administration, and three from outside of the Legislature or the administration who are certified public accountants. The members serve two year terms. Paragraph (b) states that the Chairperson of the Committee shall be "from outside of the Legislature and administration", that four members shall constitute a quorum, and that a "majority vote of the total Audit Committee (i.e., four votes) shall be required for Committee approval of any matter." Included among a variety of powers and duties in paragraph (c) is the responsibility to "To receive from the Director of Finance on or before March 15, and approve within 30 days of receipt, the presentation of the County's annual internal audit plan..."

Based on the foregoing, I believe that the Committee clearly falls within the requirements of the Open Meetings Law.

As you may be aware, the Open Meetings Law is applicable to public bodies, and §102(2) defines the phrase "public body" to mean:

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

Based on the provisions of the County Charter referenced earlier, each of the conditions necessary to conclude that the Committee constitutes a public body can, in my view, be met. The Committee consists of seven members; it conducts public business when carrying out its duties; it must do so by means of a quorum, and it performs a governmental function for Monroe County, which is a public corporation, particularly through its power to approve an internal audit plan.

In short, in my opinion, each of the conditions necessary to determine that the Committee constitutes a public body subject to the Open Meetings Law is present.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

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August 2, 2007

E-Mail

TO: Hon. James R. Blye, Town of Avon

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 Councilman Blye:

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

You referred to a situation in which the Avon Town Board included on its agenda reference to a proposed contract between the Town and a cell phone provider. A resident had obtained "a copy of the unsigned contract and wanted to go over a number of different points that he disagreed about." Soon after that discussion began, the Town Attorney "recommended in light of the fact that this was still an unsigned contract and we had an agenda yet to cover, we go into executive session at the end of the meeting and invite this citizen to join us, which he did." You wrote that there was "a claim that [the Board] violated the open meetings laws and should not have gone into executive session." You have sought an opinion on the matter.

Without additional detail concerning the substance of the discussion in executive session, I cannot offer unequivocal guidance. Nevertheless, I offer the following comments.

First, the Open Meetings Law requires that a procedure be accomplished, during an open meeting, before a public body, such as a town board, 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.

Second, 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 would appear that the only ground for entry into executive session that might have applied would have been §105(1)(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..."

Insofar as the discussion might have involved, for example, the financial history of a particular corporation (the cell tower company), an executive session would likely have been proper. However, if it did not deal with any of the qualifying topics indicated in the provision quoted above, I do not believe that an executive session could properly have been held.

I hope that I have been of assistance.

RJF:jm

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August 3, 2007

Ms. Susan Robertson
[redacted]

Dear Ms. Robertson:

Thank you for your July 3, 2007 correspondence addressed to Governor Eliot Spitzer in support of legislation to require homeowners' associations to operate in an open and democratic manner. Your correspondence was forwarded to this office for a response, and we offer the following comments.

As you may be aware, the Open Meetings Law applies to public bodies, and §102(2) of that statute defines the phrase "public body" to mean:

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

Based on the foregoing, the Open Meetings Law is applicable to governmental entities; it does not apply to private or non-governmental organizations such as homeowners' associations.

Similarly, the Freedom of Information Law applies to agency records, and "agency" is defined in §86(3) to include:

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

In short, the Freedom of Information Law pertains to the obligation of state and local government to disclose records. That statute does not apply to private entities, i.e., homeowners' or condominium associations.

Because there is no state law pertaining to those entities that requires openness, transparency or disclosure analogous to that required of government, it is suggested that you express your views to those who have the ability to introduce legislation, specifically, members of the state senate and assembly. You might also seek the support of others that may be influential, such as the AARP.

We appreciate your thoughts on this matter and hope that we have been of assistance.

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

cc: ECO

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August 3, 2007

E-Mail

TO: Mr. Gary L. Rhodes

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. Rhodes:

I have received your letter in which you asked whether a town board may conduct an executive session "to discuss a vacancy on a planning board." You suggested that an executive session could not be held because "there should not have been any personnel matters to discuss."

In my opinion, a town board would have the authority to enter into executive session to discuss the characteristics of individuals who might be appointed to serve on a planning board.

It is noted that the term "personnel" appears nowhere in the Open Meetings Law, and that the language of the provision often cited to discuss so-called personnel is precise. That provision, §105(1)(f), authorizes a public body, such as a town board, to enter into executive session to discuss:

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

The terms of the provision quoted above are not restricted to topics pertaining to employees; rather, they include items as they relate to a "particular person or corporation." Because a discussion concerning the choice of an individual to be appointed to a planning board involves a matter "leading to the appointment...of a particular person", I believe that it could be properly be held during an executive session.

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

RJF:jm

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August 6, 2007

Mr. Kyle York
[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. York:

We are in receipt of your correspondence and accompanying DVD concerning the Department of Environmental Conservation's responsibility to address public concerns concerning dredging of the Hudson River at Queensbury, near Moreau Lake State Park. Specifically, you allege in your letter that a citizens advisory council "met behind closed doors, with no public records at all" and that "[a] CAC is an *option* for the Commissioner of DEC ... but the meetings must be made public. This CAC was special" (emphasis yours). You further indicate that, by law, citizen advisory councils "MUST have public participation with 'Open House' presentations of any clean-up plan. And by law, they MUST allow public participation through Public Hearings." While we did not take the time to watch the 80 minute presentation you submitted, and we cannot confirm that an advisory council was formed by law with respect to the issue that you describe, we offer the following general comments with respect to the requirements imposed by the Open Meetings and Freedom of Information Laws.

First, the Committee on Open Government is authorized to issue advisory opinions concerning application of the Open Meetings and Freedom of Information Laws, however, 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.

Second, although we are not experts with respect to the Environmental Conservation Law, we believe that an advisory council formed by law is likely a public body subject to the Open Meetings Law.

Section 102(2) of that statute defines the phrase "public body" to mean:

> "...any entity for which a quorum is required in order to conduct public business and which consists of two or more members,

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

Judicial decisions indicate generally that advisory bodies having no power to take final action, other than committees consisting solely of members of public bodies, fall outside the scope of the Open Meetings Law. As stated in those decisions: "it has long been held that the mere giving of advice, even about governmental matters is not itself a governmental function" [Goodson Todman Enterprises, Ltd. v. Town Board of Milan, 542 NYS2d 373, 374, 151 AD2d 642 (1989); Poughkeepsie Newspapers v. Mayor's Intergovernmental Task Force, 145 AD2d 65, 67 (1989); see also New York Public Interest Research Group 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)].

In the decisions cited above, none of the entities were designated by law to carry out a particular duty and all had purely advisory functions. More analogous to your questions may be the decision rendered in MFY Legal Services v. Toia [402 NYS2d 510 (1977)]. That case involved an advisory body created by statute to advise the Commissioner of the State Department of Social Services. In MFY, it was found that "[a]lthough the duty of the committee is only to give advice which may be disregarded by the Commissioner, the Commissioner may, in some instances, be prohibited from acting before he receives that advice" (id. 511) and that, "[t]herefore, the giving of advice by the Committee either on their own volition or at the request of the Commissioner is a necessary governmental function for the proper actions of the Social Services Department" (id. 511-512).

Accordingly, if an advisory council performs a necessary and integral function in the implementation of the Environmental Conservation Law, and/or if the Department could not act without first having consulted with such council, we believe that the council would be performing a governmental function and, therefore, would be a public body subject to the Open Meetings Law.

Third, 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, 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.

Further, while the Department may be required by law or regulation to hold public hearings at particular junctures in the deliberative process, from our perspective, hearings may be different than meetings. 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 public 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. 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. We believe that it would be unreasonable, for example, to authorize those with one point of view to speak for ten minutes or perhaps without limitation, while permitting those with a different view to speak for three minutes or not at all.

If it is contended that a hearing was not conducted reasonably, the potential remedies, if they can be characterized as such, would involve offering complaints to those who conducted the hearing or the initiation of a judicial proceeding under 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.

Turning to your allegations that records were removed from the Department's website and that they may no longer exist, there is nothing in the Freedom of Information Law that requires a state agency to make certain records available on a website.

Relevant is §86(3) of the Freedom of Information Law, that 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 definition, an "agency" is a governmental entity performing a governmental function, such as the Department of Environmental Conservation. If the council described above is a public body for purposes of the Open Meetings Law because it performs a governmental function, for the same reason, it would be an agency for purposes of the Freedom of Information Law.

In general, 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. While we are not aware of the specific records that you have requested, the following discussion pertains to the authority of an agency to withhold a particular type of records.

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.

Accordingly, if the council is an agency, §87(2)(g) would apply to records exchanged with the Department, and portions of those records would be required to be released upon request unless a different ground for denial could appropriately be asserted. Records exchanged between the Department and a private entity, such as Niagara-Mohawk, on the other hand, would not be considered inter-agency or intra-agency records, and this provision would not apply. Similarly, if there is an advisory council that is not a public body, not performing a governmental function as an "agency", but only rendering advice to the Department, §87(2)(g), in our opinion, would not apply to records exchanged between the Department and the council and would be required to be made available upon request.

Finally, the Freedom of Information Law provides direction concerning the time and manner in which the Department and other 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.

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

OML-AO-4151

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August 7, 2007

Kenneth Jaffe, MD
Alliance for Meredith
[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. Jaffe:

Your letter addressed to Camille Jobin-Davis of this office has been forwarded to me. Please accept our apologies for the delay in response.

You described a joint meeting of the Town Board and the Planning Board of the Town of Meredith to discuss a draft ordinance that would regulate industrial wind development in the Town. According to minutes of the meeting prepared by the Town Clerk, a motion was approved to enter into executive session "for a report from the Town Attorney on the litigation consequences of the various elements of potential wind energy legislation..." However, the tape recording prepared by the Town Clerk indicates that a motion for entry into executive session was made "for the purpose of discussing the legal implications of the various strategies...." You added that "[n]o pending or threatened litigation was cited by the Town Board members or the attorney", and that there was "no existing or threatened litigation concerning this issue that has been mentioned in public sessions or privately by town officials."

Although the correspondence attached to your letter indicates familiarity with the Open Meetings Law and judicial precedent, you sought an opinion concerning "the purpose used before entering executive session" described above. You also sought our views concerning a statement that "'comfort' of the town officials is valid reason for closed door meetings of public bodies." In this regard, I offer the following comments, which are based on the assumption that the tape recording of the meeting is the accurate rendition of what actually was expressed.

First, the Open Meetings Law requires that a procedure be accomplished, during an open meeting, before a public body, such as a town board or a planning board, may enter into an executive session. Section 105(1) states in relevant part that:

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

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

Second, it has been held judicially that :

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

In my opinion, a discussion of "the legal implications of the various strategies" would not constitute a valid basis for entry into executive session. On occasion, reference is made to executive sessions to discuss "legal matters". That subject, very simply, does not, without more, fall within any of the grounds for entry into executive session.

As you are aware, §105(1)(d) authorizes a public body to conduct an executive session to discuss "proposed, pending or current litigation." Many discussions involving legal strategies or legal matters are unrelated to litigation. Further, 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. As I understand the matter, no litigation had been proposed or threatened, and the discussion did not involve litigation strategy. If that is so, I do not believe that there would have been a valid basis for entry into executive session.

Lastly, as indicated above, the Open Meetings Law specifies the subjects that may properly be discussed during an executive session. If a topic does not fall within one or more among the eight grounds for entry into executive session, when it is considered during a meeting of a public body, it must be discussed in public, irrespective of the discomfort experienced by government officers or employees.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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OML-AO-4452

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August 8, 2007

Mr. Gary L. Rhodes
[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. Rhodes:

I have received your letter, which is dated April 15, but which did not reach this office until April 27. Please accept my apologies for the delay in response. In consideration of your remarks, I offer the following comments, primarily for the purpose of clarification.

First, the title of the Freedom of Information Law may be somewhat misleading. It is not a vehicle that requires that government officers or employees provide information in response to questions. They may choose to do so, and many do, but they are not required by that law to do so. Rather, that statute pertains to existing records, and §89(3) states in part that an agency, such as a town, is not required to create a record in response to a request.

Second, it has been held that an agency need not honor a request for records that have previously been made available to the person seeking them, unless that person can demonstrate that neither he/she nor his/her representative (i.e., that person's attorney) any longer has possession of the records [see e.g., Moore v. Santucci, 151 AD2d 677 (1989)].

Third, you wrote that the Town Board "routinely goes into executive session even to discuss vacancies on boards, which [you] do not understand that is done or allowed. As you may recall, the Open Meetings Law requires that meetings of public bodies be conducted open to the public, except to the extent that an executive session may properly be held. Paragraphs (a) through (h) of §105(1) specify and limit the topics that may properly be discussed during an executive session.

The subject of executive sessions to discuss vacancies on boards was considered in an advisory opinion sent to you earlier this month. In short, it is clear in my opinion that a public body may conduct an executive session pursuant to §105(1)(f) to weigh the strengths and/or weaknesses of those under consideration for appointment, unless the matter involves a vacancy in an elective office [Gordon v. Village of Monticello, Supreme Court, Ulster County, August 5, 1995, modified, 207 AD2d 55, reversed on other grounds, 87 NY2d 124 (1995)].

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: Henderson Town Board

OML-AO-4453

From: Freeman, Robert (DOS)
Sent: Wednesday, August 08, 2007 10:04 AM
To: burkk
Subject: Farmingdale Student Government/OML

Dear Ms. Burke:

I have received your correspondence in which you referred to notice of a meeting of the Farmingdale Student Government indicating that a meeting would begin at "7:00 p.m. Sharp", that "All are welcome", and that "Arrivals after 7:10 p.m. will not be admitted." You have asked whether the Farmingdale Student Government has "the right to deny access" to a meeting "at any time during the meeting" and whether "closing the doors" at 7:10 p.m. would "constitute a violation of the Open Meetings Law."

In this regard, §103(a) of the Open Meetings Law states in relevant part that "Every meeting of a public body shall be open to the general public..." That provision and §105(1) specify that the only portions of a meeting that may be closed involve the ability of a public body to conduct an executive session. Section 102(3) defines the phrase "executive session" to mean a portion of a meeting during which the public may be excluded. In consideration of those provisions, I believe that the public has the right to attend any portion of a meeting, except an executive session, irrespective of the time when a person chooses to attend a meeting. Public bodies often prepare agendas indicating that a variety of topics may be discussed during a meeting, and depending on a person's interest, he or she may choose to attend the entirety of the meeting any portion thereof. In short, in my view, excluding the public from any portion of an open meeting by "closing the doors" would constitute a failure to comply with law.

I hope that I have been of assistance.

cc: Farmingdale Student Government

Robert J. Freeman
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STATE OF NEW YORK
DEPARTMENT OF STATE
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August 8, 2007

Mr. Kenneth F. Dillon
[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. Dillon:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to requests made to the Schuyler County Sheriff's Department, the New York State Police and the Town of Montour. In an effort to address all issues raised in your requests and your correspondence, we offer the following.

From our perspective, unless the records maintained by the Sheriff's Department were sealed pursuant to law, the response that you received was inconsistent with law. Specifically, although you were provided access to incident reports, you were denied access to complaints, informations, depositions, records of arrest, appearance tickets, duty roster records and a list of evidence on the ground that "we do not release" such records. Further, you requested reimbursement of the $10 fee for copies of incident reports, based on Executive Law §646, which states that "[a] victim of crime shall be entitled, regardless of physical injury, without charge to a copy of a police report of the crime."

First and most importantly, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) 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 our view, the phrase quoted in the preceding sentence evidences a recognition on the part of the Legislature that a single record or report, for example, might include portions that are available under the statute, as well as portions that might justifiably be withheld. That being so, we believe that it also imposes an obligation on an agency to review records sought, in their entirety, to determine which portions, if any, might properly be withheld or deleted prior to disclosing the remainder.

The state's highest court, the Court of Appeals, expressed its general view of the intent of the Freedom of Information Law in Gould v. New York City Police Department [89 NY2d 267 (1996)], stating that:

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

Just as significant, the Court in Gould repeatedly specified that a categorical denial of access to records is inconsistent with the requirements of the Freedom of Information Law. In that case, the 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), an exception separate from that to which allusion was made in response to your request. The Court, however, wrote that: "Petitioners contend that because the complaint follow-up reports contain factual data, the exemption does not justify complete nondisclosure of the reports. We agree" (id., 276), and stated as a general principle that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government" (id., 275). The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, stating that:

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

Second, with respect to your request for copies of complaints filed by persons other than yourself, we note that the exception to rights of access of primary significance pertains to the protection of privacy, and §87(2)(b) permits an agency to deny access to records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." In the context of your inquiry, it has generally been advised that those portions of a complaint or other record which identify complainants may be deleted on the ground that disclosure would result in an unwarranted invasion of personal privacy. We point out that §89(2)(b) states that an "agency may delete identifying details

when it makes records available." Further, the same provision contains five examples of unwarranted invasions of personal privacy, the last two of which include:

> "iv. disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject party and such information is not relevant to the work of the agency requesting or maintaining it; or
>
> v. disclosure of information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency."

In our view, what is relevant to the work of the agency is the substance of the complaint, i.e., whether or not the complaint has merit. The identity of the person who made the complaint is often irrelevant to the work of the agency, and in most circumstances, we believe that identifying details may be deleted. If the deletion of personally identifying details is insufficient to ensure that the identity of complainant will not become known, other portions of the complaints may, in our view, be withheld. Copies of records memorializing a complaint that you made, in our opinion, should be made available to you, as disclosure would not involve an unwarranted invasion of personal privacy.

Third, in our view, unless arrest records, appearance tickets or citations have been sealed pursuant to §§160.50 or 160.55 of the Criminal Procedure Law, they must be disclosed. Under §160.50, when criminal charges have been dismissed in favor of an accused, the records relating to the arrest ordinarily are sealed. Under §160.55, if a charge of a felony or misdemeanor is reduced to a violation, although the records relating to the event in possession of agencies, such as a police department or office of a district attorney, are sealed, they remain available from the court in which the matter was determined. We note, however, that the sealing requirement does not apply in the case of a charge of driving while impaired, and that a record of such an arrest is not sealed unless the charge is fully dismissed.

While arrest records are not specifically mentioned in the current Freedom of Information Law, the original law granted access to "police blotters and booking records" [see original law, §88(1)(f)]. In our opinion, even though reference to those records is not made in the current statute, we believe that such records continue to be available, for the present law was clearly intended to broaden rather than restrict rights of access. Moreover, it was held by the Court of Appeals several years ago that, unless sealed under §160.50 of the Criminal Procedure Law, records of the arresting agency identifying those arrested, i.e., booking records, must be disclosed [see Johnson Newspapers v. Stainkamp, 61 NY 2d 958 (1984)].

Unless sealed, these records would in our opinion be available in great measure, if not in their entirety. Portions of such records that might be withheld, depending on the facts and circumstances, would involve the identities of witnesses, for example. If the identities of witnesses have not yet been disclosed or are not part of a public court record, those portions of the records might be deleted on the ground that disclosure would result in an unwarranted invasion of personal privacy pertaining to those persons.

With respect to your request for "duty roster reports/records detailing what deputies were on duty on November 7, 2006" we note that §89(3) states in part that an agency, such as a town, is not required to create or prepare a record in response to a request.

In a related vein, however, we note that the Freedom of Information Law pertains to all agency records, and that §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."

Therefore, insofar as the Town maintains records, irrespective of their physical form, that contain the information requested, we believe that they would be subject to rights of access conferred by the Freedom of Information Law. Again, assuming that records exist identifying those on duty on a particular date, we believe that they would be required to be made available.

With respect to your request for a list of evidence collected and your request to the New York State Police for incident reports that were denied on the grounds that "they are records which were compiled for law enforcement purposes and which, if disclosed, would interfere with judicial proceedings and/or would constitute an unwarranted invasion of personal privacy of those concerned", we note that several of the grounds for denial might be pertinent and serve to enable a law enforcement agency to withhold portions, but not the entire contents of requested records, as discussed above.

For example, the provision at issue in a decision cited earlier, Gould, supra, §87(2)(g), enables an agency to withhold records that:

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

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

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

Often the most relevant provision concerning access to records maintained by law enforcement agencies is §87(2)(e), which permits an agency to withhold records that:

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

In our view, the foregoing indicates that records or portions thereof compiled for law enforcement purposes can only be withheld to the extent that disclosure would result in the harmful effects described in sub- paragraphs (i) through (iv) of §87(2)(e).

When a trooper or police officer is called to a certain location, the presence of that person with his or her vehicle is not secret. It is an event that can be known by any person present or any passerby. That being so, we believe that a record or portion of a record indicating that a state trooper or other police officer visited a certain address must be disclosed. Additional details contained within that record or related records might properly be withheld. For instance, if there is a notation that there was a domestic dispute, but there was no arrest or charge, it has been advised that such a notation may be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy. Nevertheless, a notation that a visit was made to 210 Main Street at a certain time, without more, would, in our view, be accessible, for it would reflect the content of the traditional police blotter entry described by the Appellate Division in Sheehan v. City of Binghamton, [59 AD2d 808 (1977)].

In sum, arrest and incident reports, by their nature, differ in content from one situation or incident to another. To suggest that they may be withheld in their entirety, categorically, in every instance, is in our opinion contrary to both the language of the Freedom of Information Law and its judicial construction by the state's highest court.

With respect to your questions concerning the appropriate fee for obtaining copies of records, the specific language of the Freedom of Information Law and the regulations promulgated by the Committee on Open Government indicate that, absent statutory authority, an agency may charge fees only for the reproduction of records. Section 87(1)(b) of the Freedom of Information Law states:

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

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

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

One of the rare instances in which an agency may charge a fee different from that generally permitted by the Freedom of Information Law relates to the situation that you described. Specifically, §66-a of the Public Officers Law, a statute that deals with accident reports and certain other records maintained by the Division of State Police, provides in subdivision (2) that:

> "Notwithstanding the provisions of section twenty-three hundred seven of the civil practice law and rules, the public officers law, or any other law to the contrary, the division of state police shall charge fees for the search and copy of accident reports and photographs. A search fee of fifteen dollars per accident report shall be charged, with no additional fee for a photocopy. An additional fee of fifteen dollars shall be charged for a certified copy of any accident report. A fee of twenty-five dollars per photograph or contact sheet shall be charged. The fees for investigative reports shall be the same as those for accident reports."

Based on the foregoing, it is clear that a statute separate from the Freedom of Information Law authorizes the Division of State Police to charge fifteen dollars for the search and copy of accident reports. It is not clear, however, what authority the State Police relies on to change your $10.00 for copies of incident reports, unless those reports may be characterized as "investigative reports." We are familiar with the provisions of Executive Law §646, however, we are not aware of the legislative intent behind its construction, or any judicial interpretation.

Although compliance with the Freedom of Information Law involves the use of public employees' time and perhaps other costs, the Court of Appeals has found that the Law is not intended to be given effect "on a cost-accounting basis", but rather that "Meeting the public's legitimate right of access to information concerning government is fulfillment of a governmental obligation, not the gift of, or waste of, public funds" [Doolan v. BOCES, 48 NY 2d 341, 347 (1979)].

We turn now to your repeated requests to the Town of Montour, for "certified, return receipts and/or any other items of evidentiary proof that each and every member of the Town of Montour Town Board was notified in writing at least two (2) days prior to the town meeting held on November 12, 2006, as required by Town Law §62 and Public Officers Law §104" and "certified copies of the proof of publication of notice for the public hearing of November 13, 2006, as required by Town Law §108 and Public Officers Law §104." In response to your requests, the Records Access Officer indicated that "the Town of Montour is not the custodian of such record(s)."

It is not clear what "is not the custodian of records" means in this instance, or what the records access officer intended it to mean in response to your request. We note that the provision of Town Law to which you refer, §62, requires "two days notice in writing to members of the board" be given prior to special meetings, but that it does not require that written notice be delivered in a particular fashion, i.e., by certified letter. In contrast, the other provision of Town Law that you reference, §108, requires that notice of a public hearing on a preliminary budget "...shall be published at least once in the official newspaper...". Accordingly, while the Town would not be required by law to maintain copies of records indicating that notice of a special meeting was sent via certified or return receipt mail, because the Town is required to provide written notice of a special meeting and to publish notice of a public hearing on a preliminary budget, if records confirming that requirement exist, the Town would be required to produce them in response to your request.

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

Further, we note that §104 of the Open Meetings Law pertains to notice and states that:

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

> 3. The public notice provided for by this section shall not be construed to require publication as a legal notice.
>
> 4. If videoconferencing is used to conduct a meeting, the public notice for the meeting shall inform the public that videoconferencing will be used, identify the locations for the meeting, and state that the public has the right to attend the meeting at any of the locations."

This section imposes a dual requirement, for notice must be posted in one or more conspicuous, public locations, and in addition, notice must be given to the news media. The term "designated" in 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 town hall has been designated as a location for posting notices of meetings, the public has the ability to know where to ascertain whether and when meetings of the 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.

To clarify, please note the 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 to 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.

The town's response to your request for copies of minutes reflecting town board's decision to conduct a public hearing on November 13, 2006, again, is confusing. 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. In this instance, it is our opinion that the response from the Town, indicating that the Town "is not the custodian of such record(s)" constitutes a constructive denial of access, and can be appealed.

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

OML-AO-4455

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August 9, 2007

Ms. Sarah J. Nicholas
[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. Nicholas:

I have received your letter and hope that you will accept my apologies for the delay in response.

You attached a newspaper article concerning a lawsuit brought by employees of the City of Long Beach who contended that the three republican members of the City Council fired them because they are democrats. The City Council consists of five members. It was held by the U.S. Court of Appeals, in the words of the article, that "it made no difference that the firings might have been planned in secret and with partisan political input." The alleged plan to fire the employees was later confirmed by means of action approved by a majority of the Council at a Council meeting. You have sought my views on the matter as it relates to the Open Meetings Law.

In this regard, ordinarily, a gathering of a majority of the members of a public body, such as the City Council, for the purpose of discussing public business would constitute a "meeting" that falls within the coverage of the Open Meetings Law. Every meeting must be preceded by notice given in accordance with §104 of that statute and conducted open to the public, unless an executive session may properly be held. However, since the Open Meetings Law became effective in 1977, it has contained an exemption concerning political committees, conferences and caucuses. When a matter is exempted from the Open Meetings Law, the provisions of that statute do not apply.

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..."

Therefore, in general, either the majority or minority party members of a legislative body may conduct closed political caucuses, either during or separate from meetings of the public body. In short, a gathering of the three republican members, despite being a majority of the Council, may be conducted in private as a political caucus, outside the coverage of the Open Meetings 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:tt

OML-AO-4456

From: Freeman, Robert (DOS)
Sent: Thursday, August 09, 2007 10:34 AM
To: [redacted] Tefft, Teshanna (DOS)
Subject: Open Meetings Law

Dear Mr. Isselhard:

I have received your correspondence concerning the status of gatherings under the Open Meetings Law involving the supervisors of several towns, major landowners, and the president of a firm that develops wind energy. If I understand the situation accurately, the Open Meetings Law would not apply.

That statute is pertains to meetings of public bodies, such as town boards, county legislatures, boards of education, etc. Unless and until a quorum of a public body, a majority of its total membership, gathers to conduct public business as a body, the Open Meetings Law does not apply. The gatherings that you described, if I understand them correctly, include representatives of public bodies, but no quorum of any particular public body. If that is so, again, the Open Meetings Law would not apply.

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

Robert J. Freeman
Executive Director
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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4457

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August 10, 2007

E-Mail

TO: Mr. Mark Pribis

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. Pribis:

I have received your letter in which you sought guidance concerning the application of the Open Meetings Law.

You wrote that you serve as a member of a board of education and asked whether "email discussions among board members" would be proper or otherwise under the Open Meetings Law.

In this regard, the primary issue in my view involves the term "meeting", which is defined in §102(1) of the Open Meetings Law to mean "the official convening of a public body for the purpose of conducting public business, including the use of videoconferencing for attendance and participation by the members of the public body." Based upon an ordinary dictionary definition of "convene", that term means:

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

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

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

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

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

In a landmark decision rendered in 1978, the state's highest court, the Court of Appeals, held that any gathering of a quorum of a public body for the purpose of conducting public business constitutes a "meeting" subject to the Open Meetings Law, whether or not there is an intent to take action, and regardless of the manner in which a gathering may be characterized [see Orange County Publications, Division of Ottoway Newspapers, Inc. v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. The Court affirmed a decision rendered by the Appellate Division that dealt specifically with so-called "work sessions" and similar gatherings during which there was merely an intent to discuss, but no intent to take formal action. In so holding, the court stated:

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

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

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

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

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

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

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

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

From my perspective, communications between Board members by any means including e-mails, letters and telephone calls which generate responses and dialogue may be, but are not generally inappropriate. In my experience, there are numerous situations in which detailed communications have been prepared and disseminated to or among members of public bodies in which the Open Meetings Law is not implicated. Often those communications serve as a means of

acquiring or exchanging information, knowledge, expertise or different points of view, all of which enable members of public bodies to carry out their duties more effectively on behalf of the public.

If a member of a board having a particular interest or expertise offers information in writing to other members, by means of intra-agency memorandum or perhaps via email, I do not believe that it could be concluded that such action, by itself, would constitute a meeting, even if it leads to responses by other members. In my capacity as the director of an agency headed by a public body, I frequently transmit a variety of detailed materials to the members of the Committee on Open Government prior to its meetings in order that the members can become familiar with the issues, and to be prepared and conversant at the meetings. In some cases, the materials may be clear and convincing, thereby eliminating the need for a lengthy discussion of their contents at an upcoming meeting. I do not believe that the transmission, whether accomplished through receipt or consideration of the materials by use of email or the Postal Service, would constitute a meeting or that such activity in any way circumvents or contravenes the Open Meetings Law. If a superintendent of schools transmits materials to board members prior to meetings for the same reason, to enable the members to prepare for a meeting, I do not believe that the Open Meetings Law would be implicated. If two of the members want to discuss or communicate with respect to the content of the materials, whether briefly or in detail, unless the board consists of three members, I do not believe that the Open Meetings Law would apply or be implicated in any way.

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

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

If the members of a board of education are on a listserv or its equivalent and one member transmits an email message to all of the other members, again, the members would likely open the message at different times. But what if the receipt of a message precipitates a series of exchanges among the members? What if a majority of the members engage in instantaneous or simultaneous

communications in a chat room or by means of instant messaging on what often is known as a "buddy list"? In that situation, what might be characterized as a "virtual" meeting would occur, absent the ability of the public to know of the meeting or to observe the performance of public officials. In my view, a court would determine that a virtual convening of that nature would constitute a secret meeting held in contravention of the Open Meetings Law.

Another possible scenario pertains to what might be characterized as "serial" communications. Although it did not involve email, the decision cited at the outset, Cheevers, supra, involved an effort to take action by means of a series of telephone conversations. In that case, the court determined that the action effectively taken was a nullity. The court cited and relied upon an opinion rendered by this office and stated that:

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

In Cheevers, which involved a town board consisting of five members, one member contacted another by phone, who in turn phoned a third member, and that member phoned a fourth. Together they drafted a letter, determined to have it published and submitted a voucher for payment

by the town to a newspaper. The fifth member, who had not been contacted, contended that the action taken by means of a series of telephone conversations constituted a meeting held in violation of the Open Meetings Law, and the court agreed.

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

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

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4458

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August 10, 2007

E-MAIL

TO: David Peach

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. Peach:

I have received your letter in which you indicated that the members of the Alexandria Town Board met prior to the start of its scheduled meeting to review minutes of the previous meeting. You have questioned the status of that gathering in relation to the Open Meetings Law.

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

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

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

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

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

Based upon the direction given by the courts, when a majority of the Board is present to discuss Town business, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law. Further, if the Board intends to begin its review of the minutes or otherwise conduct public business at a particular time, notice indicating that time should be given in accordance with §104 of the Open Meetings Law.

I hope that I have been of assistance.

RJF:tt

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4459

41 State Street, Albany, New York 12231
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August 13, 2007

E-MAIL

TO: Valerie Smith

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. Smith:

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

You referred to a situation in which two members of a five member board were present at your town board's regularly scheduled meeting. After listening to "public input", you wrote that the two members "dismissed the meeting." However, the two members present "phoned a third member and waited for her to arrive, then convened the meeting an hour after the regular meeting time and proceeded to conduct business."

From my perspective, the situation that you described involving the eventual presence of the third member represented a failure to comply with law. In essence, a meeting would have been held without having given notice to as required by §104 of the Open Meetings Law. In this regard, I offer the following comments.

First, a "meeting" of a public body, such as a town board, involves a gathering of a majority of its total membership for the purpose of conducting public business. A gathering of two of five members would not constitute a meeting. However, if three of five gather to conduct public business, I believe that the gathering would be a "meeting" that falls within the scope of the Open Meetings Law.

Second, 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."

According to your letter, no notice was given after the public was dismissed or prior to the gathering of the three members of the board.

Lastly, §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."

In a related vein, although a majority of the board may have been present, it appears that there was no quorum and, therefore, no action could validly have been taken. Pertinent is §41 of the General Construction Law which provides guidance concerning quorum and voting requirements. 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, at a meeting duly held at a time fixed by law, or by any by-law duly adopted by such board of body, or at any duly adjourned meeting of such meeting, or at any meeting duly held upon reasonable notice to all of them, shall constitute a quorum and not less than a majority of the whole number may perform and exercise such power, authority or duty. For the purpose of this provision the words 'whole number' shall be construed to mean the total number which the board, commission, body or other group of persons or officers would have were there no vacancies and were none of the persons or officers disqualified from acting."

Based upon the language quoted above, a public body, such as a town board, cannot carry out its powers or duties except by means of an affirmative vote of a majority of its total membership taken at a meeting duly held upon reasonable notice to all of the members.

In sum, it appears that the notice provisions in the Open Meetings Law and that Town Law were not given effect, and that the meeting as you described was invalidly held.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

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OML-AO-4460

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August 14, 2007

E-Mail

TO: Ms. Virginia Buechele

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. Buechele:

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

If I understand the matter correctly, the Town of Poughkeepsie does not disclose records relating to items referenced on agendas of Town Board meetings. You asked whether that is appropriate, and in this regard, I offer the following comments.

First, the Freedom of Information Law pertains to all records of an agency, such as a town, for §86(4) defines the term "record" expansively to mean:

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

Based on the foregoing, whether written material is draft or final, or approved or unapproved, I believe that it would constitute a "record" that falls within the scope of the Freedom of Information Law.

Second, some aspects of the records at issue may be deniable, but others might be accessible to the public. 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. 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 Town staff or Board members and forwarded to other 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.

I note that the Court of Appeals, the State's highest court, 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 suggested earlier, intra-agency materials may be accessible or deniable in whole or in part, depending upon their specific contents.

Also relevant may be §87(2)(b), which enables an agency to withhold records or portions thereof which if disclosed would result in an unwarranted invasion of privacy. That provision might be applied with respect to a variety of matters relating to hiring, evaluation or discipline of staff, for example.

Section 87(2)(c) of the Freedom of Information Law permits an agency to withhold records to the extent that disclosure "would impair present or imminent contract awards or collective bargaining negotiations". Items within an agenda packet might in some instances fall within that exception.

I point out that although records or perhaps portions of records may be withheld, there is no requirement that they must be withheld. The Court of Appeals, the state's highest court, 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 a Board member transmits a memorandum 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 seemingly diminishing the need or rationale for withholding.

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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August 14, 2007

E-MAIL

TO: Louise Doubleday

FROM: Robert J. Freeman, Executive Director

Dear Ms. Doubleday:

As you are aware, I have received your letter concerning the appointment of a new member to the Town of Stark Planning Board. Please accept my apologies for the delay in response. You expressed concern with respect to the manner in which the new member was appointed and questioned whether that person may be engaged in a conflict of interest.

In this regard, having reviewed §271 of the Town Law concerning the creation of planning boards and the appointment of their members, there is no provision that requires that notification of an intent to appoint a member be given to the public. While some sort of notice is often given or input from the public sought prior to the designation of a new member, I know of no requirement that any such notice or opportunity must be given. I note, too, that the Town Board would have had the ability to conduct an executive session to discuss its choice of a new member. Section 105(1)(f) of the Open Meetings Law permits a public body, such as a town board, to enter into executive session to discuss:

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

Again, based on the foregoing, since a discussion involving the selection of a new member of the planning board would have involved "...a matter leading to the appointment...of a particular person," I believe that the Board would have had the authority to conduct one or more executive sessions to discuss those persons under consideration for appointment.

Lastly, the advisory jurisdiction of this office is limited to matters relating to the Freedom of Information, Open Meetings and Personal Privacy Protection Laws. Because that is so, I have neither the jurisdiction nor the expertise to offer commentary relating to conflicts of interest. It is suggested that you might review the Town's code of ethics required to be adopted pursuant to §806

of the General Municipal Law, which is found within Article 18 of the General Municipal Law, entitled "Conflicts of Interest of Municipal Officers and Employees."

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

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August 15, 2007

Mr. Henry Terry
[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. Terry:

I have received your letter and a variety of correspondence relating to it. Please accept my apologies for the delay in response. You have sought an advisory opinion concerning "various practices by the Incorporated Village of Patchogue (the 'Village') to block" your requests for records. In this regard, I offer the following comments.

First, 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." The use of the term "shall" indicates that the Village is required to prepare the certification that you requested.

Second, with respect to contentions that requests may be "overbroad", I point out that the Freedom of Information Law as initially enacted required that an applicant must seek "identifiable" records. However, since 1978 it has merely required that an applicant "reasonably describe" the records sought. Moreover, 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 our 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.

I note, too, that the request in Konigsberg involved thousands of pages of material; the volume of a request is not necessarily significant. Further, I do not believe that the Village may require that "separate" requests must be submitted.

While I am unfamiliar with the record keeping systems of the Village, to the extent that records sought can be located with reasonable effort, I believe that your requests would have met the requirement of reasonably describing the records. In Ruberti, Girvin & Ferlazzo v. Division of State Police [218 AD2d 494, 641 NYS2d 411 (1996)], one element of the decision pertained to a request for a certain group of personnel records, and the agency argued that it was not required to search its files those requested "because such records do not exist in a 'central file' and, further, that FOIL does not require that it review every litigation or personnel file in search of such information" (id., 415). Nevertheless, citing Konigsberg, the court determined that:

> "Although the record before this court contains conflicting proof regarding the nature of the files actually maintained by respondent in this regard, an agency seeking to avoid disclosure cannot, as respondent essentially has done here, evade the broad disclosure provisions FOIL by merely asserting that compliance could potentially require the review of hundreds of records" (id.).

If Village staff can locate the records of your interest with a reasonable effort analogous to that described above, it would be obliged to do so. As indicated in Konigsberg, only if it can be established that the Village maintains its records in a manner that renders its staff unable to locate and identify the records would a request fail to meet the standard of reasonably describing the records.

Additionally, the regulations promulgated by the Committee on Open Government, which have the force and effect of law, state that an agency's designated records access officer has the duty of assuring that agency personnel "assist persons seeking record to identify the records sought, if necessary, and when appropriate, indicate the manner in which the records are filed, retrieved or generated to assist persons in reasonably describing records" and further, "to contact persons seeking records when a request is voluminous or when locating the records sought involves substantial effort,

so that agency personnel may ascertain the nature of records of primary interest and attempt to reasonably reduce the volume of the records requested" (21 NYCRR 1401.2[b][2] and [3]).

Third, while the Village court may be part of the Village government, courts are not subject to the Freedom of Information Law. That statute pertains to agency records, and §86(3) of that statute defines the term "agency" to include:

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

In turn, §86(1) defines "judiciary" to mean:

> "the courts of the state, including any municipal or district court, whether or not of record."

In view of the foregoing, the courts and court records are not subject to the Freedom of Information Law. This is not intended to suggest that court records cannot be obtained. Although the courts are not subject to the Freedom of Information Law, their records are generally available under other provisions of law (see e.g., Uniform Justice Court Act §2019-a). Therefore, although records maintained by a court are not accessible based on rights conferred by the Freedom of Information Law, rights of access often exist under a different provision of law.

Fourth, the Freedom of Information Law does not address issues involving the retention and disposal of records. Article 57-A of the Arts and Cultural Affairs Law, deals with the management, custody, retention and disposal of records by local governments. For purposes of those provisions, §57.17(4) of the Arts and Cultural Affairs Law defines "record" to mean:

> "...any book, paper, map, photograph, or other information-recording device, regardless of physical form or characteristic, that is made, produced, executed, or received by any local government or officer thereof pursuant to law or in connection with the transaction of public business. Record as used herein shall not be deemed to include library materials, extra copies of documents created only for convenience of reference, and stocks of publications."

Further, §57.25 of the Arts and Cultural Affairs Law states in relevant part that:

> "1. It shall be the responsibility of every local officer to maintain records to adequately document the transaction of public business and the services and programs for which such officer is responsible; to retain and have custody of such records for so long as the records are needed for the conduct of the business of the office; to adequately protect such records; to cooperate with the local government's records

> management officer on programs for the orderly and efficient management of records including identification and management of inactive records and identification and preservation of records of enduring value; to dispose of records in accordance with legal requirements; and to pass on to his successor records needed for the continuing conduct of business of the office...
>
> 2. No local officer shall destroy, sell or otherwise dispose of any public record without the consent of the commissioner of education. The commissioner of education shall, after consultation with other state agencies and with local government officers, determine the minimum length of time that records need to be retained. Such commissioner is authorized to develop, adopt by regulation, issue and distribute to local governments retention and disposal schedules establishing minimum retention periods..."

Based on the foregoing, records cannot be destroyed without the consent of the Commissioner of Education, and local officials must "have custody" and "adequately protect" records until the minimum period for the retention of the records has been reached.

Since questions regarding the retention of tape recordings of open meetings have been the subject of numerous questions over the course of time, I would add that the minimum retention period for such records is four months.

Next, with respect minutes of meetings of public bodies, such as village boards of trustees, §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. At a minimum, however, minutes must consist of a record or summary of motions, proposals, resolutions, action taken and the vote of each member.

Lastly, 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. If, for example, the Village does not maintain "[a]n index of all submissions of village officers and employees, from 1991 till the present, pursuant to Incorporated Village of Patchogue Code §5A-12...", it would not be required to prepare an index, a new record, containing the information sought.

In a related vein, some aspects of your requests may not involve requests for records, but rather interpretations of law. For instance, you sought records pertaining to "taxation of boat slips, authorization and proposed or actual....Code sections governing the taxation of boat slips, rules, regulations, procedures", etc. If I correctly understand that request, a response might involve making a series of judgments based on opinions, some of which would be subjective, mental impressions, the strength of one's memory, and perhaps legal research. By means of analogy, in a situation in which an individual sought provisions of law that might have been "applicable" in governing certain activity, it was advised that the request was inappropriate. Specifically, the request involved "copies of the applicable provisions and pages of the Civil Service Law and applicable rules promulgated by the Department of Civil Service which govern the creation and appointment of management confidential positions" (emphasis added). In response, it was suggested that:

> "...the foregoing is not a request for records. In essence, it is a request for an interpretation of law requiring a judgment. Any number of provisions of law might be "applicable", and a disclosure of some of them, based on one's knowledge, may be incomplete due to an absence of expertise regarding the content and interpretation of each such law. Two people, even or perhaps especially two attorneys, might differ as to the applicability of a given provision of law. In contrast, if a request is made, for example, for "section 209 of the Civil Service Law", no interpretation or judgment is necessary, for sections of law appear numerically and can readily be identified. That kind of request, in my opinion, would involve a portion of a record that must be disclosed. Again, a request for laws that might be "applicable" is not, in my view, a request for a record as envisioned by the Freedom of Information Law."

From my perspective, insofar as a request involves the making of a judgment regarding the applicability of laws, it likely does not constitute a request for records properly made pursuant to the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Trustees
Patricia M. Seal, Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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August 16, 2007

E-MAIL

TO: Marcia Novek

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. Novek:

I have received your letter and the materials attached to it. You asked to be informed of "your rights" in relation to an alleged failure of the Supervisor of the Town of Manlius to disclose certain records pursuant to the Freedom of Information Law. The records pertain to a "mudslide disaster" that occurred in 2002 and which continues to affect you and your residence.

Based on a review of your correspondence, I offer the following comments.

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

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

Based on the foregoing, as a general matter, the Freedom of Information Law applies to entities of state and local government in New York, such as the Town of Manlius.

As I understand your remarks, an effort was made without success to obtain an engineering report from the attorney representing a neighbor without success. If that was so, the neighbor's attorney would not have had an obligation to disclose the report to you or others, for neither your neighbors nor their attorney would be an "agency", and the Freedom of Information Law would not have applied. You indicated, however, that you obtained the study following a request made to FEMA under the federal Freedom of Information Act, which applies to federal agencies.

That study and other records, such as a letter sent to your Congressman by the Supervisor, were not disclosed in response to your request to the Town. Here I point out that the Freedom of Information Law is expansive in its coverage, for it includes all agency records, irrespective of their authorship, origin or function. Specifically, §86(4) defines the term "record" to mean:

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

Due to the breadth of the definition quoted above, if the Supervisor maintained the report or the letter to which you referred, or any other written material falling within the scope of your request, those documents would constitute "records" subject to rights of access conferred by the Freedom of Information Law. Further, in any instance in which records sought are withheld, the law requires the person seeking the records be informed of the denial of access and the right to appeal the denial pursuant to §89(4)(a) [see regulations of the Committee on Open Government, 21 NYCRR §1401.7(b)]. If my understanding of the matter is accurate, you were not informed that any aspect of your request was denied.

Next, 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. From my perspective, neither the engineering report nor the letter to the Congressman could properly have been withheld by the Supervisor, for none of the exceptions to rights of access would have been applicable. I note, too, that in most instances, communications between a municipality and a federal agency must be disclosed. In short, it is unlikely that those documents would fall within any of the grounds for denial.

Lastly, you referred to a meeting in Town Hall involving the Supervisor and business people for the purpose of discussing repair of the damage caused by the mudslide and complained that you were informed that there were no minutes. In my view, there may have been no requirement that minutes be prepared. Provisions concerning the obligation to prepare minutes appear in §106 of the Open Meetings Law. That statute pertains to meetings of public bodies, such as town boards, and it applies when a quorum, a majority of a public body, gathers to conduct public business. If there was no quorum of the Town Board present at the gathering that you described, the Open Meetings Law would not have applied, and there would have been no obligation to prepare minutes.

I hope that I have been of assistance.

RJF:tt

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4464

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August 17, 2007

Mr. George R. Hubbard
[redacted]

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

Dear Mr. Hubbard:

I have received your letter and the materials attached to it. Please accept my apologies for the delay in response. You have sought an advisory opinion relating to the implementation of the Open Meetings Law by the Greece Central School District and its Board of Education.

One of the attachments is the Superintendent's report to the Board, which states in part: "At the Executive Session scheduled for this upcoming Tuesday, we have four items on the agenda." In relation to that statement, your first area of inquiry involves the ability of the Board or the Superintendent to schedule an executive session in advance of a meeting.

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

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

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

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

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

For the reasons expressed in the preceding commentary, a public body cannot in my view schedule an executive session in advance of a meeting. In short, because a vote to enter into an executive session must be made and carried by a majority vote of the total membership during an open meeting, technically, it cannot be known in advance of that vote that the motion will indeed be approved. However, as an alternative method of achieving the desired result that would comply with the letter of the law, rather than scheduling an executive session, the Superintendent or the Board on its agenda or notice of a meeting could refer to or schedule a motion to enter into executive session to discuss certain subjects. Reference to a motion to conduct an executive session would not represent an assurance that an executive session would ensue, but rather that there is an intent to enter into an executive session by means of a vote to be taken during a meeting.

Next, you asked whether the discussion of the "PEG Access Management Agreement" could properly have been discussed during an executive session, and whether the motion to enter into executive session was consistent with law. The minutes of the meeting indicate that a motion was made to conduct an executive session "to discuss collective negotiations and pending litigation."

As suggested earlier, subdivision (1) of §105 of the Open Meetings Law specifies and limits the topics that may properly be discussed in executive session. You wrote that the "'Draft Contract for PEG cable access' is not part of collective negotiations (pursuant to Article 14 of Civil Service Law) or any identified pending litigation." In consideration of the nature of the motion and your assertion, it does not appear that an executive session could properly have been held.

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

> "The purpose of paragraph d is "to enable is to enable a public body to discuss pending litigation privately, without baring its strategy to its adversary through mandatory public meetings' (Matter of Concerned Citizens to Review Jefferson Val. Mall v. Town Bd. Of Town of Yorktown, 83 AD2d 612, 613, 441 NYS2d 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 AD2d 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 NYS2d 44, 46 (1981), emphasis added by court].

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

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

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

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

A proper motion might be: "I move to enter into executive session to discuss the collective bargaining negotiations involving the teachers' union", if indeed that is the subject to be discussed.

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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August 20, 2007

E-MAIL

TO John O'Donnell

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'Donnell:

As you are aware, I have received your letter concerning a denial by the Town Board of the Town of Evans of requests by members of your citizens' group to speak during Board meetings.

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

Second, the Open Meetings Law clearly provides the public with the right "to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy" (see Open Meetings Law, §100). However, that statute is silent with respect to the issue of public participation. Consequently, if a public body does not want to answer questions or permit the public to speak or otherwise participate at its meetings, I do not believe that it would be obliged to do so. Nevertheless, a public body, such as a town board, may choose to answer questions and permit public participation, and many do so. When a public body does permit the public to speak, it has been advised that it should do so based upon rules that treat members of the public equally.

Although public bodies have the right to adopt rules to govern their own proceedings [see e.g., County Law, §153; Town Law, §63; Village Law, §4-412; Education Law, §1709(1)], the courts have found in a variety of contexts that such rules must be reasonable. For example, although a board of education may "adopt by laws and rules for its government and operations", in a case in which a board's rules prohibited the use of tape recorders at its meetings, the Appellate Division found that the rule was unreasonable, stating that the authority to adopt rules "is not unbridled" and

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

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

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

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

In short, I do not believe that the Board is required to permit the public to speak at its meetings. However, if it chooses to do so, it must do so, in my opinion, in a manner that is reasonable and generally consistent with the preceding commentary.

I hope that I have been of assistance.

RJF:tt

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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August 21, 2007

E-MAIL

TO: Cheri Evershed

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. Evershed:

As you are aware, I have received a variety of material from you involving issues that have arisen in the Town of Irondequoit relating to the Open Meetings and Freedom of Information Laws.

The initial issue involves your functioning as a member of the Planning Board and a request that you recuse yourself from consideration of a certain application that was about to come before the Board "because [you] made public comments during public input at a town board meeting." In my view, there is no valid reason to recuse yourself or to be bound by rules that offer you, as a planning board member, a lesser right to speak and express yourself than the public at large. From my perspective, it is the duty of elected and appointed officials to express themselves in order that the public can know how those officials feel about issues important to their communities. In the case of elected officials, the public cannot know whether candidates for public office, whether they are incumbents or challengers, merit support in an election unless those persons express their views on the issues. I ask rhetorically: could it be that members of Congress who represent us should recuse themselves from voting on legislation because they have expressed their views, pro or con, regarding bills that have not yet reached the floor for a vote? On the contrary, the public wants and needs to know how its leaders, even those like you chosen to serve on local boards, feel about issues important to the communities that they serve.

Second, you referred to a contention that "personnel issues" constitutes a proper subject for consideration in executive session. Based on judicial precedent, a motion identifying the subject to be considered in executive session in that manner is inadequate.

By way of background, the Open Meetings Law is based upon a presumption of openness. Stated differently, meetings of public bodies must be conducted open to the public, unless there is a basis for entry into executive session. Moreover, the Law requires that a procedure be

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

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

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

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

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

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

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

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 insufficient, 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.

The remaining issue involves the fee charged by the Town for a DVD containing a reproduction of a Town Board meeting. You wrote that "some if not all of the computers at town hall have the capability to burn a DVD." As it pertains to fees for copies of records, §87(1)(b) of the Freedom of Information Law states:

> "Each agency shall promulgate rules and regulations in conformance with this article...and pursuant to such general rules and regulations

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

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

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

Based upon the foregoing, it is likely that a fee for "burning a DVD" would involve the cost of a DVD.

Lastly, although compliance with the Freedom of Information Law involves the use of public employees' time and perhaps other costs, the Court of Appeals has found that the Law is not intended to be given effect "on a cost-accounting basis", but rather that "Meeting the public's legitimate right of access to information concerning government is fulfillment of a governmental obligation, not the gift of, or waste of, public funds" [Doolan v. BOCES, 48 NY 2d 341, 347 (1979)].

I hope that I have been of assistance.

RJF:tt

cc: Town Board
Michael Leone, Town Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4467

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August 21, 2007

E-MAIL

TO: Edmund J. Wiatr, Jr.

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. Wiatr:

As you are aware, I have received your letter relating to the implementation of the Open Meetings Law by the Town of New Hartford. Please accept my apologies for the delay in response.

You asked that this office "investigate" the activities of the Town and the Town Clerk. In this regard, the Committee on Open Government and its staff are authorized by law to provide advice and opinions concerning the Open Meetings and Freedom of Information Laws. We have neither the authority nor the resources to conduct investigations or to compel entities of government to comply with law. Nevertheless, I offer the following comments concerning the issues that you raised.

You referred initially to an alleged failure on the part of the Town to make copies of minutes of Town Board meetings available in a timely manner. I direct you to §106 of the Open Meetings Law pertains to minutes of meetings and states that:

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

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

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

I 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.

Next, you wrote that the Town Board is "abusing the Executive Meetings when discussing matters that are simply not covered by the term Executive Meetings." It assumed that you are referring to executive sessions, portions of open meetings during which the public may be excluded. Without an indication of the nature of the alleged abuse, I cannot offer specific guidance or commentary. However, as you may be aware, a public body, such as a town board, cannot conduct an executive session to discuss the subject of its choice. Rather, paragraphs (a) through (h) of §105(1) of the Open Meetings Law specify and limit the subjects that may properly be discussed during an executive session.

Lastly, you wrote that "Town Officials...refuse to print the substance of any Executive Meeting..." 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, however, there is no requirement that minutes of the executive session be prepared.

I point out, too, 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)].

Copies of this opinion will be sent to the Town Board and the Town Clerk.

I hope that I have been of assistance.

RJF:tt

cc: Town Board
Hon. Gail Young, Town Clerk

OML-AO-4468

From: Freeman, Robert (DOS)
Sent: Thursday, August 23, 2007 8:45 AM
To: [redacted]
Subject: RE: Cicero Town Board Question

In short, there is no law that deals with the issue, and the Open Meetings Law does not refer in any way to adjournment. If no additional business is being considered, I believe that a public body may end its meeting either in public or from an executive session.

Robert J. Freeman
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STATE OF NEW YORK
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August 23, 2007

Mr. Norman J. Goldman
[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. Goldman:

I have received your letter and the news article attached to it. Please accept my apologies for the delay in response.

You referred to a press conference held by three members of the Clifton Park Town Board prior to the Board's regularly scheduled meeting. You wrote that notice of the press conference was not given in accordance with the Open Meetings Law, and you contend that it was an "illegal meeting." From my perspective, the issue is whether the press conference constituted a "meeting" that fell within the coverage of the Open Meetings Law. Perhaps more important in my opinion is reference in the news article suggesting that four of five members took action without having held a meeting or informing the fifth member.

First, with respect to the press conference, it unclear whether it was conducted essentially by one member of the Board, or whether the three members functioned collectively, as a body. By way of background, the Open Meetings Law pertains to meetings of public bodies, such as town boards, and §102(1) states that a "meeting" is "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, I do not believe that the Open Meetings Law would be applicable.

As suggested earlier, if, for example, one member of the Board conducted the press conference and the other two stood by, without participating other than by being present, I do not believe that the event could be characterized as a "meeting" that would have fallen within the scope of the Open Meetings Law. On the other hand, if the three conducted the press conference jointly, it is likely in my view that the gathering would have constituted a meeting that should have been preceded by notice given in accordance with §104 of the Law.

Second, with respect to action apparently taken outside of a meeting, the article states that:

> "In a letter to state Comptroller Thomas P. DiNapoli, four of five town council members asked for an opinion on the plan and the possible need for legislation to activate it.
>
> The announcement of the proposed rebate was held in town hall prior to the May 14 town board meeting.
>
> Town supervisor Philip Barrett was joined by council members Lynda Walowit and Scott Hughes. Councilman Tom Paolucci missed the meeting, but his signature appears with the other three in the letter to the comptroller and he said later he agrees with the action,
>
> Councilman Sanford 'Sandy' Roth did not attend the meeting, nor was his signature on the letter. Roth said later he was not informed to the action prior to the announcement."

In this regard, I 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 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. 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 were enacted in 2000 and in my view, those amendments clearly indicate that there are only two ways in which a public body may validly conduct a meeting. Any other means of conducting a meeting, i.e., by telephone, by mail, or by e-mail, would be inconsistent with law.

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

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

Based on the foregoing, again, a valid meeting may occur only when a majority of the total membership of a public body, a quorum, has "gathered together in the presence of each other or through the use of videoconferencing." Moreover, only when a quorum has convened in the manner

described in §41 of the General Construction Law would a public body have the authority to carry out its powers and duties. Consequently, it is 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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4470

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August 24, 2007

E-Mail

TO: Ms. Connie Holoman

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. Holoman:

I have received your letter in which you referred to an inconsistency between the provisions of §41 of the General Construction Law entitled "Quorum and majority" as that statute is referenced in relation to the Open Meetings Law, and §356 of the Education Law.

In brief, §41 of the General Construction Law states that a quorum of a public body is a majority of its total membership, notwithstanding absences or vacancies, and that action may be taken only by means of an affirmative vote of a majority of the total membership. For example, if a public body consists of ten members, six would constitute a quorum, and six affirmative votes would be needed for that entity to do what it is empowered to do. According to §356(1) of the Education Law dealing with "Councils of state-operated institutions", those entities consist of ten members, and subdivision (2) provides that "Five members attending shall constitute a quorum for the transaction of business and the act of a majority of the members present at any meeting shall be the act of the council."

In this regard, according to the rules of statutory construction (see McKinney's Statutes, §32), when one statute deals with a matter generally, and a different statute deals with a particular aspect of that matter, the specific prevails over the general. In this instance, §41 deals with quorum requirements and applies generally to public bodies, while §356 deals with particular bodies. Therefore, I believe that §356 of the Education Law prevails over §41 of the General Construction Law.

I hope that the foregoing enhances your understanding and that I have been of assistance.

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4471

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August 27, 2007

Mr. Brian Caterino
[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, except as otherwise indicated.

Dear Mr. Caterino:

We are in receipt of your request for an advisory opinion concerning application of the Open Meetings Law to a meeting held on May 1, 2007 by the Board of Education of the Greece Central School District, along with a copy of the proposed minutes for the meeting. Please accept our apologies for the delay in response. For clarity sake, rather than summarizing the proposed minutes for the meeting, set forth are relevant portions in their entirety:

> " Motion: That the Board of Education go into Executive Session to discuss collective negotiations and pending litigation.
>
> Moved: Boiley
> Seconded: Moscato
>
> Motion: The Board of Education should not be discussing the Draft Contract for PEG cable access in Executive Session. (Board Members voted no if they thought the topic should not be discussed and yes if they thought that it was an appropriate subject for Executive Session)
>
> Moved: Hubbard
> Seconded: Walsh (for the purpose of discussion)
> Hubbard no
> Grason no
> Hauer yes
> VanOrman yes
> Boily yes
> Russell yes

Oberg yes
Moscato no
Walsh yes
Motion Failed 6-3

Motion: That the Board of Education go into Executive Session to discuss collective negotiations and pending litigation.

Moved: Boily
Seconded: Moscato
Adopted: 9-0"

Despite the clerk's notation that the second motion "Failed 6-3", it is our understanding, based on my telephone conversation with you, that the Board discussed the draft contract for PEG cable access in executive session. If that was so, it is our opinion that the Board was not acting in compliance with the Open Meetings Law when it discussed the proposed contract in executive session. In this regard, we offer the following.

From our perspective, an issue and, therefore, a problem involves the extent to which a motion for entry into executive session adequately describes the matter to be considered. Absent sufficient detail, the public has no way of ascertaining whether or the extent to which an executive session may properly be held.

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 "collective negotiations" may be conducted or discussed in executive session, not all contract negotiations or discussions concerning proposed contracts fall within the grounds for entry into executive session. The only provision that pertains specifically to negotiations, §105(1)(e), deals with collective bargaining negotiations between a public employer and a public employee union under Article 14 of the Civil Service Law, which is commonly known as the Taylor Law. That provision appears to be inapplicable in the context of the situation that you described in the Board's second motion, "discussing the Draft Contract for PEG cable access."

The remaining ground for entry into executive session that may be pertinent, §105(1)(f), authorizes a public body to enter into executive session to discuss:

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

Based on the Board's description of the matter, it does not appear that the discussion would focus on any particular person. If the discussion involves the financial history of a cable company or

matters leading to its appointment or employment by the District, to that extent, an executive session could, in our view, properly be held. If those topics are not the subjects of the discussion, again, it does not appear that there would be a basis for entry into executive session.

Further, we note the "litigation" purpose referenced in the District's first and third motion. 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, we believe that the exception is intended to permit a public body to discuss its litigation strategy behind closed doors, rather than issues that might eventually result in litigation.

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 District." If the Board seeks to discuss its litigation strategy in relation to a person or entity that it intends to sue, and if premature identification of that person or entity could adversely affect the interests of the Board and the District's residents, it has been suggested that the motion need not identify that person or entity, but that it should clearly indicate that the discussion will involve the litigation strategy. Only by means of that kind of description can the public know that the subject matter may justifiably be considered during an executive session.

Finally, in our telephone conversation you indicated that no action was taken during any of the executive sessions on May 1, 2007. With respect to 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 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 judgement 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."

The same provision also states 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."

A finding of a failure to comply with the requirements imposed by the Open Meetings Law, would, in our opinion, be dependent upon the attendant facts.

It is also noted that §107(2) of the Open Meetings Law provides that:

> "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."

As such, the authority to award attorney's fees is discretionary.

Enclosed for your information is a copy of an advisory opinion issued to Mr. George Hubbard on August 17, 2007, concerning the same meeting.

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

Sincerely,

Camille S. Jobin-Davis
Assistant Director

CSJ:tt

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4472

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August 27, 2007

E-MAIL

TO: Michelle Fahmy

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. Fahmy:

We are in receipt of your request for an advisory opinion concerning application of the Open Meetings Law to certain proceedings of the Board of Trustees of the Town of Bath. The transcripts and minutes you provided suggest that the Bath Town Board intentionally misrepresented the nature of a portion of its meeting of July 9, 2007, and in effect, held a meeting in private. When action is taken in private in violation of the Open Meetings Law, a court is authorized to invalidate such action.

A brief description of the proceedings of the Town Board on the night of July 9, 2007 is as follows: The agenda indicates that new business would be discussed toward the beginning of the meeting, including a discussion of a "Moratorium" that is separate and distinct from the "Local Law #2 Adult Use Moratorium" that would be discussed as part of old business. It also indicates that an executive session would be held at the end of the meeting, after which a motion would be made to adjourn the meeting. At the beginning of the meeting, Supervisor Muller indicated the Board would discuss moratoriums as indicated on the agenda. After unanimous approval of the motion for entry into executive session, the Supervisor said that the Town Board would return to regular session only to adjourn the meeting. However, after the executive session, the Board reconvened to vote, without discussion, to establish an escrow account and to approve the signing of an escrow agreement with Wal-Mart.

Assuming that the information described above is accurate, we agree with your contention that "the public was actively deceived by the Bath Town Board." Ultimately, you "question the legality of the business conducted by the Bath Town Board post Executive Session on July 9, 2007." In this regard, we offer the following.

From our perspective, a basic requirement of the Open Meetings Law is that the public has the right to know when and where a public body is or will be conducting a meeting. Section 104 of the Open Meetings Law pertains to notice and states that:

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

In consideration of the foregoing, first, we point out that a public body is required only to provide only notice of the time and place of a meeting. There is nothing in the Open Meetings Law that requires that notice of a meeting include reference to the subjects to be discussed. Similarly, there is nothing in that statute that pertains to or requires the preparation of an agenda.

In our view, every law, including the Open Meetings Law, must be implemented in a manner that gives reasonable effect to its intent. In that vein, to give effect to the 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. Further, if the public is verbally informed that a meeting is over, and the members reconvene after the public has left the premises, in our opinion, any new gathering following adjournment or purported adjournment would constitute a new meeting that must be preceded by notice given in accordance with §104. That requirement, was apparently not met, and the Board conducted what in essence was a secret meeting during which action of great significance to the community was taken without notice or the ability of the public to attend.

While there is nothing in the Open Meetings Law or any other law of which we are aware that deals specifically with agendas, we note that many public bodies prepare agendas. The Open Meetings Law does not require that a prepared agenda be followed, and we have previously advised that a public body on its own initiative may adopt rules or procedures concerning the preparation and use of agendas. However, it is our opinion that when an agenda is shared with the public, relied on

at a meeting, and clarified that it is not being amended, the public should be able to rely on the agenda and, in this instance, the assurance offered by the Supervisor that the meeting would adjourn.

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."

Again, it appears that the Board took action during a secret meeting, and further, that the Board intentionally did so without notice. 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." It appears that was not the case here.

It is striking that a lengthy discussion was held in executive session, ostensibly to discuss collective bargaining negotiations, immediately after which two motions were made pertaining to an issue that was not referenced in the motion for entry into executive session and that had been the subject of discussion earlier in the meeting. We further note that in the circumstances involved here, there is no provision of law that permits a board to discuss whether to enter into an escrow agreement in executive session.

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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OML-AO-4473

From: Freeman, Robert (DOS)
Sent: Monday, August 27, 2007 3:35 PM
To: Bob Petrucci
Subject: RE: 8-2007 PB MInutes FOIL Request

The Open Meetings Law requires that minutes of open meetings be prepared and made available within two weeks. Specifically, §106(3) states in relevant part that: "Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meeting..."

I note that there is no law that requires that minutes be approved. If it is the policy or rule of a public body to approve its minutes and it cannot do so within two weeks, it has been advised that the minutes be disclosed within that time and marked as "draft" or "preliminary", for example. By doing so, the public body is complying with the Open Meetings Law and concurrently indicating that the minutes are subject to change.

Robert J. Freeman
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OML-AO-4474

From: Freeman, Robert (DOS)
Sent: Monday, August 27, 2007 5:08 PM
To: [redacted]

Dear Mr. Lambert:

I have received your inquiry and can understand how the question has arisen. The provision concerning the preparation of a record indicating the manner in members of agencies (public bodies) cast their votes appears in the Freedom of Information Law, §87(3)(a). That provision does not indicate where the record of votes must be kept or where it must appear, but rather only that it must be maintained. The Open Meetings Law, §106, pertains to minutes of meetings of public bodies and indicates that minutes must include reference to "motions, proposals, resolutions and any other matter formally voted upon and the vote thereon." The "vote thereon", does not necessarily have to be the vote of each member, but rather may be the tally, i.e., 3 in favor, 2 opposed.

Although the record of the votes of each member typically is included in minutes, the Court of Appeals, citing the language quoted above, held in Perez v. City University of New York that "A final determination may easily be recorded in the meeting's minutes without an accounting of each participant's ballot. Though we construe the provisions of the Open Meetings Law liberally, will not add a requirement to the text of the statute" [5 NY3d 522, 530 (2005)].

In short, although a record of the votes of each member must be maintained in a record, that record may, but need not be, the minutes of a meeting.

I hope that I have been of assistance.
Robert J. Freeman
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OML-AO-4475

From: Freeman, Robert (DOS)
Sent: Wednesday, August 29, 2007 8:17 AM
To: Yitzchak Fogel
Subject: RE: General Construction Law, Open Meetings Law

When there is no provision other than §41 of the General Construction Law applicable to a public body, and there is no other in most instances, action can only be taken by means of an affirmative vote of a majority of the total membership of the body.

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OML-AO-4476

From: Freeman, Robert (DOS)
Sent: Wednesday, August 29, 2007 2:21 PM
To: Pinni Bohm, Speaker of the 50th CLAS Assembly, 2nd Session
Subject: RE: Important: General Construction Law Interpretation

Dear Ms. Bohm:

I agree with your view that the Student Government at Brooklyn College is subject to the requirements of both the Open Meetings Law and §41 of the General Construction Law. That being so, to take any action, to carry out any of its powers or duties, I believe that there must be an affirmative vote of a majority of the total membership (not merely those present at a meeting) of the Student Government body.

I hope that I have been of assistance.

Robert J. Freeman
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STATE OF NEW YORK
DEPARTMENT OF STATE
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OML-AO-4478

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September 5, 2007

E-MAIL

TO: Mr. Robert E. Curtis, Orange County School Boards Association

FROM: Camille S. Jobin-Davis, Assistant Director

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

Dear Mr. Curtis:

We are in receipt of your request for an advisory opinion concerning application of the Open Meetings Law to certain hypothetical gatherings of a board of education. You raised several questions concerning meetings at which consensus is reached regarding organizational or "personnel" issues, without notice to the public, the legal ramifications of a consensus rather than a vote, and the justification necessary to abstain from voting. In this regard, we offer the following.

First, we do not believe there is a distinction between what you term a "special meeting", a "workshop" and a "meeting" subject to the Open Meetings Law. By way of background, the definition of "meeting" [see Open Meetings Law, §102(1)] has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals, 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 AD2d 409, aff'd 45 NY2d 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 AD2d 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 convenes to discuss the school district, any such gathering, in our opinion, would constitute a "meeting" subject to the Open Meetings Law, even if it is characterized as a "workshop."

Second, while there is nothing in the Open Meetings Law that directly addresses notice of "special" meetings, that statute requires that notice be given to the news media and posted 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. 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, while the law does not require that the meeting be "announced in an open meeting" if a meeting is scheduled, notice of the meeting must be posted in a conspicuous public location and transmitted to the new media in a timely fashion.

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 NYS2d 643, 645 (1988)].

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

Third, 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.

In our view, a discussion of "reorganization of the district cabinet structure and/or the creation of a new administrative/cabinet/assistant superintendent position, which require the allocation of additional district funds for salaries" would not fall within the scope of §105(1)(f). In short, consideration of issues of that nature that would apparently not focus on a "particular person" and would be required to be held in public.

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

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

In view of the foregoing, it is clear in 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, we believe that minutes reflective of decisions reached must be prepared and made available. In Previdi v. Hirsch (supra), one of the issues involves access to records, i.e., minutes of executive sessions held under the Open Meetings Law. Although it was assumed by the court that the executive sessions were properly held, it was found that "this was no basis for respondents to avoid publication of minutes pertaining to the 'final determination' of any action, and 'the date and vote thereon'" (id., 646). The court stated that:

> "The fact that respondents characterize the vote as taken by 'consensus' does not exclude the recording of same as a 'formal vote'. To hold otherwise would invite circumvention of the statute.

> "Moreover, respondents' interpretation of what constitutes the 'final determination of such action' is overly restrictive. The reasonable intendment of the statute is that 'final action' refers to the matter voted upon, not final determination of, as in this case, the litigation discussed or finality in terms of exhaustion or remedies" (id. 646).

Therefore, if a 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 [see FOIL, §87(3)(a)]. We recognize that public bodies often attempt to present themselves as being unanimous and that a ratification of a vote is often carried out in public. Nevertheless, if a ratification does not indicate how the members actually voted behind closed doors, the public may not be aware of the members' views on a given issue.

Finally, with respect to your questions "how does one justify abstaining from a Board decision under the Open Meetings Law or does one need to?" and "what justifications, if any, must one apply?", they are beyond the jurisdiction of this office, and it is suggested that they be raised with an attorney having expertise on the subject.

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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September 5, 2007

E-Mail

TO: Ms. Carrie Remis

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. Remis:

I have received your letter in which you focused "on the Rochester City School Board of Education's current search for [a new] superintendent." You indicated that the Board has "begun convening 'retreats' rather than public meetings to discuss changes in the search process as well as interview and discuss candidates." The retreats, according to your letter, "are held at undisclosed off-site locations, without any public notice of the meeting's date and time."

From my perspective, the "retreats" as you described them clearly fall within the coverage of the Open Meetings Law. In this regard, I offer the following comments.

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

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

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

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

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

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

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

On the other hand, if there is no intent that a majority of public body will gather for purpose of conducting public business, but rather for the purpose of gaining education, training, to develop or improve team building or communication skills, or to consider interpersonal relations, I do not believe that the Open Meetings Law would be applicable. In that event, if the gathering is to be held solely for those purposes, and not to conduct or discuss matters of public business, and if the members in fact do not conduct or intend to conduct public business collectively as a body, the activities occurring during that event would not in my view constitute a meeting of a public body subject to the Open Meetings Law.

In the context of the facts as you described them, the "retreats" constitute "meetings" that fall within the requirements of the Open Meetings Law.

Every meeting must be preceded by notice of the time and place given in accordance with §104 of the Open Meetings Law. Further, I believe that meetings must be held in locations where those interested in attending would have a reasonable capacity to do so (Goetchius v. Board of Education, Supreme Court, Westchester County, March 8, 1999), and that the Board must make reasonable efforts to conduct its meetings in locations that are barrier-free accessible [Open Meetings Law, §103(b)].

Lastly, as a general matter, the Open Meetings Law is based upon a presumption of openness. Stated differently, meetings of public bodies must be conducted open to the public, unless there is a basis for entry into executive session. It is emphasized that an executive session is not separate from a meeting, but rather is a portion of an open meeting during which the public may be excluded [see Open Meetings Law, §102(3)]. 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.

While a discussion of the search process involving a new superintendent would involve a "personnel matter", I do not believe that it could properly be considered in 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, stating that a public body may enter into an executive session to discuss:

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

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

When a discussion concerns matters of policy, such as the manner in which public money will be expended or allocated, the functions of a department, the creation or elimination of positions, or the process to be used in a search for a superintendent, I do not believe that §105(1)(f) could be asserted, even though those discussions may relate to "personnel". The consideration of the process to be used in a search would not involve consideration of individual candidates for the position or their relative merits, nor would it focus on a "particular person." However, when the Board interviews or discusses specific candidates, I believe that §105(1)(f) could be invoked and would serve as a proper basis for conducting an executive session.

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

I hope that I have been of assistance.

RJF:jm

cc: Board of Education

STATE OF NEW YORK
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September 20, 2007

Mr. Donald Loggins
[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. Loggins:

I have received your letter in which you requested an advisory opinion concerning the application of the Open Meetings Law. The matter focuses on groups licensed by the New York City Departments of Parks and Recreation to operate and maintain gardens on Department property. The Department bulletin attached to your letter refers to a requirement that "community garden groups reregister and sign new licenses with GreenThumb every two years." GreenThumb is a Department program.

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

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

Based on the foregoing, a public body is generally a governmental entity consisting of two or more members that performs a governmental function for the state or a unit of local government. In my view, community garden groups, although licensed by a government agency, are not themselves governmental in nature, nor do they perform a governmental function. Therefore, I do not believe that they constitute public bodies or that they are subject to the requirements of the Open Meetings 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: Counsel, Department of Parks and Recreation

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September 20, 2007

E-Mail

TO: Ms. Marla Hurban

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. Hurban:

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

You referred to an executive session held by the City of Yonkers Board of Education to discuss the budget, citing "personnel matters" as the basis for doing so. You added that "committee meetings are being held in private without public notice", as are meetings with the Mayor. You asked whether you "have any recourse."

In this regard, first, the Committee on Open Government is authorized to render advisory opinions pertaining to the Open Meetings Law. Although the Committee's opinions are not binding, it is our hope that they are educational and persuasive and that they encourage compliance with law. To attempt to enhance compliance with and understanding of the Open Meetings Law, a copy of this opinion will be sent to the Board.

Second, when it is contended that a public body, such as a board of education, fails to comply with the Open Meetings Law, §107(1) of that statute provides that:

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

> or part thereof taken in violation of this article void in whole or in part.
>
> "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."

Further, subdivision (2) of §107 provides that:

> "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."

Second, when a committee consists of members of a governing body, it is required to comply with the Open Meetings Law. Section 102(2) of the Law defines the phrase "public body" to mean:

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

The last clause in the definition refers to committees and subcommittees of a public body. Therefore, if, for example, the Board has designated a committee consisting of three of its members, the Committee would constitute a "public body" whose quorum would be two, it would be required to give effect to the Open Meetings Law and provide notice prior to its meetings to the news media and by means of posting in accordance with §104 of the Law.

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

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

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

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

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

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

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

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.

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

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

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

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

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

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

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

When a discussion concerns matters of policy, such as the manner in which public money 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 instance, if a discussion involves staff reductions or layoffs due to budgetary concerns, the issue in my view would involve matters of policy. Similarly, if a discussion of possible layoffs relates to positions and whether those positions should be retained or abolished, the

discussion would involve the means by which public monies would be allocated. In none of the instances described would the focus involve a "particular person" and how well or poorly an individual has performed his or her duties. To reiterate, in order to enter into an executive session pursuant to §105(1)(f), I believe that the discussion must focus on a particular person (or persons) in relation to a topic listed in that provision. As stated judicially, "it would seem that under the statute matters related to personnel generally or to personnel policy should be discussed in public for such matters do not deal with any particular person" (Doolittle v. Board of Education, Supreme Court, Chemung County, October 20, 1981).

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)].

Again, to attempt to enhance compliance with the Open Meetings Law, a copy of this opinion will be sent to the Board of Education.

I hope that I have been of assistance.

RJF:jm

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
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September 20, 2007

E-Mail

TO: Ms. Wendy Getting

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. Getting:

As you are aware, I have received your letter concerning the Town of Somers Planning Board. Please accept my apologies for the delay in response.

You referred to a meeting during which four members of the Board were present. Three of the four attended the previous meeting, and you asked whether "the 4th member that was not present at the [prior] meeting [could] vote on the minutes of the meeting that he was not at."

In this regard, first, there is nothing in the Open Meetings Law or any other provision of law of which I am aware that would prohibit a member of a board who did not attend a particular meeting from voting to approve or modify minutes of that meeting.

Second, although most public bodies, such as town boards, planning boards and the like, vote to approve their minutes, there is no law that requires 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
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September 20, 2007

Hon. Charles Mallow
Councilperson, City of Batavia
[redacted]

Mr. George S. Van Nest
[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 Councilman Mallow and Mr. Van Nest:

I have received letters from both of you relating to the same incident, and both of you have requested an advisory opinion concerning the Open Meetings Law. Please accept my apologies for the delay in response.

According to the letter from Councilman Mallow, the Batavia City Council considered the "new hire of an Assistant Manager", and the discussion "revolved around the position and if [the] City Charter would be violated by not filling the position", as well as the costs involved. Following discussion of that issue, the Council entered into an executive session to consider a different subject. However, at the conclusion of discussion of that topic, the City Manager brought up the topic of his need for an Assistant Manager and his "disdain for the matter being discussed in public." You left the meeting based on your contention that the subject was "improper" for discussion in executive session. You were later informed by two Council members that the discussion continued and that the Council "agreed to approve the position." No minutes were taken concerning the executive session.

Mr. Van Nest described the same discussion as involving "the current employment demands on the City Manager, as well as the need to properly support the City Manager in his day to day management of City affairs..., as well as the need for an assistant "to spread the workload." He added that the City Manager "needed to discuss particular issues regarding the workload he has been operating under, backlog of his tasks, pending major projects and take action on City matters in a timely fashion." In relation to the foregoing, the City Manager "had to discuss the demands on his

personal employment and his need for adequate support", and that "[a]lthough certain Council members raised fiscal issues, the purpose was not to discuss budgeting or fiscal matters." He also wrote that "no motion was made and no vote was taken."

Based on the foregoing, I do not believe that an executive session could properly have been held. In short, the matter appear to have related to the demands and duties inherent in the position held by a city manager, irrespective of who might hold that position. In this regard, I offer the following comments.

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

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

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

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

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

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

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

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

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

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

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

When a discussion concerns matters of policy, such as the manner in which public money will be expended or allocated, the functions of a department or perhaps the creation or elimination of positions, I do not believe that §105(1)(f) may be asserted, even though the discussion may relate to "personnel". In the circumstance that was described, I do not believe the issue would not have focused on any "particular person", nor would it have involved the subjects relating to a particular person delineated in §105 (1)(f). 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).

While some aspects of the discussion might have related to the workload of the City Manager, it does not appear to have involved his performance; rather, it related to the duties pressures and workload associated with the position of City Manager, as well as issues involving the expenditure of public money and the fiscal impact of creating a new position. If that was so, again, in consideration of the language of §105(1)(f), I do not believe that an executive session could validly have been held.

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

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

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

Lastly, §106 of the Open Meetings Law pertains to minutes of meetings, and based on that provision, if no action is taken during an executive session, there is no obligation to prepare minutes. However, if a consensus is reached upon which a public body relies, it has been held that the consensus is in reality action taken that must be memorialized in minutes [see Previdi v. Hirsch, 524 NYS2d 643 (1988)].

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: City Council

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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September 20, 2007

E-MAIL

TO: Peter Meyer

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. Meyer:

I have received your letter and hope that you will accept my apologies for the delay in response.

You wrote that you were recently elected to serve on the Board of Education of the Hudson City School District and that, in that capacity, you received a memorandum stating in part that:

> "Board members are reminded that information acquired in the course of an executive session, or in their Board packet, may neither be disclosed nor used to further a member's personal interest, pursuant to S805-a(1)(b) of the General Municipal Law, and Board Policy except as may be required pursuant to a lawfully served subpoena or court order to testify regarding the subject matter at issue."

You have questioned the propriety of the statement.

From my perspective, the portion of the statement pertaining to disclosure of the "Board packet" is clearly inconsistent with law. Further, while my opinion may differ from that of others, the portion of the statement concerning disclosure after an executive session is, as you suggested, "a bit broad", and in my view, overbroad. In this regard, I offer the following comments.

It is emphasized that in most instances, even when records *may* be withheld under the Freedom of Information Law or when a public body, such as a board of education, *may* conduct an executive session, there is no obligation to do so. 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 disclose records or 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 a ruling by the Commissioner of Education indicates that members of a board of education who breach confidentiality of an executive session may be removed from office. 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).

In my experience, there are often records or portions of records in a "board packet" that are accessible to the public. For instance, although portions of a memorandum from a superintendent to a board consisting of advice, opinion or recommendations may be withheld pursuant to §87(2)(g) of the Freedom of Information Law, that same provision specifies that other portions of the same record consisting of statistical or factual information must be disclosed (see subparagraph (i)]. Other records in a board packet may be accessible to the public in their entirety. In short, the content of the statement that you quoted is in my opinion, inconsistent with law.

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. Further, assuming the validity of the preceding analysis, I believe that the statement to which you referred is overbroad.

I hope that I have been of assistance.

RJF:tt

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4491

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October 3, 2007

Mr. Jeff Wright
Editor
Buffalo Business First
465 Main Street
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The staff of the Committee on 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. Wright:

I have received your letter in which you sought an advisory opinion concerning propriety of "private meetings of a new board impaneled by the state..."

You wrote that the "new board is guiding the joint governance of Erie County Medical Center and Kaleida Health, two hospital systems that have been mandated to merge by the state Berger Commission", and that it has met twice, "both times behind closed doors." Statements by the State Department of Health and President of State University at Buffalo, an *ex officio* member of the board, indicated that board meetings are not required to be held open to the public pursuant to the Open Meetings Law.

Those statements appear to conflict with a news release issued by the Department on September 12 and a letter sent by Commissioner Daines to Michael A. Young, Chief Executive Officer of the Erie County Medical Center Corporation, on the same day. The release states that:

> "A new board of trustees has been named to govern the future, combined Erie County Medical Center (ECMC) and Kaleida Health Systems, State Commissioner Richard F. Daines announced today...
>
> "Under the legislation authorizing the Commission on Health Care Facilities in the 21st Century, the commissioner is empowered to take 'all steps necessary' to implement the Commission's mandates, including naming a single board with representatives of Kaleida, ECMC, the University of Buffalo School of Medicine and community leaders.

> "'The board has a challenging task: to bring about a single unified joint governance for these two systems,' Dr. Daines said, noting that the deadline for implementing the Commission mandate is December 31, 2007. 'My staff and I will continue to advise and discuss on the matter, and look forward to the board's proposals to come.'"

Dr. Daines' letter to Mr. Young reiterated the primary points included in the news release and specified that he "selected 14 voting members consisting of three members each representing ECMC, Kaleida, UB and five community leaders" and that the "15th voting member of the board will be the CEO of the new board selected by a vote of the board." He added that:

> "...the board should meet no later than September 21, 2007, to continue the process of implementing the requirements of the Commission, including reaching out to ECMC and Kaleida to determine the precise nature of the relationship between the parties. At its first meeting, the President of UB shall serve as chair, a quorum shall consist of eight members, and a majority vote of the members shall suffice for any matter to pass. The chair shall be responsible to notify board members of the initial meeting, although in the case of facility representatives, it may do so by notice to the facility CEO."

Based on the news release and Dr. Daines letter to Mr. Young, I believe that the board of trustees designated to "bring about a single unified joint governance" for two health care institutions is required to comply with the Open Meetings Law.

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

The documents referenced above indicate that the members of the new board have been designated by the Commissioner based on the authority to do so conferred upon him by statute, that the board must create a unified joint governance as required by state, that the board will "govern" the combined institutions and serve as "the trustees of the unified governance structure", that a quorum will consist of eight of the board's fifteen members, and that action can be taken by a vote of a majority of the members. In short, I believe that each of the ingredients necessary to find that the board constitutes a "public body" is present.

It is emphasized, too, 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.).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Richard F. Daines, M.D., Commissioner
John B. Simpson, Chair and President, University at Buffalo

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OML-AO-4492

From: Freeman, Robert (DOS)
Sent: Thursday, October 04, 2007 9:46 AM
To: Schillaci, Theresa (DOS)
Subject: RE: Open Meetings Law and Agenda Items

Good morning - -

I offer two points in relation to your question. First, the Open Meetings Law is silent with respect to agendas. Therefore, an agenda can be as minimal or as detailed as public body desires, and there is no obligation to abide by the agenda. Second, for reasons explained in detail in the attached opinion, a public body cannot, in a technical sense, schedule an executive session in advance of a meeting. Very simply, since a motion to enter into executive session must be carried by majority vote of a public body's total membership, and since the outcome of that vote cannot be known in advance, a public body cannot state with certainty that an executive session will be held. It may, however, schedule a motion to go into executive session, and it is suggested that the agenda include something like that.

If you'd like to discuss the matter, please call. Camille will be in every day, but I'll be on vacation for a week starting tomorrow.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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October 4, 2007

E-Mail

TO: Mr. Todd Elzey

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. Elzey:

I have received your most recent letter, and in consideration of the time constraints that you described, I offer the following comments.

You have inquired with respect to Ontario County's obligation "under the Open Meetings Law, or Freedom of Information Law to make the details of a proposal available for review in advance of Board of Supervisor Committee or full Board meetings." You indicated that the details of a particular proposal were not disclosed with notice or agendas pertaining to meetings. In this regard, the Open Meetings Law, §104, requires that every meeting of a public body, such as the Board of Supervisors or a committee consisting of members of the Board, must be preceded by notice of the time and place given to the news media and by means of posting. The Open Meetings Law is silent with respect to agendas. In short, that law does not require that a public body provide details relating to the subject that it will be considering at an upcoming meeting or meetings.

With respect to the disclosure of records, the Freedom of Information Law does not require that a government agency disclose records or provide information on its own initiative. An agency may choose to do so, but it is not required to do so by that statute. Any person may, however, request records from an agency, and the agency must respond to a request in some manner within five business days of the receipt of a request.

Since you referred to proposals, it is likely that some aspects of records of that nature may be withheld. 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.

Pertinent under the circumstances would be §87(2)(g), which authorizes an agency to withhold records that:

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

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

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

RJF:jm

cc: Board of Supervisors

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OML-AO-4494

From: Mercer, Janet (DOS)
Sent: Thursday, October 11, 2007 2:33 PM
To: 'Robert Fitzgerald'
Subject: RE: Public speaking at Board of education open meetings

I have received your inquiry in which you asked what guidelines must be adhered to when allowing the public to speak at meetings.

In brief, it has been advised that the Open Meetings Law is silent with respect to the ability of those in attendance to speak or otherwise participate. Therefore, a public body, such as a board of education, is not obliged to permit the public to speak at its meetings. Many public bodies, however, authorize public participation, and in that event, it has been advised that they do so by means of reasonable rules that treat members of the public equally.

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.

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 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, I 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.

I hope that I have been of assistance.

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OML-AO-4495

VIA EMAIL

From: Mercer, Janet (DOS)
Sent: Friday, October 12, 2007 9:06 AM
To: 'Jim Santoro'
Subject: RE: Open Meetings Law

The Open Meetings Law applies to public bodies and §102(2) of that statute defines the phrase "public body" to mean:

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

Based on the foregoing, the Open Meetings Law is applicable to governmental entities; it does not apply to private or non-governmental organizations such as homeowner's associations.

I hope that the foregoing serves to clarify your understanding.

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STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16828
OML-AO-4496

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

October 12, 2007

Mr. James W. Buck
[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. Buck:

I have received your letter concerning a delay in responding to your requests for records of the Livingston Manor Fire District.

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

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

It is noted that new language was added to that provision on May 3, 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, legislation became effective 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.

Lastly, since your requests involve minutes of meetings, I note that §106 of the Open Meetings Law specifies that minutes of meetings must be prepared and made available within two weeks of the meetings to which they pertain.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Fire Commissioners

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16834
OML-AO-4497

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October 15, 2007

E-Mail

TO: Hon. Andrea Haxton, City of Lackawanna

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 Councilwoman Haxton:

I have received two items of correspondence from you.

The first involves the need to seek records pursuant to the Freedom of Information Law in consideration of your role as a member of the Lackawanna City Council.

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

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

It is also noted that under §89 (1) of the Freedom of Information Law, the Committee on Open Government is required to promulgate regulations concerning the procedural implementation of that statute (21 NYCRR Part 1401). In turn, §87 (1) requires the governing body of a public corporation to adopt rules and regulations consistent those promulgated by the Committee and with the Freedom of Information Law. Further, §1401.2 of the regulations provides in relevant part that:

> "(a) The governing body of a public corporation and the head of an executive agency or governing body of other agencies shall be responsible for insuring compliance with the regulations herein, and shall designate one or more persons as records access officer by name or by specific job title and business address, who shall have the duty of coordinating agency response to public requests for access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public form continuing from doing so."

As such, the City Council has the duty to promulgate rules and ensure compliance. Section 1401.2 (b) of the regulations describes the duties of a records access officer and states in part that:

> "The records access officer is responsible for assuring that agency personnel...
>
> (3) upon locating the records, take one of the following actions:
> (i) make records promptly available for inspection; or
> (ii) deny access to the records in whole or in part and explain in writing the reasons therefor.
> (4) Upon request for copies of records:
> (i) make a copy available upon payment or offer to pay established fees, if any; or
> (ii) permit the requester to copy those records..."

Based on the foregoing, the records access officer must "coordinate" an agency's response to requests. As part of that coordination, I believe that other City officials and employees are required to cooperate with the records access officer in an effort to enable him or her to carry out his or her official duties.

The second pertains to meetings held "without 72 hour public notices." Here I direct your attention to the Open Meetings Law. That statute requires that notice be posted and given to the news media prior to every meeting of a public body. Specifically, §104 provides that:

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

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

can generally be met by telephoning the local news media and by posting notice in one or more designated locations.

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

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

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

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
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October 16, 2007

E-Mail

TO: Mr. Jeffrey Greenfield

FROM: Janet M. Mercer, Administrative Professional

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

I have received your inquiry in which you asked whether there is a law that requires a person to supply his/her name and address in order to speak at a public meeting of a board of education.

In brief, it has been advised that the Open Meetings Law is silent with respect to the ability of those in attendance to speak or otherwise participate. Therefore, a public body, such as a board of education, is not obliged to permit the public to speak at its meetings. Many public bodies, however, authorize public participation, and in that event, it has been advised that they do so by means of reasonable rules that treat members of the public equally.

With respect to the possibility of distinguishing among those who may speak, since the Open Meetings Law provides the general public with the right to attend meetings, it has been advised that if a public body permits members of the public to speak, it must permit any person to do so, irrespective of the residence of the speaker. It follows in my view, that a person cannot be required to specify his or her residence as a condition that must be met before he or she may speak. Further, in many instances, individuals, due to concerns associated with safety, security and privacy, have valid reasons for choosing not to provide their residence addresses.

A similar contention may be offered in my opinion regarding the disclosure of the speaker's name. Again, if any person may attend a meeting and a public body cannot prohibit a person from attending due to his or her status or interest, the names of those who attend are irrelevant to the right to attend. That being so, I do not believe that a person should be required to give his or her name as a condition precedent to speaking. There may be a variety of reasons for wanting to avoid identifying oneself. For instance, if a parent of a student wants to describe a problem before a board of education, providing a name would likely identify the student. If a member of the public seeks to bring forward a complaint or allegation, identifying himself or herself could result in personal hardship.

In short, I do not believe that a person can be compelled to identify himself or herself in order to speak in the same manner as others at meetings.

I hope that I have been of assistance.

JM

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

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October 18, 2007

Ms. Ellen O'Brien Meyers
Special Assistant
NYS Developmental Disabilities Planning Council
155 Washington Avenue
Albany, NY 12210

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

Dear Ms. Meyers:

I have received your letter in which you indicated that the Developmental Disabilities Planning Council records "all auditory pieces" of its meetings and produces live webcasts of the meetings that are archived. Your question is whether "there [is] still a need to have a staff person act as a scribe to write up meeting minutes..."

In this regard, the Open Meetings Law contains what might be characterized as minimum requirements concerning the contents of minutes. Specifically, §106 of the Open Meetings Law provides that:

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

Based on the foregoing, minutes need not consist of a verbatim account of everything that was said; on the contrary, so long as the minutes include the kinds of information described in §106, I believe that they would be appropriate and meet legal requirements.

While an audio or video recording would likely contain the elements of minutes, I believe that minutes should nonetheless be reduced to writing in order that they constitute a permanent, written record that can be viewed by the public. I point out that in an opinion rendered by the State Comptroller, it was found that, although tape recordings may be used as an aid in preparing minutes, they do not constitute the "official record" (1978 Op. St. Compt. File #280).

It is also noted that the State Archives, pursuant to provisions of the Arts and Cultural Affairs Law, develops schedules indicating minimum retention periods for various kinds of records. The retention schedule indicates that audio and video recordings of meetings must be retained for a minimum of four months. However, the schedule also indicates that minutes of meetings must be kept permanently. Because audio and video recordings cannot be preserved permanently, it would be inappropriate in my opinion to consider them as "official" minutes. Preferable in my view would be the preparation of minutes that contain the information described in §106(1) of the Open Meetings Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

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OML-AO-4500

VIA EMAIL

From: Freeman, Robert (DOS)
Sent: Tuesday, October 23, 2007 12:51 PM
To: scottbinns
Attachments: o3732.wpd

Dear Mr. Binns:

Please be advised that this office has neither the resources nor the authority to conduct investigations. However, in brief, any gathering of a majority of a public body, such as a village board of trustees, for the purpose of conducting public business, constitutes a "meeting" that must be held in accordance with the Open Meetings Law and which must be preceded by notice given to the news media and by means of posting. That is so, even if there is no intent to take action, and regardless of the manner in which a gathering may be characterized. Therefore, so-called work sessions, "working meetings" and the like fall within the coverage of the Open Meetings Law. Attached is a lengthy opinion that deals with the issue in detail.

It is also noted that the Open Meetings Law provides the public with the right to be present, but that it is silent concerning the public's right to speak at meetings. Consequently, while a public body may choose to permit the public to speak, it is not required to do so. For more detailed information on that subject, go to the Open Meetings Law index to advisory opinions on our website, click on to "P" and scroll down to "Public participation."

I hope that I have been of assistance.

Robert J. Freeman
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OML-AO-4501

VIA EMAIL

From: Freeman, Robert (DOS)
Sent: Tuesday, October 23, 2007 4:28 PM
To: scook
Subject: Meeting agendas

Dear Ms. Cook:

I have received your inquiry in which you questioned a statement indicating that agendas relating to meetings of the board of an industrial development agency should be provided to board members one week in advance of meetings.

In this regard, the Open Meetings Law makes no reference to agendas. While most public bodies
prepare agendas, there is no statutory requirement of which I am aware that requires that they do so. A public body, such as the governing body of an industrial development agency, may, however, establish a policy or rule requiring that agendas be prepared and distributed to board members. Again, in the absence of such a policy or rule, I know of no law that would require that agendas be made available to board members at a certain time prior to the meetings.

I hope that I have been of assistance.

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OML-AO-4502

VIA EMAIL

From: Freeman, Robert (DOS)
Sent: Tuesday, October 23, 2007 4:44 PM
To: [redacted]
Subject: Union/BOE meeting

Dear Ms. McGreevy:

I have received your inquiry in which you questioned whether gatherings of two members of a five member board of education may hold "private meetings with Faculty representatives on a bi-monthly basis to discuss school issues."

In this regard, the Open Meetings Law pertains to meetings of public bodies. A board of education clearly constitutes a public body. However, a "meeting" of the board would involve a gathering of a majority of its total membership for the purpose of conducting public business. Therefore, a gathering in which two of the five members participate would not constitute a "meeting", and the Open Meetings Law would not be applicable. That being so, there would be no obligation to provide notice of such a gathering to the public.

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-4503

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October 23, 2007

E-MAIL

TO: Nancy Campbell

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. Campbell:

I have received your inquiry concerning the obligation of a planning board to provide notice to the public prior to a "work session" during which there will be discussion, but no action taken.

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

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

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

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

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

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

Based upon the direction given by the courts, if a majority of a public body gathers to discuss public business, any such gathering, in my opinion, would ordinarily constitute a "meeting" subject to the Open Meetings Law. Since a "work session" held by a majority of a public body is a "meeting", it would have the same responsibilities in relation to notice and the taking of minutes as in the case of a formal meeting, as well as the same ability to enter into executive sessions. The provisions concerning notice of meetings are found in §104 of the Open Meetings Law.

I hope that I have been of assistance.

RJF:tt

cc: Planning Board, Town of Saugerties

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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October 25, 2007

Hon. Virginia Stern
Councilwoman
Town of Stanford
[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 Councilwoman Stern:

I have received your letter and a variety materials relating to it. You have sought an advisory opinion concerning the application of the Open Meetings Law.

You wrote that you serve on the Town Board of the Town of Stanford, and that the Board consists of five members. The issue involves your capacity to attend meetings of the Town Codes Committee and whether doing so would result in the convening of a meeting of the Town Board held in contravention of the Open Meetings Law. By way of background, you indicated that the Town Supervisor established the Codes Committee for the purpose of discussing and updating the Town's "Master Plan and zoning regulations which can be put before the public for discussions and comments and upon which the Town Board will eventually vote." You added that the Codes Committee "is made up of 7 people, two of whom are Town Board members," and that Committee meetings are open to the public.

When you attended a meeting of the Codes Committee, you were asked to leave, and because you apparently chose not to do so, "the Supervisor cancelled the meeting and the entire committee walked out because [you were] in the audience." Soon thereafter, the Supervisor posted the following on the Town's website:

> "Codes Committee meetings suspended.
>
> At the September 20th meeting of the Codes Committee, Town Board member Virginia Stern was in the audience giving us three Town Board members in attendance.

> Town Board member Joyce Hadden and myself as Town Supervisor are on the Codes Committee and both of us were in attendance. Our Attorney for the Town, Bill Bogle advised the Town Board that having three Board members at these meetings constitutes an illegal quorum of the Town Board, which is a violation of the Open Meetings Law (Public Officer's [sic] Law). Attorney Bogle's recommendation is that these meeting [sic] should have only two Town Board members present or the Town would be in violation of the Public Officer's Law and could subject the Town to liability or the rejection of any information discussed at such sessions.
>
> Therefore as Town Supervisor, since Virginia has refused to leave the meetings, I stopped the meeting, and the Codes committee won't meet until this matter is resolved."

In my view, the contentions of the Supervisor and the Town Attorney are inaccurate, and by means of the following comments, I hope that the matter will indeed be resolved.

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

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

A meeting of a public body is a gathering of a quorum, a majority of its total membership, for the purpose of conducting public business, collectively, as a body. In the case of a town board consisting of five members, a quorum would be three, and a meeting would involve a gathering of three or more of its members for the purpose of conducting public business together as a body. I note that it has been held that when two of five members of a public body convene, because two is less than a quorum, the Open Meetings Law does not apply [Mobil Oil Corp. V. City of Syracuse Industrial Development Agency, 224 AD2d 15, motion for leave to appeal denied, 89 NY2d 811 (1997)].

The Codes Committee, as you described it, is an entity separate and distinct from the Town Board. Again, it consists of seven members, two of whom are members of the Town Board. A gathering of the Committee clearly would not constitute a meeting of the Town Board. In situations similar to that to which you and the Supervisor referred, it has been advised that a member of a governing body, such as yourself serving as a member of the Town Board, who attends a meeting of a different body, such as the Codes Committee, as a member of the audience, has the same right to attend as any member of the public. Further, because you attended as a member of the audience and were not situated with the members of the Committee in the front of the room at the table or area where the Committee members were conducting the meeting, your presence would not have

transformed the meeting of the Committee into a meeting of the Town Board. In short, the members of the Town Board might have been present in the same room, but the three would not have gathered together or convened as a board or body.

Since your presence in the audience would not have converted a meeting of the Committee into a meeting of the Town Board, it is clear in my view that there would be no "illegal quorum" of the Town Board as suggested by the Town Supervisor and the Town Attorney. Consequently, there would be no "violation of the Public Officer's (sic) Law", nor would there be any issue involving liability in relation to the Board's compliance with the Open Meetings Law.

With respect to "resolving" matter, it is my opinion in sum that the Codes Committee is an entity separate from the Town Board, that your presence as a member of the audience at meetings of the Codes Committee would not transform the gathering into a meeting of the Town Board, and because such gathering would not constitute a Town Board meeting, that your presence would not create any issue or liability concerning the Town Board's compliance with the Open Meetings Law.

I hope that the foregoing serves to resolve the matter and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Dave Tetor, Supervisor
William F. Bogle, Jr.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4505

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October 25, 2007

Hon. Paul J. Feiner, Supervisor
Town of Greenburgh
[redacted]

Ms. Linda Garfunkel
[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 Supervisor Feiner and Ms. Garfunkel:

We are in receipt of your requests for an advisory opinion concerning application of the Open Meetings Law to a gathering of certain officials and residents earlier this year. Due to the factual scenarios alleged in the materials you submitted, we believe one advisory opinion addressing all of the issues would be most efficient. Accordingly, we offer the following comments.

First, please note that only a court can make a determination whether a gathering is "illegal" or whether there has been a "violation" of the Open Meetings Law. 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 those who attended a gathering at the office of S&R Development Estates, LLC on February 3, 2007, we note that Richard Troy, in his July 9, 2007 affidavit relates that "my brother and I hosted another meeting, organized by Councilman Bass and attended by Councilman Francis Sheehan, Councilwoman Ettie [sic] Mae Barnes and Councilwoman Diana Juettner.... Councilman Bass and Councilman Sheehan had suggested that is [sic] would be appropriate for Councilwoman Barnes and Councilwoman Juettner to personally meet the principals of S&R since they would be formally voting to implement our Agreement." (Troy Affidavit, page 18.) Authors of an article in the Scarsdale Inquirer indicated that "Bass said he was out of town for the second meeting. McNally told the Inquirer that 'Francis Sheehan was there from the start. Eddie Mae Barnes came by literally for five minutes ... Diana Juettner showed up later. Never at any time was

there a quorum and never any intent to put a quorum of town board members together." (Murray and Wolfert, "Developer cries foul in land use dispute" July 20, 2007.) Finally, Supervisor Feiner indicated that he was not advised of the gathering and that notice of the gathering was not given to the public or the news media.

To the extent that the Open Meetings Law may have applied to the actions described above, we offer the following comments.

The Open Meetings Law is clearly intended to open the deliberative process to the public and provide the right to know how public bodies reach their decisions. As stated in §100 of the Law, its Legislative Declaration:

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

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.).

Further, it was held that "a planned informal conference" or a "briefing session" held by a quorum of a public body would constitute a "meeting" subject to the requirements of the Open Meetings Law [see Goodson Todman v. Kingston, 153 Ad 2d 103, 105 (1990)].

Based upon the terms of the Open Meetings Law and its judicial interpretation, if a majority of board members gathers to conduct public business, any such gathering would, in our opinion, constitute a "meeting" subject to the Open Meetings Law. On the other hand, when less than a quorum is present, the Open Meetings Law would not apply. 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.

In this regard, the Open Meetings Law is applicable to meetings of public bodies, such as the Greenburgh Town Board, 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."

Further, from our perspective, a public body, such as a town 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.

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

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 our 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, we do not believe that a valid meeting could be held or that action may validly be taken.

In the context of a meeting of a public body, a key question is whether "reasonable notice" was given to all of the members. If a court were to determine that a quorum of the members of the Board were gathered together to discuss town business, and that reasonable notice was not given to the Supervisor, we believe that it would, of necessity, find that the gathering of February 3 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 is that 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 reflect a failure to comply with the Open Meetings Law.

In sum, if there was an intent to circumvent the Open Meetings Law in the context of this situation, it is possible that a court would find that the Open Meetings Law had been infringed. On the other hand, if there was no such intent, based on the affidavit and the article quoted at the beginning of this opinion, it would appear that the event did not constitute a meeting of a public body and that the Open Meetings Law would not have applied.

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 Council

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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October 30, 2007

E-MAIL

TO: Brian M. Kelty

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. Kelty:

I have received your letter in which you inferred that the board of education in the school district in which you reside fails to comply with the Open Meetings Law by holding "so-called work sessions at which motions, votes are taken, contracts are discussed, and there is no counsel or district clerk present - ever."

In this regard, based on the judicial interpretation of the Open Meetings Law, there is no legal distinction between a "meeting" and "work session."

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 work session held by a majority of a public body is a "meeting", it would have the same responsibilities in relation to notice and the taking of minutes as in the case of a formal meeting, as well as the same ability to introduce motions, to vote and to enter into executive sessions when appropriate .

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

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

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

Based 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 work sessions, technically, I do not believe that minutes must be prepared. On the other hand, if motions are made or actions taken, those activities must be memorialized in minutes.

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
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October 31, 2007

Hon. Marion Cassie
Town Councilperson
Town of Canandaigua
5440 Route 5 & 20 West
Canandaigua, NY 14424

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

Dear Ms. Cassie:

I have received your letter and the materials relating to it. Please accept my apologies for the delay in response. You wrote that you serve as a Councilperson in the Town of Canandaigua, and you raised a series of questions concerning the application of the Open Meetings Law.

The first involves the appointment by the Town Supervisor of "subcommittees of the Town Board consisting of 2 or more members each." In this regard, as suggested by the Town Attorney, 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.

Nevertheless, when a committee subcommittee consists solely of members of a public body, such as the Town Board, I believe that the Open Meetings Law is applicable.

In support of this opinion and by way of background, I note that 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".

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

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

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

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

In view of the amendments to the definition of "public body", I believe that any entity consisting of two or more members of a public body, such as a committee, a subcommittee or "similar body" consisting of 2 or more 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, 437 NYS 2d 466, (4th Dept. 1981), *appeal dismissed* 55 NY 2d 995, 449 NYS 2d 201 (1982)]. Because an entity, such as a committee or subcommittee consisting of two or more members of a governing body, is itself a public body, it is required to meet the same requirements as the governing body relative to notice of meetings, minutes and the like, as well as the same capacity to enter in executive session when appropriate. Further, based on §103 of the Open Meetings Law, any person may attend a meeting of a public body. The presence of staff has no impact on the application of the Open Meetings Law.

With respect to the propriety of conducting meetings at 7:30 a.m., although the Open Meetings Law does not specify when meetings must be held, the intent of the Open Meetings Law is clearly stated in §100 as follows:

> "It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that

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

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

In my opinion, every provision of law, including the Open Meetings Law, should be implemented in a manner that gives reasonable effect to its intent. If a meeting is held at a time at which most of those interested in attending would not have a reasonable opportunity to do, it has been held that the entity failed to comply with law.

In a decision that dealt in part with meetings of a board of education held at 7:30 a.m., it was stated that:

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

While the Court focused on the matter as it related to a board of education, I believe that similar factors would be present with respect to the ability of Town residents to attend meetings at 7:30 a.m. Many may be unable to attend because they too have small children, because of work schedules, commuting, and other matters that might effectively preclude them from attending meetings held so early in the morning. In short, particularly in consideration of the decision cited above, the reasonableness of conducting meetings at 7:30 a.m. is in my view questionable.

The second series of questions relates to "straw votes" or reaching a "consensus" during executive sessions. You referred to a decision not to appeal "based on a straw vote."

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

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

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

Therefore, if a public body reaches a "consensus" that is reflective of its final determination of an issue, I believe that minutes must be prepared that indicate its action, as well as the manner in which each member voted [see FOIL, §87(3)(a)].

In contrast, a "straw vote", or something like it, that is not binding and does not represent members' action that could be construed as final, could in my view be taken but not recorded in minutes when it represents a means of ascertaining whether additional discussion is warranted or necessary. If a "straw vote" does not represent a final action or final determination, I do not believe that minutes including the votes of the members would be required to be prepared.

Lastly, you sought an opinion concerning whether the content of an executive session is confidential. For the purpose of analysis, reference will be made to both the Freedom of Information Law and the Open Meetings Law. The provision to which you referred, §805-a(1)(b) of the General Municipal Law, states that "No municipal officer or employee shall...disclose confidential information acquired by him in the course or his official duties or use such information to further his personal interests..." However, that provision does not define or offer guidance concerning the meaning of the term "confidential." Based on decisions rendered by the Court of Appeals, the state's highest court, as well as federal courts, I believe that to be confidential under the Freedom of Information Law, records must "specifically exempted from disclosure by state or federal statute" in accordance with §87(2)(a). Similarly, §108(3) of the Open Meetings Law refers to matters made confidential by state or federal law as "exempt" from the provisions of that statute.

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

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

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

> "Exemption 3 excludes from its coverage only matters that are:
>
> > *specifically* exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) **requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue**, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.
>
> "5 U.S.C. § 552(b)(3) (1982) (emphasis added). Records sought to be withheld under authority of another statute thus escape the release requirements of FOIA if – and only if – that statute meets the requirements of Exemption 3, including the threshold requirement that it specifically exempt matters from disclosure. The Supreme Court has equated 'specifically' with 'explicitly.' *Baldridge v. Shapiro*, 455 U.S. 345, 355, 102 S. Ct. 1103, 1109, 71 L.Ed.2d 199 (1982). '[O]nly *explicitly* non-disclosure statutes that evidence a congressional determination that certain materials ought to be kept in confidence will be sufficient to qualify under the exemption.' *Irons & Sears v. Dann*, 606 F.2d 1215, 1220 (D.C.Cir.1979) (emphasis added). In other words, a statute that is claimed to qualify as an Exemption 3 withholding statute must, on its face, exempt matters from disclosure"[Reporters Committee for Freedom of the Press v. U.S. Department of Justice, 816 F.2d 730, 735 (1987); modified on other grounds,831 F.2d 1184 (1987); reversed on other grounds, 489 U.S. 789 (1989); see also British Airports Authority v. C.A.B., D.C.D.C.1982, 531 F.Supp. 408; Inglesias v. Central Intelligence Agency, D.C.D.C.1981, 525 F.Supp, 547; Hunt v. Commodity Futures Trading Commission, D.C.D.C.1979, 484 F.Supp. 47; Florida Medical Ass'n, Inc. v. Department of Health, Ed. & Welfare, D.C.Fla.1979, 479 F.Supp. 1291].

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

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

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

The only situations in which an agency cannot disclose would involve those instances in which a statute other than the Freedom of Information Law prohibits disclosure. The same is so under the federal Act. While a federal agency *may* withhold records in accordance with the grounds for denial, it has discretionary authority to disclose. Stated differently, there is nothing inherently confidential about records that an agency may choose to withhold or disclose; only when an agency has no discretion and must deny access would records be confidential or "specifically exempted from disclosure by statute" in accordance with §87(2)(a).

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

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

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

In a case in which the issue was whether discussions occurring during an executive session held by a school board could be considered "privileged", it was held that "there is no statutory provision that describes the matter dealt with at such a session as confidential or which in any way

restricts the participants from disclosing what took place" (Runyon v. Board of Education, West Hempstead Union Free School District No. 27, Supreme Court, Nassau County, January 29, 1987). In the context of most of the duties of most municipal boards, councils or similar bodies, there is no statute that *forbids* disclosure or requires confidentiality. Again, the Freedom of Information Law states that an agency *may* withhold records in certain circumstances; it has discretion to grant or deny access. The only instances in which records may be characterized as "confidential" would, based on judicial interpretations, involve those situations in which a statute prohibits disclosure and leaves no discretion to a person or body.

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

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OML-AO-4508

VIA EMAIL

From: Jobin-Davis, Camille (DOS)
Sent: Monday, November 05, 2007 5:14 PM
To: 'tmccarthy@cliftonpark.org'
Subject: Open Meetings Law - public participation

Tom:

As promised.

http://www.dos.state.ny.us/coog/otext/o2231.htm (see paragraph "In this circumstance,...".)

To confirm, and in keeping with this advisory opinion, I believe that a public body could reasonably preclude individuals from reiterating comments previously made. If individuals who have spoken in the past wish to provide new or different information or commentary, and if the public body permits others to do the same, these individuals should be permitted to do so too.

Camille

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OML-AO-4509

VIA EMAIL

From: Jobin-Davis, Camille (DOS)
Sent: Wednesday, November 07, 2007 8:31 AM
To: Spindola, Hugo (DOS)
Subject: RE: Quick Question about Executive Sessions

Hugo,

Most importantly, the Open Meetings Law gives the Commission the discretionary authority to enter into executive session. There is no law that requires the Commission to disuses these issues in executive session, only the authority to do so if a majority agrees it is appropriate.

Second, you asked about a "discussion of a hearing officer's recommendation regarding the recent discipline imposed on a licensee (we fined and suspended a licensee and a hearing was granted to review whether it was excessive)". It sounds to me like this discussion is one of matters leading to the discipline or suspension of a particular person. Section 105(1)(f) would permit a discussion of this nature in executive session. If, on the other hand, the purpose is for you to give the Commission legal advice about how best to proceed in defense of its actions, either you could have a discussion in executive session under section 105(1)(d) "pending litigation", making sure to name the litigation in the motion for entry into executive session, or if the discussion was limited to that which is protected under the attorney-client privilege, that discussion would not be subject to the OML - see section 108(3). "Nothing contained in this article shall be construed as extending the provisions hereof to:... (3) any matter made confidential by federal or state law."

Third, you asked about "review and discussion of the New York Supreme Court's decision regarding a recent lawsuit against the Commission (an applicant was indefinitely suspended based on medical results and the Court found that Commission could not suspend an applicant if no license or permit was issued. Court ordered that we lift the suspension)." Again, if the discussion is limited to communications protected by the attorney-client privilege, it would not be subject to the OML. And, if the Commission discussed matters leading to the discipline or suspension of a particular person, those are appropriate topics for executive session. In my opinion, even when a suspension has been overruled by a court, and even if the Commission's decision may ultimately be not to suspend the person, the discussion is clearly appropriate for executive session. Other factors may bear on whether the Commission chooses to have a

discussion of this nature in executive session, for example, if the medical records that were the basis for their decision to suspend are now public.

You asked whether the executive session discussions regarding discipline and suspensions must pertain to employees. Take a look at section 105(1)(f). In my opinion, because it says "of a particular person or corporation" it is not limited to employees.

I hope I have answered all your questions. I am in the office today until 4 PM if you would like to talk further.

Camille

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OML-AO-4510

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November 9, 2007

Mr. Arthur Berg
[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. Berg:

I have received your letter and hope that you will accept my apologies for the delay in response. You have requested an opinion concerning the right to gain access to minutes of monthly meetings of a town board. As I understand your remarks, the minutes are not made available until they are reviewed by the Town Board and the Town Attorney, and then corrected an approved.

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

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

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

There is nothing in the Open Meetings Law or any other statute of which I am aware that requires that minutes be approved. Nevertheless, as a matter of practice or policy, many public bodies approve minutes of their meetings. In the event that minutes have not been approved, to comply with the Open Meetings Law, it has consistently been advised that minutes be prepared and made available for inspection and copying 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:tt

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OML-AO-4511

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November 13, 2007

Mr. Roy A. Mallette
[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. Mallette:

I have received your note and a copy of your request for records made to the Cicero Town Clerk. In addition, you questioned the propriety of an executive session held by the Town Board.

The first issue relates to the appointment of two new officers to the Town's police department. Your request for documentation concerning those officers, including "background investigations", was denied.

In this regard, 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. Most relevant is §87(2)(b), which states that an agency may withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy."

Based on judicial decisions, it is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that those individuals are required to be more accountable than others. The courts have found that, as a general rule, records that are relevant to the performance of the official duties of a public officer or employee are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)].

Conversely, to the extent that items relating to public officers or employees are irrelevant to the performance of their official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977, dealing with membership in a union; Minerva v. Village of Valley Stream, Sup. Ct., Nassau Cty., May 20, 1981, involving the back of a check payable to a municipal attorney that could indicate how that person spends his/her money; Selig v. Sielaff, 200 AD 2d 298 (1994), concerning disclosure of social security numbers].

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

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

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

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

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

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

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

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

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

It is likely that various elements of a background investigation include comments from previous employers, as well as neighbors, family members or other acquaintances of the officers. Here I note that the introductory language of §89(2)(b) indicates that an unwarranted invasion of personal privacy "includes, but shall not be limited to" the examples that follow.

Section 89(2)(b)(i) refers to the disclosure of "personal references of applicants for employment" as an unwarranted invasion of personal privacy. In my view, insofar as the background investigation includes identifying details pertaining to those who might have offered information or comments relating to the candidates, records may be withheld, for disclosure would result in an unwarranted invasion of personal privacy.

The second issue, as I understand your comments, relates to an executive session held to discuss the possibility of the acquisition of real property by the Town. Relevant is §105(1)(h), which permits a public body, such as the Town Board, to enter into an executive session to discuss the proposed acquisition, sale or lease of real property, "but only when publicity would substantially affect the value" of the property.

Although the materials do not offer sufficient detail to offer unequivocal guidance, in general, I believe that §105(1)(h) is intended to enable a public body to ensure that it can engage in a transaction optimal to the public. When the site of a parcel that may be purchased is known to the public, it is unlikely that public discussion or, therefore, publicity, would substantially affect the

value of the parcel. On the other hand, if the site of a parcel that may be acquired is not known to the public, it is possible that open discussion or publicity would lead to speculation or offers from others, and that a municipality may be unable to reach an optimal agreement on behalf of the public, or that a transaction cannot be consummated. In those kinds of circumstances, I believe that §105(1)(h) could validly be asserted as a basis for entry into executive session.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Hon. Tracy Cosilmon
Chief Joseph Snell

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November 13, 2007

Ms. Khai H. Gibbs
General Counsel
State of New York
Industrial Board of Appeals
Empire State Plaza, Agency Bldg., 2, 20th Floor
Albany, NY 12223

The staff of the Committee on 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. Gibbs:

I have received your letter in which you seek an advisory opinion concerning applicability of the Open Meetings Law to the regular meetings of the Industrial Board of Appeals ("the Board").

By way of background, §100(1) of the Labor Law provides that the Board "shall be composed of five members", all of whom are appointed by the Governor. Subdivision (5)(b) indicates that the Board "may designate one or more of its members or competent employees to hold a hearing or investigation relating to any matter pertaining to the exception of its functions..." Subdivision (5)(c) states that the Board "by one or more of its members" is empowered to "administer oaths and take affidavits", issue subpoenas and compel the attendance of witnesses and the production of documents and other evidence, and to hear testimony and take depositions "in the manner prescribed by law for like depositions in the supreme court." Section 101 pertains to review of petitions filed with the Board concerning "the validity or reasonableness of any rule, regulation or order made by the Commissioner", and states that "[i]f the board finds that the rule, regulation or order, or any part thereof, is invalid or unreasonable, it shall revoke, amend or modify the same." Section 102 specifies that a decision of the Board is final, except that it may be appealed in a proceeding under Article 78 of the Civil Practice Laws and Rules.

You wrote that the Board's monthly meetings "are almost exclusively devoted to reviewing and deliberating over proposed determinations", and that "there are various discussions requiring the legal advice and opinion of counsel." You added that "roughly 2 to 4 hours" are spent "deliberating on pending cases and written proposed decisions", as well as seeking advice of counsel, during a typical monthly meeting and expressed the belief that those portions of the meetings are exempt from the Open Meetings Law pursuant to §108 of that statute. According to your letter:

> "The remainder of the Board's monthly meeting consists of roughly 1 to 2 minutes voting to approve or modify the previous Board minutes; roughly 4 to 6 minutes reviewing the various status reports; roughly 1 to 2 minutes voting on the decisions; and roughly 5 to 10 minutes attending to ministerial matters, such as calendaring and informational updates. It is our understanding of the Open Meetings Law, that these portions of the Board's meeting, consisting of no more than 20 minutes, are considered non-exempt."

Based on my understanding of the foregoing, I believe that the majority of the Board's meetings are exempt from the coverage of the Open Meetings Law. In this regard, I offer the following comments.

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 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.

Perhaps most relevant to the duties of the Board is §108(1) of the Open Meetings Law, which exempts "judicial or quasi-judicial proceedings..." from the coverage of that statute.

In my view, 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."

When the Board deliberates toward a decision following an appeal concerning the validity or reasonableness of an order made by the Commissioner of Labor, and in consideration of its powers, which are analogous to that of a court, as well as its authority to render binding determinations reviewable only by a court, I agree that those deliberations are "quasi-judicial" and therefore, exempt from the coverage of the Open Meetings Law in accordance with §108(1).

Additionally, §108(3) exempts any matter made confidential by federal or state law from the Open Meetings Law. It has been consistently advised that when a public body, such as the Board, seeks legal advise from its attorney, the Board and its attorney create an attorney-client relationship under which their communications are privileged and confidential and, therefore, those communications are exempt from the Open Meetings Law based on the assertion of the attorney-client privilege as codified in §4503 of the Criminal Procedure Law and Rules.

Lastly, it is noted that although the deliberations of a public body 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)].

In consideration of the foregoing, it appears that some portions of the Board's meetings are subject to the Open Meetings Law. i.e., those to which you referred, and must be conducted in public, except to the extent that an executive session may properly be held in accordance with §105(1) of the Open Meetings Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Richard Baum, Esq.
David Rose, Esq.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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OML-AO-4513

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November 13, 2007

E-Mail

TO: Ms. Ann Fanizzi

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Ms. Fanizzi:

I have received your letter and appreciate your kind words. Please accept my apologies for the delay in response.

You wrote that, over the course of three years, you sought information "concerning any road changes that would result from Patterson Crossing, a 400,000 sq. ft. 'Big Box' retail center to be situated at the edge of densely populated Lake Carmel in Kent..." Although you were informed by local representatives "that they had no knowledge of applications for changes or communications from officials", you learned "that the developer...and probably some town of Kent officials and Patterson have had discussions with DOT concerning the 'road improvements' all outside the purview of residents of the town." You also referred to an admission by the Kent Town Supervisor "that negotiations had indeed taken place.

You have sought suggestions relating to the matter. In this regard, I offer the following comments, some of which are technical in nature.

First, the title of the Freedom of Information Law is somewhat misleading, for it does not require the disclosure of information per se. Rather, it is a vehicle under which the public may request and generally obtain existing records. In short, the Freedom of Information Law does not require that a government agency create a new record in response to a request for information. Similarly, although government officials may choose to supply information by responding to questions and often do so, there is nothing in the Freedom of Information Law that requires they must do so.

Second, the Freedom of Information Law pertains to all government records, for §86(4) of that statute defines the term "record" to mean:

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

In consideration of the foregoing, as soon as records are prepared by or for or come into the possession of an agency, irrespective of their source or that they may be characterized as "draft" or "preliminary", they fall within the coverage of the Freedom of Information Law. In brief, that law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the Law. Therefore, when records come into the possession of a town official in relation to the performance of his or her duties, they are subject to rights of access conferred by the Freedom of Information Law.

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

Lastly, since you referred to "discussions" among government officials, I point out that the Open Meetings Law pertains to meetings of public bodies. A public body, according to §102(2), is an entity consisting of at least two members that conducts public business and performs a governmental function collectively, as a body. Town boards, city councils, boards of education and legislative bodies, for example, are "public bodies" subject to the Open Meetings Law. A "meeting" is a gathering of a quorum, a majority of a public body's total membership, for the purpose of conducting public business. Every meeting of a public body must be preceded by notice given in accordance with §104 of the Open Meetings Law, and held open to the public, unless there is a basis for entry into an executive session.

It is emphasized that when a gathering of less than a quorum of a public body occurs, the gathering would not constitute a "meeting", and the Open Meetings Law would not apply.

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

RJF:jm

cc: Kent Town Board
Patterson Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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November 13, 2007

Ms. Valary Sahrle
[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. Sahrle:

I have received your letter and hope that you will accept my apologies for the delay in response. You have raised several issues relating to meetings of the Town Board of the Town of Perry and particular comments made by the Town Supervisor.

The first issue involved the inability to hear comments made by Board members and others during meetings. In this regard, with respect to the capacity to hear what is said at meetings, I direct your attention to §100 of the Open Meetings Law, its legislative declaration. That provision states that:

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

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

the proceedings. If a microphone or other audio device is available and its use would enable those to hear the proceedings, I believe that it must be used. To do otherwise would in my opinion be unreasonable and fail to comply with a basis requirement of the Open Meetings Law.

The second issue involves a statement by the Supervisor, apparently directed at you and others, suggesting that "he would like to have a meeting and have us not attend." Here I point out that §103(a) of the Open Meetings Law states that meetings of public bodies, such as town boards, are open to the general public. Therefore, anyone may attend a meeting of a public body, irrespective of one's interest, residence or nationality.

Lastly, you asked whether "you had to be from a town to speak at a town board meeting." In this regard, although the Open Meetings Law clearly provides the public with the right "to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy" (see Open Meetings Law, §100), the Law is silent with respect to the issue of public participation. Consequently, if a public body does not want to answer questions or permit the public to speak or otherwise participate at its meetings, I do not believe that it would be obliged to do so. Nevertheless, a public body may choose to answer questions and permit public participation, and many do so. When a public body does permit the public to speak, I believe that it should do so based upon rules that treat members of the public equally.

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

It is reiterated 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 or school district. Moreover, I believe that you served, in essence, as the residents' alter ego, and that precluding you from speaking would have been equivalent to prohibiting residents from speaking. In short, I do not believe that the Board may validly prohibit individuals from speaking at its meeting based upon residency.

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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November 13, 2007

E-MAIL

TO: Brian Lace

FROM: Robert J. Freeman, Executive Director RJF

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

Dear Mr. Lace:

I have received your letter and hope that you will accept my apologies for the delay in response.

You wrote that you are a member of the Warrensburg Board of Education and that you have "clearly understood that a 'meeting', necessary to be open to the public was when a 'quorum' of a board gathered not just several members." You added that:

> "[i]t was also clear that 3 members of a 9 member board does not constitute a 'quorum' and therefore cannot conduct public business or make decisions and therefore need not publicize their get together unless 2 additional members show up."

You have sought clarification concerning the foregoing.

In this regard, as you suggested, 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)]. However, there may be instances in which the Open Meetings Law applies to gatherings of less than the total membership of a public body, specifically, when a committee has been created that consists solely of two or more members of a public body.

By way of way of background, when the Open Meetings Law went into effect in 1977, questions consistently arose with respect to the status of committees, subcommittees and similar bodies that had no capacity to take final action, but rather merely the authority to advise. Those

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

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

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

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

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

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

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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November 13, 2007

E-MAIL

TO: Melissa Husk

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. Husk:

I have received your letter and hope that you will accept my apologies for the delay in response.

You have raised questions concerning the nature of a vote for officers "for an Athletic Club for a School Basketball Program."

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

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

Based on the foregoing, the Open Meetings Law generally pertains to governmental entities. It does not appear that the Athletic Club to which you referred is part of the government. If that is so, it would not be subject to the Open Meetings Law. Rather, its activities would be governed by its own rules, procedures or by-laws.

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

RJF:tt

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Department of State
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OML-AO-4517

VIA EMAIL

From: Freeman, Robert (DOS)
Sent: Tuesday, November 20, 2007 8:10 AM
To: Rosalind Lind, Orleans County
Subject: RE: hello from Orleans County

Hi - -

The only reference of which I am aware identifying gatherings as "special meetings" appears in §62 of the Town Law concerning town boards. That provision does not limit or restrict the subject matter that may be considered at a town board meeting, nor does it require that notice of the meeting specify the subject or subjects to be considered. I point out, too, that the Open Meetings Law requires that every meeting be preceded by notice of the time and place of the meeting; there is no requirement that the subjects to be discussed be included in the notice.

Please have a wonderful Thanksgiving!

Robert J. Freeman
Executive Director
NYS Committee on Open Government
Department of State
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November 20, 2007

Ms. Ellen DiFalco
[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. DiFalco:

I have received your letter and hope that you will accept my apologies for the delay in response. You have raised a variety of issues relating to the implementation of the Open Meetings Law by the Ulster County Special Committee to Investigate Matters Regarding the Pre-Planning, Planning and Construction of the Ulster County Law Enforcement Center (the "Special Committee"). The Special Committee was created by the Ulster County Legislature by the approval of 2007 Resolution No. 67 and indicates that it is comprised of five members of the County Legislature.

In this regard, I offer the following comments.

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

By way of background, when the Open Meetings Law went into effect in 1977, questions consistently arose with respect to the status of committees, subcommittees and similar bodies that had no capacity to take final action, but rather merely the authority to advise. Those questions arose due to the definition of "public body" as it appeared in the Open Meetings Law as it was originally enacted. Perhaps the leading case on the subject also involved a situation in which a governing body, a school board, designated committees consisting of less than a majority of the total membership of

the board. In Daily Gazette Co., Inc. v. North Colonie Board of Education [67 AD 2d 803 (1978)], it was held that those advisory committees, which had no capacity to take final action, fell outside the scope of the definition of "public body".

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

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

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

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

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

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

> "Whenever three of more public officers are given any power or authority, or three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of the whole number of such persons or officers, gathered together in the presence of each other or through the use of videoconferencing, at a meeting duly held at a time fixed by law, or by any by-law duly adopted by such board of body, or at any duly adjourned meeting of such meeting, or at any meeting duly held upon

> reasonable notice to all of them, shall constitute a quorum and not less than a majority of the whole number may perform and exercise such power, authority or duty. For the purpose of this provision the words 'whole number' shall be construed to mean the total number which the board, commission, body or other group of persons or officers would have were there no vacancies and were none of the persons or officers disqualified from acting."

Based on the provision quoted above, a valid meeting may occur only when a majority of the total membership of a public body, a quorum, has "gathered together in the presence of each other or through the use of videoconferencing." Moreover, only when a quorum has convened in the manner described in §41 of the General Construction Law would a public body have the authority to carry out its powers and duties.

In consideration of the language quoted above, I believe that a quorum of the Special Committee would be a majority of its total membership, three of five. If less than three members of the Special Committee convene, there is no quorum and the Open Meetings Law would not apply. In that situation, there would be no obligation to provide notice in accordance with §104 of the Open Meetings Law or to prepare minutes.

Next, with respect to minutes, 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, during an open meeting, there are no motions, proposals, resolutions or action taken, there is no requirement that minutes be prepared. If a motion is made, however, even merely a motion to enter into executive session, minutes must be prepared. Again, such minutes must consist of a "record or summary" of that activity. If no action is taken during an executive session, there is no requirement that minutes of the executive session be prepared.

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

Lastly, the Open Meetings Law prescribes a procedure that must be accomplished in public before a public body may conduct an executive session. Specifically, §105(1) of the 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..."

The remaining provisions, paragraph (a) through (h) of §105(1), specify and limit the grounds for entry into executive session. Therefore, a public body cannot enter into an executive session to discuss the subject of its choice.

Enclosed for your review are copies of the Open Meetings Law and "Your Right to Know", which summarizes the Freedom of Information and Open Meetings Laws.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Special Committee to Investigate Matters Regarding the Pre-Planning, Planning and Construction of the Ulster County Law Enforcement Center

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4159

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November 20, 2007

E-MAIL

TO: Kathryn Burke

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. Burke:

I have received your letter in which you wrote that it is your understanding "that minutes must be recorded for a meeting, and that a meeting is a gathering of two or more members of an agency." Based on that interpretation, you asked whether "a state agency [must] have a quorum in order to conduct business."

In this regard, first, a "meeting" as that term is defined in §102(1) of the Open Meetings Law and has been construed to by the courts, is a gathering of a majority of the total membership of a public body. Therefore, if, for example, an entity consists of seven members, a quorum would be four. The only instance in which a gathering of two members of a public body would constitute a "meeting" would involve a situation in which the total membership of the entity is either two or three.

Second, a public body may carry out its functions, powers or duties only when a quorum has convened. The term "quorum" is defined in §41 of General Construction Law as follows:

> "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."

Lastly, I am unfamiliar with the rules, by-laws or specific powers relating to the Farmingdale Student Government. Consequently, I cannot offer advice concerning the means by monies under its control may be expended or allocated or whether a quorum must be present to do so. It is suggested that you review its rules, by-laws or other provisions that govern its operation.

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

RJF:tt

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

November 26, 2007

E-MAIL

TO: James Santoro

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. Santoro:

I have received your letter concerning the status of the Radisson Community Association under the Open Meetings Law.

In this regard, that statute pertains to meetings of public bodies, and §102(2) defines the phrase "public body" to mean:

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

Based on the foregoing, a public body is generally an entity of state or local government. Assuming that the entity to which you referred is not a governmental entity, it would not be a public body subject to or required to comply with 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

OML-AO-4521

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

November 26, 2007

E-Mail

TO: Mr. Don Airey

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. Airey:

I have received your letter in which you wrote that the Town Board of Richmondville intends to conduct a "Public Wind Law Workshop" but that "public input would only be taken from the Town of Richmondville residents."

If the workshop is being conducted by a majority of the Town Board, I believe that the event would constitute a meeting of the Town Board subject to the requirements of the Open Meetings Law. Based on that assumption, I offer the following comments.

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

While public bodies have the right to adopt rules to govern their own proceedings (see e.g., Town Law, §63), the courts have found in a variety of contexts that such rules must be reasonable. For example, although a board of education may "adopt by laws and rules for its government and operations", in a case in which a board's rules prohibited the use of tape recorders at its meetings, the Appellate Division found that the rule was unreasonable, stating that the authority to adopt rules "is not unbridled" and that "unreasonable rules will not be sanctioned" [see Mitchell v. Garden City

Union Free School District, 113 AD 2d 924, 925 (1985)]. Similarly, if by rule, a public body chose to permit certain citizens to address it for ten minutes while permitting others to address it for three, or not at all, such a rule, in my view, would be unreasonable.

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 and need not identify himself or herself as a condition precedent to do so, 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. Further, there are instances in which those in attendance (i.e., battered women, persons who made complaints, etc.) may have valid reasons for not indicating their residence. In short, I do not believe that the Board may validly prohibit persons from speaking at its meeting based upon residency.

I hope that I have been of assistance.

RJF:jm

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4522

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

November 26, 2007

E-Mail

TO: Ms. Sue Cook, Genesee County Empire Development Corporation

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. Cook:

I have received your letter in which you wrote that the membership of the Genesee County Industrial Development Agency (GCIDA) is affiliated with a local development corporation (LDC) whose Board "is made up entirely of the GCIDA Board Members." You indicated that LDC Board meetings are held immediately after the meetings of the GCIDA and asked whether it is "possible to combine the public meeting notices into one document rather than preparing two separate notices."

In this regard, in my opinion, because the membership of the GCIDA and the LDC are the same, it is clear that both constitute public bodies required to comply with the Open Meetings Law. Section 104 of that statute requires that every meeting of a public body be preceded by notice of the time and place given to the news media and by means of posting.

I know of no reason why notice given with respect to meetings of both the GCIDA and the LDC cannot be "combined" into one document, so long as that document specifies that there are will indeed be two meetings and that the time and place of both of those meetings are given.

I hope that I have been of assistance.

RJF:jm

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4523

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

November 27, 2007

Mr. Garry Cranker
[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. Cranker:

I have received your correspondence and, once again, apologize for the delay in response.

By way of brief background, an advisory opinion was prepared at your request on July 27 concerning the Open Space Implementation Committee created by a resolution approved by the Ogden Town Board. Although it was indicated that advisory bodies have generally been found to fall outside the coverage of the Open Meetings Law, it was advised that the entity in question constituted a "public body" required to comply with that statute because it included three members, a majority, of the Town Board. Your question relates to the status of that entity in view of an amendment to the resolution removing one of the Board members.

In my opinion, since the Open Space Implementation Committee no longer includes a majority of the members of the Town Board or any other public body, and since its function is advisory, I do not believe that it would constitute a public body or, therefore, that it is required to comply with the Open Meetings Law.

Although I cannot respond to your question in the absence of any action involving the Supervisor's resignation from the entity, for that issue does not relate to the Open Meetings Law, I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt
cc: Town Board

State of New York
Department of State
Committee on Open Government

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Albany, New York 12231
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OML-AO-4524

VIA EMAIL

From: Freeman, Robert (DOS)
Sent: Thursday, November 29, 2007 8:47 AM
To: Michelle Rea, New York Press Association
Subject: RE: question
Attachments: O2588.wpd; o3154.wpd

Good morning - -

Before responding, please never feel that you're "bothering" us with questions; we're here to be bothered! Also, I'm sorry that you cancelled your vacation, but happy that you'll be attending the meeting. Your views give strength to what I believe the Committee is supposed to be about.

As for the questions, first, when a committee or subcommittee consists of two or more members of a governing body, the committee or subcommittee is itself a "public body" required to comply with the Open Meetings Law. For example, if a board consists of seven, its quorum is four. If that board designates a committee consisting of three of its members, the committee would constitute a public body with a quorum of two, a majority of its total membership. Attached is an opinion offering the legislative history that justifies the opinion. And second, there is no distinction between a work session and a meeting. The Court of Appeals dealt with the issue nearly thirty years ago and determined that any gathering of a majority of a public body for the purpose of conducting public business constitutes a "meeting" subject to the Open Meetings Law, irrespective of its characterization or the absence of an intent to take action. Attached is an opinion dealing with that issue as well.

I hope that this helps. Should additional questions arise, please don't hesitate to get in touch.

See you next week!

Robert J. Freeman
Executive Director
NYS Committee on Open Government
Department of State
41 State Street

Albany, NY 12231
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OML-AO-4525

VIA EMAIL

From: Freeman, Robert (DOS)
Sent: Thursday, November 29, 2007 12:08 PM
To: Tedra L. Cobb; Thompson, Michael (DOS)
Subject: RE: IDA minutes

Hi - -

I will do so. With respect to the issue, the Open Meetings Law applies equally to all public bodies, and an IDA, a creation of the General Municipal Law, clearly constitutes a public body required to prepare and disclose minutes in accordance with §106 of the Open Meetings Law. In brief, that the IDA may not be part of County government is irrelevant. As a public body, it is required to prepare and make its minutes available on request within two weeks. It is noted, too, there is no law requiring that minutes be approved. If it is the practice to do so, but approval has not yet occurred, it has been advised that minutes be made available within the statutory time, and that they may be marked as "draft" or "preliminary", for example. By doing so, the recipient is informed that the minutes are subject to change. Lastly, while it is becoming common to post minutes of meetings on an entity's website, there is as yet no obligation to do so.

As you requested, an more expansive opinion will be prepared and sent to the IDA Chair and its attorney. In the meantime, certainly you can share the foregoing verbally or otherwise with those individuals or suggest that they review the provisions of the Open Meetings Law, particularly the definition of "public body" appearing in §102(2) and §106 concerning minutes.

See you next week.

Robert J. Freeman
Executive Director
NYS Committee on Open Government
Department of State

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4526

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November 29, 2007

E-MAIL

TO: Francis Grates

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. Grates:

I have received your letter in which you referred to the possibility that the "public forum" section of the agenda may be eliminated by "legislators."

In this regard, the Open Meetings Law is silent with respect to the ability of those in attendance to speak or otherwise participate. Therefore, a public body, such as a legislative body, is not obliged to permit the public to speak at its meetings. Many public bodies, however, authorize public participation, and in that event, it has been advised that they do so by means of reasonable rules that treat members of the public equally.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16884
OML-AO-4527

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November 29, 2007

Mr. Robert Nied
[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. Nied:

I have received your correspondence pertaining to the Town of Richmondville and its implementation of the Open Meetings Law and a response to a request made under the Freedom of Information Law to Schoharie County. Please accept my apologies for the delay in response.

In your initial letter, you referred to gatherings between the Town Board and representatives of Reunion Power, a private company, to discuss the possibility of amending the Town's zoning law to accommodate Reunion's proposal to construct an industrial wind turbine facility on private land. Specifically, you wrote that a quorum of the Board met with representatives of Reunion on March 29 without having given notice and entered into executive to engage in "contractual discussions." However, the discussion consisted of negotiations between a private landowner and Reunion concerning the lease of the landowner's property; the Town would not be a party to any agreement, and the Town's participation appears to have involved only consideration given to the need to amend the zoning law. You referred to another meeting held wholly in private in June by a quorum of the Town Board and representatives of Reunion.

In this regard, first, 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 a majority of the Town Board convened at the events to which you referred, I believe that those gatherings constituted "meetings" required to have been held in accordance with the Open Meetings Law. Section 104 of that statute requires that notice of the time and place of every meeting be given to the news media and to the public by means of posting.

Second, paragraphs (a) through (h) of §105(1) of the Open Meetings Law specify and limit the topics that may properly be discussed during an executive session. The only reference among the eight grounds to "contractual discussions" pertains to "collective negotiations pursuant to article fourteen of the civil service law." Article 14 deals with collective bargaining negotiations involving a public employer and a public employee union. Clearly the topic at issue did not relate to collective bargaining. In short, as you described the situation, there would have been no basis for conducting an executive session at either of the gatherings to which you referred.

The issue concerning the request made to Schoharie County pertained to the deletion of a portion of a communication sent by an employee of Reunion to a County employee. Here I point out as a general matter that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (j) of the Law.

In any instance in which a request is denied in whole or in part, the person seeking the record must be informed of the denial, and the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), which have the force and effect of law, require that the reason for the denial be given in writing and that the person denied access be informed of the right to appeal to the head or governing body of the agency or a person designated to determine appeals. You indicated that there was no explanation for the deletion. If that is so, and if you were not informed of the right to appeal, the County, in my view, failed to comply with law.

Lastly, I have reviewed the document at issue, which indicates that a portion of one line was deleted. Based on the context and the remainder of the content of the document, it is doubtful in my opinion that there was a valid ground for the deletion.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Richmondville Town Board
Records Access Officer, Schoharie County
Alicia Terry

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4528

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November 30, 2007

Mr. Hyland
[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. Hyland:

This is in response to our telephone conversation in which you inquired about the ability of a town board to adopt a budget at a meeting that occurred prior to the date set forth in the notice of the meeting at which the board was scheduled to do so. You indicated that the town board held a public hearing regarding the budget, at which time the date of the meeting during which the board would vote on the budget was announced. Prior to the meeting date, you learned through the local newspaper that the budget had already been adopted. In this regard, we offer the following comments.

First, a public body, such as a town board, may take action only at a meeting conducted by a quorum of its members.

Second, every meeting of a public body must be preceded by notice. Section 104 of the Open Meetings Law pertains to notice and states that:

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

> 4. If videoconferencing is used to conduct a meeting, the public notice for the meeting shall inform the public that videoconferencing will be used, identify the locations for the meeting, and state that the public has the right to attend the meeting at any of the locations."

This section 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 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 town hall has been designated as a location for posting notices of meetings, the public has the ability to know where to ascertain whether and when meetings of a school board will be held.

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

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

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".

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

OML-AO-4528A

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

December 7, 2007

Mr. Leonard Denner
[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. Denner:

I have received your letter and hope that you accept my apologies for the delay in response. You referred to an executive session held by the Warrensburg Central School District Board of Education to discuss "confidential legal matters" relating to an audit of the District.

In this regard, first, 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 in public, unless there is a basis for 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. 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), paragraphs (a) through (h), specify and limit the subjects that may appropriately be considered during an executive session. Therefore, it is clear that a public body may not conduct an executive session to discuss the subject of its choice.

In the context of the facts as you described them, I do not believe that the Board would have had a proper basis for entry into executive session. In short, "confidential legal matters" is not among the grounds for conducting an executive session.

Second, you did not indicate whether the audit that was the subject of the discussion had been disclosed to the public. Here I direct your attention to the Freedom of Information Law, which, like the Open Meetings Law, is based on a presumption of access. Records of an agency, such as a school district, are available to the public, except those records or portions thereof that may be withheld pursuant to a series of exceptions to rights of access appearing in §87(2). One of the exceptions, due to its structure, often requires disclosure, and I believe that would be so in this instance. Specifically, §87(2)(g) authorizes an agency to withhold records that:

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

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

Since the record that was the subject of the discussion is an "external audit", I believe that it would be accessible under subparagraph (iv) of §87(2)(g).

In an effort to enhance compliance with and knowledge of open government laws, a copy of this response will be sent to the Board of Education.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt
cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4529

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

December 12, 2007

E-MAIL

TO: Hon. Anthony Fava, Deputy Mayor, Village of Mamaroneck

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 Deputy Mayor Fava:

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

You referred to communications by three of five members of the Village of Mamaroneck Board of Trustees in which they voted on an issue "via email form." You have sought an opinion concerning the propriety of taking action through voting accomplished by email.

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

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

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

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

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

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

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

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

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

Based on the foregoing, again, a valid meeting may occur only when a majority of the total membership of a public body, a quorum, has "gathered together in the presence of each other or

through the use of videoconferencing." Moreover, only when a quorum has convened in the manner described in §41 of the General Construction Law would a public body have the authority to carry out its powers and duties. Consequently, it is my opinion that a public body may not take action or vote by means of e-mail.

Conducting a vote or taking action via e-mail would, in my view, be equivalent to voting by means of a series of telephone calls, and in the only decision dealing with a vote taken by phone, the court found the vote to be a nullity. In Cheevers v. Town of Union (Supreme Court, Broome County, September 3, 1998), which cited and relied upon an opinion rendered by this office, the court stated that:

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

Lastly, if a majority of the members of the Board engage in "instant e-mail" or communicate in a chat room in which the communications are equivalent to a conversation, I believe 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).

I hope that I have been of assistance.

RJF:tt

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December 12, 2007

Sarah Hall, Editor
Liverpool Review
Eagle Newspapers
5910 Firestone Drive
Syracuse, NY 13206

The staff of the Committee on 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. Hall:

I have received your letter in which you wrote that you "have had several former members of [y]our local school board approach [you] and state they have information, but they cannot divulge it as it was discussed in executive session." You expressed an understanding, however, that "once an individual is no longer a member of the board, they are no longer bound by confidentiality in terms of executive session and are free to discuss it if they so choose."

You have asked that I confirm that to be so. In brief, in my opinion, the only instances in which members of a public body, such as a board of education, 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." Further, when an individual no longer serves as a board member, as you have suggested, with one exception, I believe that he/she is free to discuss any topic.

I note that the Commissioner of Education has rendered a decision indicating that board members may be removed from office if they divulge information acquired during an executive session. Notwithstanding my disagreement with that decision, I do not believe that it would apply to a former board member.

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. Not referenced, 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.

I am not suggesting that board members, present or former should intentionally disclose information that could clearly be damaging to an individual or the operation of a governmental entity. However, based on the proceeding analysis, I reiterate my belief that the Commissioner's conclusion is inconsistent with both state and federal judicial decisions.

Lastly, if a person no longer serves as a member of a board of education, I do not believe that he or she could be penalized by the Commissioner of Education or a board of education. Further, I believe that, with one exception, a former board member is free to disclose information as he/she sees fit. The exception, in my opinion, would involve information identifiable to a student acquired in his/her capacity as a member of the board when that information is required to be kept confidential by federal law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 12, 2007

E-MAIL

TO: Donna Suhor

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. Suhor:

I have received your letter and hope that you will accept my apologies for the delay in response. You have asked whether "a public authority can use a web cam to feed the meeting (as a recoding and live) as a substitute for allowing the public to observe the board meeting room for board meetings."

In this regard, §103(a) of the Open Meetings Law states that meetings of public bodies, such as the governing bodies of public authorities, "shall be open to the general public." Additionally, in its legislative declaration, the Open Meetings Law states in §100 that the public has the right to attend, listen and observe the performance of public officials. Therefore, assuming that the room in which a meeting is conducted can accommodate those interested in attending, I believe that those whose seek to attend have the right to be present in the meeting room.

I note that situations have arisen in which a greater number of members of the public would like to be present than a meeting room will accommodate, and in which the public body has arranged for closed circuit television in a different location within the same building, thereby enabling the public to observe the meeting. Doing so in that kind of circumstance would, in my opinion, be reasonable and appropriate. However, it is reiterated that when there is space in a room in which a meeting is held for those interested in attending to do so, I believe that they have the right to be present in that room.

I hope that I have been of assistance.

RJF:tt

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December 12, 2007

E-MAIL

TO: Peter Weiss

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. Weiss:

I have received your letter and hope that you will accept my apologies for the delay in response.

You referred to a "potential conflict of interest" relating to a situation in which an attorney threatened to sue the town on behalf of a group of clients, one of whom is a member of the town board. You raised a series of questions concerning that board member's participation in board business.

In this regard, it is emphasized that the Committee on Open Government is authorized to provide advice and opinions concerning the Open Meetings Law and the Freedom of Information Law. Its duties do not include interpretation of provisions of ethics laws or related matters, such as recusal. Insofar as the issues that you raised related to the Open Meetings Law, however, I offer the following comments.

First, §105(2) of the Open Meetings Law indicates that any member of a public body such as a town board, has the right to attend an executive session held by the public body.

Second, 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)]. Again, members of a public body have the right to attend executive sessions of the body.

Likely relevant to the facts that you presented 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 the town board seeks legal advice from its attorney and the attorney offers legal advice, the communications between the board and the attorney would, in my opinion, be confidential and outside the coverage of the Open Meetings Law.

When the board seeks legal advice from its attorney and the attorney is rendering legal advice, and disclosure to the board member who may be suing the town would be adverse to the interests of the town, I believe that the other four members could meet without the presence of that fifth member, and that their communications would be privileged and, outside the requirements of the Open Meetings Law. In that kind of situation, I believe that the suing member could be excluded from the gathering, for based upon the facts, he or she could not be characterized as the client, 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.

I hope that I have been of assistance.

RJF:tt

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OML-AO-4533

VIA EMAIL

From: Freeman, Robert (DOS)
Sent: Thursday, December 13, 2007 9:54 AM
To: Ravi Raman
Subject: RE: Emailing: Welcome to the Committee on Open Government.htm

If a majority of a board gathers to discuss public business, i.e., to "strategize and discuss the implementation of [its] decisions", any such gathering would, in my view, constitute a "meeting" required to be conducted in accordance with the Open Meetings Law. Only if there is a basis for entry into executive session could the board exclude the public from such a meeting. Further, as you are likely aware, paragraphs (a) through (h) of §105(1) specify and limit the grounds for entry into executive session.

Robert J. Freeman
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December 14, 2007

E-MAIL

TO: Hermon Bishop, Esq., Village of Westhampton Beach

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. Bishop:

We are in receipt of your request for an advisory opinion concerning application of the Open Meetings Law to various email communications between board members of a certain village board to whom you provide legal advice. Specifically, you advised the chair of the board that "he cannot e-mail other board members information about pending applications before the Board, especially dialogue between board members that may result in a decision at a later time." You sought our views on the matter and in this regard, we offer the following comments.

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

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

In view of that definition and others, 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., a 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 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: by means of a physical gathering or a gathering by means of video-conference. Any other means of conducting a meeting, i.e., by telephone conference, by mail, or by e-mail, would be inconsistent with law.

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

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

In a landmark decision rendered in 1978, the state's highest court, the Court of Appeals, held that any gathering of a quorum of a public body for the purpose of conducting public business constitutes a "meeting" subject to the Open Meetings Law, whether or not there is an intent to take action, and regardless of the manner in which a gathering may be characterized [see Orange County Publications, Division of Ottoway Newspapers, Inc. v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)]. The Court affirmed a decision rendered by the Appellate Division that dealt specifically with so-called "work sessions" and similar gatherings during which there was merely an intent to discuss, but no intent to take formal action. In so holding, the court stated:

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

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

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

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

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

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

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

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

If a member of a board having a particular interest or expertise offers information in writing to other members, by means of intra-agency memorandum or perhaps via email, we do not believe that it could be concluded that such action, by itself, would constitute a meeting, even if it leads to responses by other members. In our capacity as staff of the Committee on Open Government, we frequently transmit a variety of detailed materials to the members of the Committee on Open Government prior to its meetings in order that the members can become familiar with the issues, and to be prepared and conversant at the meetings. In some cases, the materials may be clear and convincing, thereby eliminating the need for a lengthy discussion of their contents at an upcoming meeting. We do not believe that the transmission, whether accomplished through receipt or consideration of the materials by use of email or the Postal Service, would constitute a meeting or that such activity in any way circumvents or contravenes the Open Meetings Law. If the chair of a board transmits materials to board members prior to meetings for the same reason, to enable the members to prepare for a meeting, we do not believe that the Open Meetings Law would be implicated. If two of the members want to discuss or communicate with respect to the content of the materials, whether briefly or in detail, unless the board consists of three members, we do not believe that the Open Meetings Law would apply or be implicated in any way.

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

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

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

Another possible scenario pertains to what might be characterized as "serial" communications. Although it did not involve email, the decision in Cheevers v. Town of Union (Supreme Court, Broome County, September 3, 1998) involved an effort to take action by means of a series of telephone conversations. In that case, the court determined that the action effectively taken was a nullity. The court cited and relied upon an opinion rendered by this office and stated that:

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

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

In like manner, if a series of email communications among members of a village board involves action taken by the board, we would agree that a meeting would effectively have been held

in contravention of the Open Meetings Law. Nevertheless, we believe that there is a distinction between that situation and one in which the members, via email or telephone, exchange questions, information or points of view, so long as there is no virtual convening of a majority and "votes" are not collected or taken.

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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December 17, 2007

Richard C. Hellenbrecht
Chairman
Queens Community Board 13
[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 Chairman Hellenbrecht:

As you are aware, I have received your letter in which you raised questions relating to the Open Meetings Law. Please accept my apologies for the delay in response.

You wrote that a provision in the New York City Administrative Code requires that employees in certain titles must be residents of the City, and that a newspaper alleged some time ago that a particular employee of the Community Board that you serve as Chairman resides elsewhere. The matter was investigated by two committees of the Board, which believe that the allegation is true, and the City's Chief of Labor and Employment Law has stated that "a covered employee in violation of the residency requirement is not entitled to the position." She also stated that such a violation is a "conditions of employment" issue, and not a disciplinary matter.

Since the issue does not involve discipline, your first question is whether an executive session may be held to discuss the matter. From my perspective, the answer is based on whether or the extent to which the Board's discussion focuses on the employee who is the subject of the inquiry. As you are likely aware, the Open Meetings Law is based on a presumption of openness. Stated differently, meetings of public bodies, such as community boards, must be conducted open to the public, except to the extent that the subject matter under consideration falls within one or more the grounds for entry into executive session appearing in paragraphs (a) through (h) of §105(1) of the Law.

Pertinent under the circumstances is §105(1)(f), which permits a public body to conduct an executive session to discuss:

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

Based on the language quoted above, the ability to enter into executive session is not limited to disciplinary matters. Insofar as the Board's discussion involves, for example, a matter that may lead to the dismissal or removal of a particular employee, I believe that an executive session could properly be held. On the other hand, insofar as the discussion involves the propriety or desirability of the residency policy, or does not focus on "a particular person", none of the grounds for entry in executive session would, in my opinion, apply.

With respect to "the rules regarding advance public announcement of a possible executive session", you expressed an understanding that "the public and invited attendees must know in advance the intent to enter into executive session and the general topic." In this regard, first, I point out that there is nothing in Open Meetings Law that requires the preparation of an agenda or that notice be given prior to a meeting that an executive session might be held. The provisions concerning notice, which appear in §104, require that a public body provide notice of the time and place of a meeting; there is no obligation to indicate the topic or topics to be considered.

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

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

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

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

> "The respondent Board prepared an agenda for each of the five designated regularly scheduled meetings in advance of the time that those meetings were to be held. Each agenda listed 'executive session' as an item of business to be undertaken at the meeting. The

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

For the reasons expressed in the preceding commentary, a public body cannot in my view schedule an executive session in advance of a meeting. In short, because a vote to enter into an executive session must be made and carried by a majority vote of the total membership during an open meeting, technically, it cannot be known in advance of that vote that the motion will indeed be approved. However, as an alternative method of achieving the desired result that would comply with the letter of the law, rather than scheduling an executive session, the Board on its agenda or notice of a meeting could refer to or schedule a motion to enter into executive session to discuss certain subjects. Reference to a motion to conduct an executive session would not represent an assurance that an executive session would ensue, but rather that there is an intent to enter into an executive session by means of a vote to be taken during a meeting. Similarly, a reference to an executive session to be held, "if necessary", would not guarantee that such a session will be held, but rather that it might be held. In my view, that kind of reference would be fully appropriate.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
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December 17, 2007

Brian Staples, Chair
William Small, Esq.
St. Lawrence County Industrial Development Agency
Office of Economic Development
State Highway 80
Canton, NY 13617

Dear Messrs. Staples and Small:

Ms. Tedra L. Cobb, a member of the St. Lawrence County Legislature, has asked that I offer an opinion relating to minutes of meetings of the St. Lawrence County Industrial Development Agency (IDA). She indicated that the IDA has been advised that it is "not part of the County government" and is not required to prepare or disclose minutes within two weeks of its meetings. Ms. Cobb has also apparently suggested that minutes of the IDA meetings be made available on a website.

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

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

The St. Lawrence County IDA was created by §914 of the General Municipal Law as "a body corporate and politic", having the powers and duties described in Article 18-A of the General Municipal concerning industrial development agencies. Section 856 entitled "Organization of industrial development agencies" states in subdivision (2) that any such agency "shall be a corporate governmental agency, constituting a public benefit corporation", and subdivision (3) states that "A majority of the members of an agency shall constitute a quorum."

A "public benefit corporation" is, according to §66 of the General Construction Law, a kind of public corporation, and as specified above, a public corporation is a public body. Therefore, it is clear in my view that every IDA constitutes a "public body" subject to the requirements of the Open Meetings Law. Whether it is "part of county government" is irrelevant; it is governmental entity, a public benefit corporation and, therefore, obliged to comply with that law.

Every public body is required to give effect to §106 of the Open Meetings Law pertaining to minutes. That provision states that:

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

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.

Lastly, there is nothing in the Open Meetings Law that requires that minutes of meetings be posted on a website. However, it has become common to do so, and any recipient of minutes may post those records on a website, notwithstanding the practice of a particular governmental entity.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Tedra L. Cobb

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December 18, 2007

Ms. Ann 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:

We are in receipt of your request for an advisory opinion concerning application of the Freedom of Information Law to various requests for records made to the Town of Pitcairn, and application of the Open Meetings Law to certain actions of the Town Board. In response to your questions regarding ethics issues and conflicts of interest, we point out that the Committee on Open Government is authorized to provide guidance concerning the Freedom of Information and Open Meetings Laws. We are not empowered to provide opinions concerning ethics laws. In response to your questions regarding access to records and meetings, we offer the following.

First, it is our understanding that the Town contracted with Hancock & Estabrook ("law firm") for legal services, and to retain Thew Associates ("surveyor") to survey Vrooman Road. We note that the Town denied access to itemized bills relating to the law firm and surveyor and failed to provide a copy of the "confidentiality agreement" you requested, despite repeated reference to this agreement in public meetings (see Minutes November, 2006; May 14, 2007), which will be addressed later in this correspondence. Instead, the Town provided a copy of an unsigned retainer agreement for "legal services on an as needed basis for Town matters at your discretion" and denied access to the remainder of the records based on the attorney-client privilege.

It appears that the records you have requested are Town records that fall within the framework of the Freedom of Information Law and should have been provided to you in whole or in part.

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

quoted in the preceding sentence evidences a recognition on the part of the Legislature that a single record or report, for example, might include portions that are available under the statute, as well as portions that might justifiably be withheld. That being so, we believe that it also imposes an obligation on an agency to review records sought, in their entirety, to determine which portions, if any, might properly be withheld or deleted prior to disclosing the remainder.

The Court of Appeals, 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)].

Pertinent in our 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, we 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 we are 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 our view, the key word in the foregoing is "detailed." Certainly we 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. However, as suggested in both Knapp and Orange County Publications, "descriptive" material reflective of the "general nature of services rendered", as well as the dates, times and duration of services rendered ordinarily would be beyond the coverage of the privilege.

In the context of your request, insofar as the records include information in the nature of a description of legal advice, legal strategy or similar information reflective of communications falling within the scope of the attorney-client privilege, we believe that deletions would have been proper. More importantly, we do not believe that the Town has the authority to deny access to billing statements for legal services in their entirety.

Further, the records you requested indicating amounts paid to a surveyor would not fall under the attorney-client privilege, and it is likely that they should be disclosed in their entirety based on the above analysis. While these records may not be in the physical custody of the Town, based on the nature of the relationship between the Town and the lawfirm, it appears that they are Town records that fall within the framework of the Freedom of Information Law. As indicated above, that statute pertains to agency records, such as those of a county department, and §86(4) defines the term "record" expansively to mean:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever

> including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

In consideration of the language quoted above, documents need not be in the physical possession of an agency to constitute agency records; so long as they are produced, kept or filed for an agency, the courts have held they constitute "agency records", even if they are maintained apart from an agency's premises.

It has been found, for example, that records maintained by an attorney retained by an industrial development agency were subject to the Freedom of Information Law, even though an agency did not possess the records and the attorney's fees were paid by applicants before the agency. The Court determined that the fees were generated in his capacity as counsel to the agency, that the agency was his client, that "he comes under the authority of the Industrial Development Agency" and that, therefore, records of payment in his possession were subject to rights of access conferred by the Freedom of Information Law (see C.B. Smith v. County of Rensselaer, Supreme Court, Rensselaer County, May 13, 1993).

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. 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 maintained by Hancock & Estabrook are "kept, held, filed, produced or reproduced...*for* an agency", such as the Town, i.e., for the purpose of providing services that would otherwise be carried out by that entity, we believe that they would constitute "agency records" that fall within the scope of the Freedom of Information Law. This is not to suggest that a relationship of that nature would transform Hancock & Estabrook into an agency required to comply with the Freedom of Information Law, but rather that some of the records that it maintains are maintained for an agency, for example, those pertaining to the surveyor, and that those records fall within the coverage of that statute.

In other 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, as you did in this instance. 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, insofar as Hancock & Estabrook maintains records for the Town, to comply with the Freedom of Information Law and the implementing regulations, the records access officer

must either direct Hancock & Estabrook to disclose the records in a manner consistent with law, or acquire the records from them in order that she can review the records for the purpose of determining rights of access.

With respect to the "confidentiality agreement" and any records that have been withheld based on such alleged agreement, we note that a request for or promise of confidentiality is irrelevant in determining the extent to which Town 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".

Clearly, it is the content of the records that is relevant in determining the extent to which they are available or deniable under the Freedom of Information Law.

We turn now to the Open Meetings Law issues identified in your correspondence. There were multiple occasions over the past two years when the Town Board entered into executive session to discuss legal matters pertaining to Vrooman Road, or to discuss the Vrooman Road survey (August 2006, October 2006, February 2007).

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 our 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 the preceding paragraph, i.e., that they are intended to enable public bodies to avoid some sort of identifiable harm. Specifically, it has been determined that the mere possibility, threat or fear of litigation would be insufficient to conduct an executive session, for it has been held that:

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

Based upon the foregoing, we believe that the exception is intended to permit a public body to discuss its litigation strategy behind closed doors, rather than issues that might eventually result in litigation. 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, it is not clear from the minutes whether all of the discussions would fall under this exception.

We 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].

The emphasis in the passage quoted above on the word "*the*" indicates that when the discussion relates to litigation that has been initiated, the motion must name the litigation. For example, a proper motion might be: "I move to enter into executive session to discuss our litigation strategy in the case of the XYZ Company v. the Town of Pitcairn." If the Town Board seeks to discuss its litigation strategy in relation to a person or entity that it intends to sue, and if premature identification of that person or entity could adversely affect the interests of the Town and its residents, it has been suggested that the motion need not identify that person or entity, but that it should clearly indicate that the discussion will involve the litigation strategy. Only by means of that kind of description can the public know that the subject matter may justifiably be considered during an executive session.

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: Hon. Rebecca J. Moore
Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1696
OML-AO-4538

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December 19, 2007

E-MAIL

TO: Kyle Hassler

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. Hassler:

I have received your letter and hope that you will accept my apologies for the delay in response. You described a series of difficulties and issues concerning the operation of the Town of Piercefield.

In this regard, the primary function of the Committee on Open Government involves providing advice and opinions concerning the Freedom of Information and Open Meetings Laws. Although you did not refer directly to those statutes, some of your remarks relate to them, and I offer the following comments.

First, since there appear to have been changes in policy, I note that a public body, such as a town board, may take action only during a meeting held in accordance with the Open Meetings Law. A "meeting" is any gathering of a majority of the membership of a public body for the purpose of conducting public, irrespective of whether there is an intent to take action or vote.

Second, minutes of meetings need not be detailed or expansive. Section 106 of the Open Meetings Law pertains to minutes, and states in subdivision (1) 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 must at a minimum consist of a record or summary of motions, proposals, resolutions, action taken and the vote of the members. Therefore, if, for example, a policy is changed or adopted by the Town Board, any such action must be memorialized in minutes of the

meeting during which the event occurred. If there is a desire to have a more detailed record of an open meeting, judicial precedent indicates that any person may tape record or video record such a meeting, so long as the use of the recording device is neither disruptive nor obtrusive [Mitchell v. Board of Education of the Garden City Union Free School District, 113 AD2d 924 (1985); Csorny v. Shorham -Wading River Central School District, 759 NYS2d 513, 305 AD2d 83 (2003).

Third, another source of information is the Freedom of Information Law, which pertains to all government agency records and defines the term "record" broadly in §86(4) to mean:

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

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 (j) of the Law.

With specific respect to a town, I note that §29 of the Town Law states that a town 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."

Lastly, there are thousands of advisory opinions potentially useful to you that are available on our website that deal with particular aspects of or issues arising in relation to the Freedom of Information and Open Meetings Laws.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-4539

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December 21, 2007

E-MAIL

TO: Ira Simon

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. Simon:

I have received your inquiry in which you asked whether "committee meetings of Library boards need to be open to the public and advertised if no action will be take place other than recommendations to the entire board at a later time and in a public forum."

Assuming that the committee consists of members of library board of a governmental entity, I believe that the gathering that you described would be subject to the requirements imposed by the Open Meetings Law. In this regard, I offer the following comments.

First, 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 public libraries that are not-for-profit corporations, must be conducted in accordance with that statute.

But for the enactment of §260-a, the boards of trustees of non-governmental or not-for-profit corporations that head public libraries would not fall within the scope of the Open Meetings Law. However, a board of trustees of a public library that is a governmental entity would fall within the coverage of the Open Meetings Law, even if §260-a of the Education Law had not been enacted, for it would constitute a "public body" subject to that statute.

Section 102(2) of the Open Meetings Law defines the phrase "public body" to mean:

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

Based on the foregoing, the Open Meetings Law clearly applies to the governing bodies of governmental entities, and in addition, the last clause in the definition indicates that committees, subcommittees and similar bodies of a public body are themselves public bodies required to comply with the Open Meetings Law. In contrast, while the board of trustees of a public library that is not a governmental entity is required to conduct its meetings in accordance with the Open Meetings Law, §260-a of the Education Law provides, by implication, that committees and subcommittees of boards of trustees, except those in New York City, are not required to give effect to the Open Meetings Law.

In consideration of the preceding commentary, if the board of trustees of the library is a public body, I believe that committees and subcommittees consisting of two or members of the board would be required to comply with Open Meetings Law. In that instance, meetings of the committee would have to be preceded by notice given in accordance with §104 of the Open Meetings Law, and the committee would have the same obligations concerning openness and capacity to conduct executive sessions as the board of trustees.

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

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

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

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

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

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

I hope that I have been of assistance.

RJF:tt

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Department of State
Committee on Open Government

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OML-AO-4540

VIA EMAIL

From: Freeman, Robert (DOS)
Sent: Friday, December 21, 2007 9:24 AM
To: gsmith

Dear Ms. Smith:

I have received your correspondence and suggest that there is no particular procedure that must be followed to request an advisory opinion from this office. So long as such a request is made in writing and includes sufficient information to enable staff to prepare an opinion, we do so.

Based on your comments, however, I offer the following observations here. First, since you referred to a meeting of the Gaines Planning Board that was conducted "behind closed doors", I note that meetings of public bodies, such as planning boards, must be held open to the public, unless there is a basis for entry into an executive session. An executive session is a portion of an open meeting during which the public may be excluded, and paragraphs (a) through (h) of §105(1) of the Open Meetings Law specify and limit the grounds for entry into an executive session.

Also, I point out that minutes of meetings need not be expansive. Section 106(1) indicates that minutes of open meetings must consist, at a minimum, of a record or summary of all motions, proposals, resolutions, action taken and the vote of the members. The minutes may include information in addition to reference to those events, but there is no obligation to do so.

The full text of the Open Meetings Law is available on our website.

I hope that I have been of assistance.

cc: Gaines Planning Board

Robert J. Freeman
Executive Director
NYS Committee on Open Government
Department of State

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OML-AO-4541

VIA EMAIL

From: Freeman, Robert (DOS)
Sent: Friday, December 21, 2007 9:41 AM
To: [redacted]

I have received your inquiry in which you asked whether "the laws of the State of New York permit the use of email for notification of meetings and other notices by clubs within the State."

In this regard, the statute relating to your inquiry that falls within the advisory jurisdiction of this office is the Open Meetings Law, which applies to "public bodies." A public body is generally a governmental entity, such as a city council, board of education, town board, etc. The Open Meetings Law does not apply to private clubs, or to private for profit or not-for-profits corporations. Assuming that your question involves entities that are not subject to the Open Meetings Law, I would conjecture that there is no state law that addresses the matter of employing email to give notice of meetings, and that any such provisions would be found in the by-laws or rules of a club or other private entity.

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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OML-AO-4542

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December 26, 2007

Mrs. Rose Mary Warren
[redacted]

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

Dear Mrs. Warren:

I have received your letter and hope that you will accept my apologies for the delay in response.

You referred to a change in the time of meetings of the Board of Trustees of Niagara Community College to 3:30 p.m. for committee meetings and 4 p.m. for the "regular" meetings. You indicated that those times may be inconvenient for "the working person or the homemaker, like [yourself], who is preparing dinner." While that may be so, I believe that a court would find that the time of the meetings to which you referred would be reasonable. In my view, so long as meetings of public bodies are held during regular business hours or during the evening, they would be conducted in a manner consistent with the Open Meetings Law.

You also indicated that you can attend committee meetings, but that "they may go into executive session." You have sought my opinion concerning the committee's ability to do so. In this regard, the Open Meetings Law pertains to public bodies, and §102(2) defines the phrase "public meeting" to mean:

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

The last clause of the definition refers to any "committee or subcommittee or similar body of [a] public body." Based on that language and judicial decisions, when a public body, such as a board of trustees, creates or designates its own members to serve as a committee or subcommittee, the committee or subcommittee would constitute a public body subject to the requirements of the Open Meetings law. Therefore, committees of the Board consisting solely of its own members would have the same obligations regarding notice and openness, for example, as well as the same authority to conduct executive sessions as the governing body [see Glens Falls Newspapers. Inc. v. Solid Waste and Recycling Committee of the Warren County Board of Supervisors, 195 AD2d 898 (1993)]. If, for example, the Board of Trustees consists of seven members, a quorum of the Board would be four. If a standing committee consists of three members, because the committee is a public body separate and distinct from the Board, its quorum would be three.

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: Board of Trustees

STATE OF NEW YORK
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December 26, 2007

Ms. Marilyn Liscinski
[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. Liscinski:

I have received your letter and the materials attached to it. Please accept my apologies for the delay in response. You raised issues relating to the Open Meetings Law and focused on a practice of the Chester School District not to include comments made by the public in minutes of its meetings.

In short, there is no requirement that minutes include comments by the public or others made during meetings or reference to them in minutes of meetings. The provision dealing with the content of minutes of meetings, §106 of the Open Meetings Law, includes what might be characterized as minimum requirements concerning the content of minutes. Specifically, §106 states that:

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

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

Subdivision (1) pertains to minutes of open meetings, and at a minimum, that provision directs that minutes consist of a record or summary of motions, proposals, resolutions, action taken and the votes of the members. While minutes may include greater detail, such as the identities of speakers or reference to their commentary, there is no obligation to do so.

The news article attached to your letter suggests that I indicated that "including public comment could open a district up to litigation." I do not believe that I made such a statement or offered advice to that effect. Clearly minutes could include comments by the public, even though comments are not required to be included in minutes. Further, you or any member of the public may, according to judicial precedent, record open meetings, so long as the use of a recording device is neither disruptive nor obtrusive [see Mitchell v. Board of Education, 113 AD2d 924 (1985); Csorny v. Shoreham-Wading River Central School District, 305 AD2d 83 (2003)]. Therefore, any person may have a record of the entirety of an open meeting of a public body. That being so, so long a minutes of board meetings prepared by a school district are accurate, whether they are brief or detailed, are accurate, I do not envision how litigation could result based solely on their content.

You also wrote that the Board conducts executive sessions "all the time without prior notice." In this regard, as you are likely aware, the Open Meetings Law is based on a presumption of openness. Stated differently, meetings of public bodies, such as school boards, must be conducted open to the public, except to the extent that the subject matter under consideration falls within one or more the grounds for entry into executive session appearing in paragraphs (a) through (h) of §105(1) of the Law. Therefore, a public body cannot enter into an executive session to discuss the subject of its choice.

With respect to any advance public announcement of an executive session, I point out that there is nothing in Open Meetings Law that requires the preparation of an agenda or that notice be given prior to a meeting that an executive session might be held. The provisions concerning notice, which appear in §104, require that a public body provide notice of the time and place of a meeting; there is no obligation to indicate the topic or topics to be considered.

Further, 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. Further, the Law contains a procedure that must be accomplished during an open meeting before an executive session may be held. Specifically, §105(1) states in relevant part that:

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

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

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

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

For the reasons expressed in the preceding commentary, a public body cannot in my view schedule an executive session in advance of a meeting. In short, because a vote to enter into an executive session must be made and carried by a majority vote of the total membership during an open meeting, technically, it cannot be known in advance of that vote that the motion will indeed be approved. However, as an alternative method of achieving the desired result that would comply with the letter of the law, rather than scheduling an executive session, the Board on its agenda or notice of a meeting could refer to or schedule a motion to enter into executive session to discuss certain subjects. Reference to a motion to conduct an executive session would not represent an assurance that an executive session would ensue, but rather that there is an intent to enter into an executive session by means of a vote to be taken during a meeting. Similarly, a reference to an executive session to be held, "if necessary", would not guarantee that such a session will be held, but rather that it might be held. In my view, that kind of reference would be fully appropriate.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Education
Helen Ann Livingston